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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

ESTIMATE.¹

ESTOPPEL. — See also COVENANTS, DECREES, DEEDS, ELECTION, JUDGMENTS, LACHES, LANDLORD AND TENANT, LIMITATIONS, RECORD, WAIVER, etc.

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V. Pleading.

I. Definition. — An estoppel is the preclusion of a person from asserting a fact by previous conduct, inconsistent therewith on his own part, or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.²

1. A verdict for the plaintiff, estimating instead of assessing his damages at a specified sum, is sufficiently formal and definite to support a judgment in his favor for the sum specified. Said the court: "These words are equivalent, and either may be used. They mean 'to fix' the amount of damages, or the value of the thing to be ascertained. This is enough. Webster Unabr., words 'Assess' and 'Estimate.'" *Roddy v. McGetrick*, 49 Ala. 159.

2. Bouv. Law Dict. For other definitions see *Russell v. Colyer*, 4 Heisk. (Tenn.) 192; *Dakin v. Anderson*, 18 Ind. 54; *Pence v. Arbuckle*, 22 Minn. 420; *International Bank v. German Bank*, 3 Mo. App. 371;

Demarest v. Hopper, 2 Zab. (N. J.) 619; *Haynes v. Stevens*, 11 N. H. 31; *Sparrow v. Kingman*, 1 N. Y. 256; *Sharpley v. Abbott*, 42 N. Y. 447; *Ruse v. Mut. Ben. Lf. Ins. Co.*, 26 Barb. (N. Y.) 561; *Reynolds v. Garner*, 66 Barb. (N. Y.) 312; *Frost v. Saratoga Mut. Ins. Co.*, 5 Den. (N. Y.) 157; *Norton v. Kearney*, 10 Wis. 453; *Mich. Ins. Bank v. Eldred*, 6 Biss. (U. S.) 373.

"Estoppel in pais may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Big. on Estop. (4th ed.) 445.

II. By Record. — 1. *Of Legislature.* — Legislative records import absolute verity, and are binding on all the world.¹

2. *Of Court.* — a. *Generally.* — As a memorial that certain proceedings transpired, the record² of a court is conclusive against all persons, whether parties, privies, or strangers,³ except in direct proceedings to annul or correct the record.⁴

As a declaration of rights and duties, the record binds the parties thereto, and those in privity with them in collateral proceedings;⁵ but ordinarily it does not affect strangers.⁶

b. *Pleadings.* — A party is estopped for the purposes of the action by a material⁷ allegation or admission⁸ in a pleading,⁹ unless

1. Big. on Estop. (4th ed.) 33.

2. **What is the Record?** — The decisions and statutes of the various States are not uniform on the subject. See Freeman on Judg. (3d ed.) § 78 *et seq.*; Kibble v. Butler, 14 S. & M. (Miss.) 207; Mandeville v. Perry, 6 Call (Va.) 78.

It adds nothing to the verity of a thing to call it part of the record if it is not properly such. Nichols v. Bridgeport, 27 Conn. 459; Douglas v. Wickwire, 19 Com. 489; Hahn v. Kelly, 34 Cal. 391; Kitchens v. Hutchins, 44 Ga. 620; Abbott v. Hackman, 2 S. & M. (Miss.) 510; Dimm's Appeal, 90 Pa. St. 367. See, also, Mullin v. Insurance Co., 56 Vt. 39.

Docket entries are as conclusive as the record, before the latter is made up. Read v. Sutton, 2 Cush. (Mass.) 115.

3. Scott v. Ware, 64 Ala. 174; Taylor v. Means, 73 Ala. 468; Reed v. Jackson, 1 East, 355. The record is conclusive as to the time of the proceedings and the amount for which judgment was given. Floyd v. Ritter, 56 Ala. 356.

4. See Big. on Estop. (4th ed.) 24; Willard v. Whitney, 49 Me. 235; Balch v. Shaw, 7 Cush. (Mass.) 282; Rogers v. Beauchamp, 102 Ind. 33.

5. 1 Herman on Estop. 21; Co. Litt. 260 a; Gray v. State, 63 Ala. 66; McCoy v. State, 22 Ark. 308; Kemper v. Waverly, 81 Ill. 278; Ridgway v. Morrison, 28 Ind. 201; Murrah v. State, 51 Miss. 652; State v. McDonald, 24 Minn. 48; Turrell v. Warren, 25 Minn. 9; Winchester v. Thayer, 129 Mass. 129; Calvin v. State, 12 O. St. 69; Foss v. Bogan, 92 Pa. St. 296.

An appearance of record cannot be denied by plea or otherwise. Thompson v. Emmert, 4 McLean (U. S.), 96; Reed v. Pratt, 2 Hill (N. Y.), 64.

A record of the settlement of a suit by consent of the parties is conclusive against them, and the appearance of the defendant at a trial thereafter protesting against the same, does not estop him to set up the irregularity of the proceeding. Sherwood v. Youmans, 98 Pa. St. 453.

Exceptions. — The recitals of non-domestic and inferior courts as to the *jurisdictional* facts are not binding on the parties. Mulligan v. Smith, 59 Cal. 206. See title "Judgments." And in New York the same has been held of superior domestic courts. Ferguson v. Crawford, 70 N. Y. 253.

6. Except as to the findings and recitals of jurisdictional facts, the record of a judgment *in rem* binds strangers. See Big. on Estop. (4th ed.) 34, and titles "Decrees" and "Judgments."

The clerk of a court may bind himself by the record. Thompson v. Building Assoc. 23 Kan. 209.

And perhaps a stranger may take advantage of an admission of record made for his benefit. Dahlman v. Forster, 55 Wis. 382.

7. Greeneville, etc., Rd. v. Joyce, 8 Rich. (S. Car.) 117. But not by an *immaterial* allegation. Cloud v. Calhoun, 10 Rich. Eq. (S. Car.) 358; Morgan v. Vaughan, T. Raym. 456.

8. Whether the admission is express or implied, as where an allegation is not traversed. Bank v. Pinkers, 83 N. Car. 377; Lessing v. Cunningham, 55 Tex. 231; McEwen v. Jenks, 6 Lea (Tenn.), 289; Oshkosh v. State, 59 Wis. 425.

Where a party defendant is sued, and answers by a wrong name, and judgment is entered against him accordingly, no advantage can be taken of the misnomer. McCreery v. Everding, 54 Cal. 168.

A plea of tender estops the defendant to deny the indebtedness. Beach v. Jeffery, 1 Ill. App. 283.

9. Horne v. Carter, 20 Fla. 45; Goldthwait v. Bradford, 36 Ind. 149; Kingsbury v. Buchanan, 11 Ia. 387; Armstrong v. Fahnestock, 19 Md. 58; Hinsdale v. Larned, 16 Mass. 65; Brantley v. Kee, 5 Jones Eq. (N. Car.) 332; Morton v. Outland, 18 O. St. 383. See also Donnan v. Intelligence Printing, etc., Co., 70 Mo. 168. As to admissions inconsiderately made, see Smith v. Fowler, 12 Lea (Tenn.), 163.

the pleading is withdrawn or amended.¹ He is estopped, also, to deny the truth of an allegation successfully² pleaded in a subsequent action between the same parties, founded on such allegation, or the transaction to which it relates;³ but ordinarily he is not so estopped in an independent action.⁴

c. *Verdict*. — A verdict, or other finding, not followed by a judgment, works no estoppel.⁵ A verdict followed by a judgment is conclusive in another action between the same parties upon an identical point in issue, though the cause of action is not the same.⁶

d. *Judgment*.⁷ — See titles DECREES and JUDGMENTS.

III. By Deed.⁸ — I. *To whom it Applies*. — Only the parties⁹ to

1. Corley v. McKeag, 9 Mo. App. 38; Wheelock v. Lee, 74 N. Y. 495.

2. He is not bound by an allegation *unsuccessfully* pleaded. McQueen's Appeal, 104 Pa. St. 595; Appeal of Susquehanna Ins. Co., 105 Pa. St. 615.

3. Hill v. Huckabee, 70 Ala. 183; Ogden v. Rowley, 15 Ind. 56; Perkins v. Jones, 62 Ia. 345; Hooker v. Hubbard, 102 Mass. 239; Mobberly v. Hubbard, 60 Md. 376; Pendleton v. Dalton, 92 N. Car. 185; Wills v. Kane, 2 Grant's Cas. (Pa.) 60; Watterson v. Lyons, 9 Lea (Tenn.), 566; Kaehler v. Dobberpuhl, 60 Wis. 256; Martin v. Boyce, 49 Mich. 122; Philadelphia, etc., Rd. v. Howard, 13 How. (U. S.) 307; Andrews v. Ins. Co., 18 Hun. (N. Y.) 163; Stuyvesant v. Grissler, 12 Abb. Pr. U. S. (N. Y.) 6; Fowler v. Stevens, 29 La. Ann. 353. But see Fowler v. Hobbs, 86 Ind. 131.

Where a material fact is alleged which is met by new matter set up in avoidance, and so is impliedly admitted, and the matter in avoidance is sustained by the findings, the implied admission does not work an estoppel. Remington Paper Co. v. O'Dougherty, 81 N. Y. 474.

An executor who represents in his petition for letters testamentary that certain property belonged to the estate of the decedent, and files an inventory including such property, is not thereby estopped from afterwards claiming the property as his own. Anthony v. Chapman, 65 Cal. 73.

A party cannot recover on a statement of facts entirely inconsistent with claims set up by him in a prior suit for the same cause of action. Walker v. Walker, 37 La. Ann. 107.

4. McLemore v. Nuckolls, 37 Ala. 662; Beatty v. Randall, 5 Allen (N. Y.), 441; Boileau v. Rutten, 2 Ech. 665.

5. Estate of Holbert, 57 Cal. 257; Wadsworth v. Connell, 104 Ill. 369; Hawkes v. Truesdell, 99 Mass. 557. But see Estep v. Hutchman, 14 S. & R. (Pa.) 435.

6. Betts v. Starr, 5 Conn. 550; Edgell

v. Sigerson, 26 Mo. 583; Gardner v. Buckbee, 3 Cow. (N. Y.) 120; Edwards v. Stewart, 15 Barb. (N. Y.) 67; Outram v. Morewood, 3 East. 346.

In the fact that the cause of action is not the same seems to lie the distinction between verdict estoppels, so called, and judgment estoppels. See Big. on Estop. (4th ed.) 83 *et seq.*; Freeman on Judg. (3d ed.) sect. 252.

Verdict estoppels are conclusive as to questions of fact rather than of law. Bernard v. Hoboken, 3 Dutch. (N. J.) 412. See also Boyd v. Alabama, 94 M. S. 645.

7. The great body of the law of estoppel by record is a branch of the law of judgments. See that title.

8. The distinction between sealed and unsealed instruments is abolished in some States, but it is believed that the general principles of estoppel by deed remain unchanged. See Big. on Estop. (4th ed.) 321; Jones v. Morris, 61 Ala. 518; Rankin v. Warner, 2 Lea (Tenn.), 302.

9. Bates v. Norcross, 17 Pick. (Mass.) 14. **States**. — The state is estopped by its deed with covenants of warranty. State v. Brewer, 64 Ala. 287; Nieto v. Carpenter, 7 Cal. 527; Folger v. Palmer, 35 La. Ann. 743; Commonwealth v. André, 3 Pick. (Mass.) 224; St. Paul, etc., Rd. v. First Div. St. Paul, etc., Rd., 26 Minn. 31; opinion in respect to Gor., 49 Mo. 216; Land Co. v. Saunders, 103 U. S. 316. Compare Alexander v. State, 56 Ga. 478; People v. Brown, 67 Ill. 435; State v. Bevers, 86 N. Car. 588.

A State is not estopped by the unauthorized acts of its officers. State v. Brewer, 64 Ala. 287; Pulaski v. State, 42 Ark. 118; Att'y-Gen. v. Marr, 55 Mich. 445.

Persons. — A party is not estopped by a deed under which he does not claim. Kidder v. Blaisdell, 45 Me. 461; Graves v. Colwell, 90 Ill. 612.

But the acceptance of a deed of land subject to a mortgage conclusively admits the binding force of the mortgagee in favor

a deed, and those in privity¹ with them, are bound by, or can take advantage of, the estoppel created by the instrument.² Parties are affected in the character in which they executed the deed only.³ Ordinarily, the grantee in a deed-poll is not estopped thereby,⁴ except in the case of leases;⁵ but if the instrument contains admissions or covenants intended for him, he is bound by his acceptance of it.⁶

There can be no estoppel by deed against infants⁷ and married women, not *sui juris*.⁸

of the mortgagee on the ground of an implied covenant with the mortgagee. *Hill v. Minor*, 79 Ind. 48; *Smith v. Graham*, 34 Mich. 302; note on "Particular Recitals," *post*.

1. *Broadwell v. Merritt*, 87 Mo. 95; *Hasenritter v. Kirchhoffer*, 79 Mo. 239; *Taylor v. Needham*, 2 Taunt. 279.

Privity.—Privity in estoppel means holding subordinate to. See *Bigelow Estop.* 337; *Shay v. McNamara*, 54 Cal. 159; *Campbell v. Hale*, 16 N. Y. 575; *Doe v. Derby*, 1 Ad. & E. 783. See also 20 Am. L. Rev. 407 *et seq.*

A second assignee of property is not in privity with the first. *Weyh v. Boylan*, 85 N. Y. 394. The creditors of a grantee are not in privity with him. *Waters's Appeal*, 35 Pa. St. 523. Nor is a purchaser from the mortgagor in privity with him so as to be estopped to contest the validity of the mortgage. *Scates v. King*, 110 Ill. 456.

One who marries the widow of a mortgagor, the widow being in possession of the property, is not estopped to deny the validity of the mortgage. *Gorton v. Roach*, 46 Mich. 294.

A tenant by courtesy, or in dower, is in privity with the decedent and estopped to the extent of the holding through him. *Doe v. Skirrow*, 2 Nev. & P. 123; *Co. Litt.* 352 b.

2. **Strangers.**—*Glasgow v. Baker*, 72 Mo. 441; *Brittain v. Daniels*, 94 N. Car. 781; *Kitzmiller v. Rensselaer*, 10 Ohio St. 63; *Sunderlin v. Struthers*, 47 Pa. St. 411; *Kerngood v. Davis*, 21 S. Car. 183.

One who acts under authority from the grantee cannot be regarded as a stranger to the deed. *Osgood v. Abbott*, 58 Me. 73.

Against the general rule, a town has been permitted to claim an estoppel against parties to a deed reciting the boundaries of their lands. *Tobey v. Taunton*, 119 Mass. 404.

The recital in a deed made by one of two tenants in common, is not binding on the other tenant in common. *Thomason v. Dayton*, 40 Ohio St. 63.

3. *Smith v. Penny*, 44 Cal. 162; *Hall v. Matthews*, 68 Ga. 490; *Trentman v. Eldridge*, 98 Ind. 525; *Metters v. Brown*, 1

Hurl & C. 686. Thus, a widow who executes a deed to land as administratrix, is not estopped to claim dower in the same. *Wright v. De Groff*, 14 Mich. 164.

But a guardian who covenants that he has authority to sell a ward's land is estopped thereby to claim title in his own right. *Heard v. Hall*, 16 Pick. (Mass.) 457. An agent may estop himself to claim title to property in his own right. *Blanchard v. Tyler*, 12 Mich. 339. An unauthorized warranty by a trustee bars his personal claim. *Prouty v. Mather*, 49 Vt. 415.

4. *Cooper v. Watson*, 73 Ala. 252; *Winlock v. Hardy*, 4 Litt. (Ky.) 272; *Great Falls Co. v. Worster*, 15 N. H. 414; *Sparrow v. Kingman*, 1 Comst. (N. Y.) 242; *Garden v. Greene*, 5 R. I. 104.

5. *Big. on Estop.* (4th ed.) 345. See Estoppel "by Possession under Another," *post*.

6. *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35.

If a recital in a deed is intended to be binding upon one party only, the estoppel will be confined to him. *Stronghill v. Buck*, 14 Q. B. 781; *Bower v. McCormick*, 23 Gratt. (Va.) 310.

The acceptance of a deed with covenant of warranty, "excepting only the widow's right of dower," did not estop the grantee to deny the fact of the marriage. *Stevenson v. McReary*, 12 Sm. & M. (Miss.) 57.

7. *Cook v. Toumbs*, 36 Miss. 685. An infant bound in service until twenty-one years of age, will not be estopped by a recital of his age in the indenture. *Houston v. Turk*, 7 Yorg. (Tenn.) 13.

8. **Married Women.**—At common law a married woman was not estopped by her covenants of warranty or recitals. *Wood v. Terry*, 30 Ark. 285; *Gonzales v. Hukil*, 49 Ala. 260; *Patterson v. Lawrence*, 90 Ill. 612; *Strawn v. Strawn*, 50 Ill. 33; *Snoddy v. Leavitt*, 105 Ind. 357; *Trentman v. Eldridge*, 98 Ind. 525; *Preston v. Evans*, 56 Md. 476; *McLeery v. McLeery*, 65 Me. 172; *Barker v. Circle*, 60 Mo. 258; *Lowell v. Daniels*, 2 Gray (Mass.), 161; s. c., 61 Am. Dec. 448; *Sparrow v. Kingman*, 1 N. Y. 242; *Wallace v. Minor*, 6 Ohio, 367; *Goodenough v. Fellows*, 53 Vt. 102; *Bank of*

2. *When it does not Apply.*¹ — Generally an invalid deed works no estoppel.² Nor does a valid deed create an estoppel in collateral matters.³ No estoppel arises from any particular statement, if from the whole instrument the truth appears.⁴

The assertion of an estoppel may be prevented by the existence of an estoppel by deed,⁵ or matter in pais,⁶ against its use.

A grantee cannot deny his covenants in a deed;⁷ nor can he

America v. Banks, 101 U. S. 240. Compare *Dukes v. Spangler*, 35 Ohio St. 119; *Hill v. West*, 8 Ohio, 222; *King v. Rea*, 56 Ind. 19; *Massie v. Sebastian*, 4 Bibb (Ky.), 433.

The rule is changed greatly by statute. *Knight v. Thayer*, 125 Mass. 25. See note on "Married Women" under "Title by Estoppel," *post*. And at common law she might join with her husband in conveying her land, while not liable on the covenants. *Doane v. Willcutt*, 5 Gray (Mass.), 328; *Powell v. Monson, etc., Co.*, 3 Mason (U. S.), 347. See also *Littell v. Hoagland*, 106 Ind. 320.

With regard to her separate estate, a married woman is practically *sui juris* and may be estopped. *Jones v. Reese*, 65 Ala. 134; *Howell v. Hale*, 5 Lea (Tenn.), 405; *Powell's Appeal*, 98 Pa. St. 403.

A woman living under her maiden name, apart from her husband, under a void decree of divorce, and acting and representing herself as a single woman, binds herself by her acknowledgment of a deed as a single woman. *Reis v. Lawrence*, 63 Cal. 129; s. c., 49 Am. Rep. 83.

1. *Non est factum.* — Of course there can be no estoppel by a recital in a deed against pleading *non est factum*. *Manufacturing Co. v. Elizabeth*, 42 N. J. 249.

2. *Mason v. Mason*, 140 Mass. 63; *James v. Wilder*, 25 Minn. 305; *Sherlen v. Whelan*, 41 Wis. 88; *Fairtitle v. Gilbert*, 2 T. R. 169. Compare *Stockton v. Williams*, 1 Doug. (Mich.) 546. But a grantor may be estopped by a deed not properly witnessed and acknowledged. *Wilson v. Hicks*, 40 Ohio St. 418. Of course this rule does not apply to a conveyance of land before the grantor acquired the title. See "Title by Estoppel."

A deed given in contravention of a statute works no estoppel. *Merriam v. Boston, etc.*, Rd. 117 Mass. 241; *Chandler v. Ford*, 3 Ad. & E. 649. But it may when executed in violation of an injunction. *Wilson v. Western Land Co.*, 77 N. Car. 445. The officers of a corporation are not estopped to deny their authority to execute a deed which the corporation had no power to make. *Fairtitle v. Gilbert*, 2 T. R. 169.

A grantee procuring a deed by fraud cannot claim an estoppel against the grantor. *Partridge v. Messer*, 14 Gray (Mass.), 180; *Cunningham v. Cunningham*, 20 S. Car.

317. But an innocent purchaser from the grantee may. *McNeil v. Jordan*, 28 Kan. 7.

Deed Void in Part. — A deed void as to some grantors may work an estoppel against others. *Chapman v. Abrahams*, 61 Ala. 108; *Wellborn v. Finley*, 7 Jones (N. Car.) 228; *North v. Henneberry*, 44 Wis. 306. A deed in part bad may create an estoppel as to the good part. *Daniels v. Tearney*, 102 U. S. 415; *United States v. Hodson*, 10 Wall. (U. S.) 395.

3. *Norris v. Norton*, 1 Ark. 319; *Bank of America v. Banks*, 101 U. S. 240; *Carpenter v. Buller*, 8 M. & W. 209. See also, *Francis v. Boston, etc., Corp.* 4 Pick. (Mass.) 365; *McCullough v. Dashiell*, 78 Va. 634. But if the proceeding, though not upon the deed, grows out of it, it is not collateral. *Wiles v. Woodward*, 5 Ex. 557. And the estoppel is restricted to the interest which the deed undertakes to transfer. *Fisher v. Mining Co.*, 94 N. Car. 397.

Way of Necessity. — A covenant of warranty does not estop the grantor to claim a way of necessity. *Brigham v. Smith*, 4 Gray (Mass.), 297.

4. *Wheelock v. Henshaw*, 19 Pick. (Mass.) 341; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 110; *Pargeter v. Harris*, 7 Q. B. 708.

Or if the truth appears by some other instrument expressly referred to for that purpose, there is no estoppel. *Hannon v. Christopher*, 34 N. J. Eq. 459.

5. *Co. Litt.* 352 b; *Branson v. Wirth*, 17 Wall. (U. S.) 32. So a grantee who had bound himself to discharge a mortgage on the land could not maintain an action on the covenants of warranty of the grantor by reason of having been deprived of the land by virtue of the mortgage. *Brown v. Staples*, 28 Me. 497. The other deed must not be collateral to the question raised. *Lamson v. Tremere*, 1 Ad. & E. 792.

6. *Watts v. Welman*, 2 N. H. 458; *Platt v. Squire*, 12 Met. (Mass.) 494.

A mortgage given by a vendee stipulated that it should not be foreclosed until the mortgagee had removed all clouds from the title; but the mortgagor was estopped from setting up this stipulation where he had himself prevented the removal of a cloud. *Haney v. Roy*, 54 Mich. 635.

7. *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35.

dispute his grantors' title, when in possession under him, for the purpose of escaping entirely the payment of the purchase price;¹ or in a contest with another claiming from the same grantor, unless he claims under a paramount title acquired by himself;² but generally, with these exceptions, a grantee may deny his grantors title,³ unless an obligation to surrender the property at some time exists.⁴

A widow is not estopped to claim dower by reason of having joined with her husband in conveying his property,⁵ unless she expressly released her right to dower.⁶

1. *Munford v. Pearce*, 70 Ala. 452; *Marsh v. Thompson*, 102 Ind. 272; *Robertson v. Pickrell*, 109 U. S. 608.

2. *Long v. Wilkinson*, 57 Ala. 259; *Keith v. Keith*, 104 Ill. 397; *Hasselman v. U. S. Mfg. Co.*, 97 Ind. 365; *Woburn v. Henshaw*, 101 Mass. 193; *Wilcoxon v. Osborn*, 77 Mo. 621; *Huntington v. Prichard*, 11 Sm. & M. (Miss.) 327; *Kinsman v. Loomis*, 11 Ohio, 475; *Curlee v. Smith*, 91 N. Car. 172; *Riddle v. Murphy*, 7 S. & R. (Pa.) 235; *Wilkins v. May*, 3 Head (Tenn.), 173; *Bolling v. Teal*, 76 Va. 487; *Robertson v. Pickrell*, 109 U. S. 608; *McCusker v. McEvery*, 9 R. I. 528; s. c., 11 Am. Rep. 295.

It has been held in California, that, for the purpose of enabling an ousted cotenant to regain possession, the other cotenant cannot set up an outstanding title; but that, possession having been regained, either may proceed against the other under a paramount title. *Olney v. Sawyer*, 54 Cal. 379.

3. *Collins v. Bartlett*, 45 Cal. 371; *Hubbard v. Norton*, 10 Conn. 422; *Gwinn v. Smith*, 55 Ga. 145; *Graves v. Colwell*, 90 Ill. 612; *Patterson v. Johnson*, 113 Ill. 570; *Winlock v. Hardy*, 4 Litt. (Ky.) 272; *Wilcoxon v. Osborn*, 77 Mo. 621; *Sands v. Davis*, 40 Mich. 14; *Kidder v. Blaisdell*, 45 Me. 461; *Brown v. Staples*, 28 Me. 497; *Norton v. Norton*, 5 Cush. (Mass.) 524; *Huntington v. Pritchard*, 11 Sm. & M. (Miss.) 327; *Gaylord v. Repass*, 92 N. Car. 553; *Averill v. Wilson*, 4 Barb. (N. Y.) 180; *Sparrow v. Kingman*, 12 Barb. (N. Y.) 208; s. c., 1 Const. 245; *Haynes v. Stevens*, 11 N. H. 28; *Kan. Pac. Ry. v. Dunmeyer*, 24 Kan. 725; *Riddle v. Murphy*, 7 S. & R. (Pa.) 235; *Kerbrough v. Vance*, 6 Baxt. (Tenn.) 110; *Whitmire v. Wright*, 22 S. Car. 446; s. c., 53 Am. Rep. 724; *Green Bay Canal Co. v. Hewitt*, 62 Wis. 316; *Blight v. Rochester*, 7 Wheat. (U. S.) 513. But see *Skinner v. Grace Church*, 54 Mich. 543.

But a grantee cannot accept a deed with covenants of seisin, and claim that they are broken by reason of the fact that the title was in the grantee himself at the time. *Furness v. Williams*, 11 Ill. 229; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161.

The acceptance of a conveyance was held not to estop the grantee to show that

the premises were leasehold instead of freehold as described in the deed. *Gaunt v. Wainman*, 3 Bing. N. C. 69; *Whitmire v. Wright*, 23 S. Car. 446; s. c., 53 Am. Rep. 724.

The acceptance of a deed with covenants of general warranty of upland on a shore, and at the same time of another deed from the same grantor, of flats in front thereof, with a limited covenant of warranty, was held not to estop the grantee to claim title to the latter tract. *Porter v. Sullivan*, 7 Gray (Mass.), 441. See also *Craig v. Lewis*, 110 Mass. 377.

The grantee is estopped to show a defect in the grantor's title for the purpose of defeating the widow's claim to dower, if he claim by no paramount title. *Wedge v. Moore*, 6 Cush. (Mass.) 8; *Gayle v. Price*, 5 Rich. (S. Car.) 525; *Dashiel v. Collier*, 4 J. J. Marsh. (Ky.) 601. Nor in such a case can he be heard to say that the conveyance was made in fraud of the grantor's creditors. *Kimball v. Kimball*, 2 Greenl. (Me.) 226. But he is not estopped to defeat a widow's claim for dower by showing a defect in the grantor's title, if he claim by a paramount title. See cases *supra*.

Mortgages.—A grantee of land who reconveys in mortgage with covenants of warranty to secure the purchase-money, may show an outstanding title under which he has been evicted in an action against the grantor on his covenants of seisin, and against incumbrances. *Hubbard v. Norton*, 10 Conn. 422; *Randall v. Lower*, 98 Ind. 255; *Brown v. Staples*, 28 Me. 497; *Connor v. Eddy*, 25 Mo. 72; *Sumner v. Barnard*, 12 Met. (Mass.) 459; *Lot v. Thomas*, 2 N. J. 407; *Haynes v. Stevens*, 11 N. H. 28. See also note, "Mortgages," under "Title by Estoppel," *post*.

4. See "Estoppel by Possession under Another," *post*.

5. *Roach v. White*, 94 Ind. 510; *Lothrop v. Foster*, 51 Me. 367.

A wife who joins with a second husband in conveying land of a first husband is estopped to claim dower therein in right of the first marriage. *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Usher v. Richardson*, 29 Me. 415.

6. *Farley v. Eller*, 29 Ind. 322; *Usher v.*

3. *To what it applies.* — *a. Recitals,*¹ *etc.* — Particular² and definite recitals are conclusive evidence of the material³ facts stated.⁴

Richardson, 29 Me. 415; Stearns v. Swift, 8 Pick. (Mass.) 532.

And an express release of dower creates no estoppel, if the husband's deed is inoperative. Blain v. Harrison, 11 Ill. 387; Hoppin v. Hoppin, 96 Ill. 265. And her release creates no estoppel as against the grantee or a purchaser from him with notice, if the conveyance was in fraud of the husband's creditors. Woodworth v. Paige, 5 Ohio St. 70.

If a husband conveys his wife's land in his own name only, and she merely affixes her signature and seal to the deed without words expressing her formal participation in the granting part, she will not be estopped to claim the land after his death. Bruce v. Wood, 1 Met. (Mass.) 542; Raymond v. Holden, 2 Cush. (Mass.) 264.

1. The term "recital" as used in the law of estoppel applies to all material statements of fact contained in the instrument. Big. on Estop. (4th ed.) 354.

2. A particular recital states some fact *definitely*. Calkins v. Copley, 29 Minn. 471; Sutton v. Casselleggi, 5 Mo. App. 111. It should clearly affirm or deny a past or present fact, or admit some liability. Zimmler v. San Luis Water Co., 57 Cal. 221; Calkins v. Copley, 29 Minn. 471; School District v. Stone, 106 U. S. 183.

3. Immaterial statements work no estoppel. Walker v. Sioux City Co., 65 Ia. 563; Reed v. McCourt, 41 N. Y. 435.

The date of the instrument is often immaterial, and subject to contradiction. Dyer v. Rich, 1 Met. (Mass.) 180; Kimbro v. Hamilton, 2 Swan (Tenn.), 190. (See DATE, vol. 5.) But when of the essence of the contract, it is binding. Kelley v. State, 25 O. St. 567. A recital that one of the bargainors in a deed was a *feme covert* was *held* not to conclude any of the parties from showing that she was in fact a *feme sole*. Brinegar v. Chaffin, 3 Dev. (N. Car.) 108.

4. Usina v. Wilder, 58 Ga. 178; Lucas v. Beebe, 88 Ill. 427; Redwood v. Tower, 28 Minn. 45; Green's Appeal, 97 Pa. St. 342; School Dist. v. Stone, 106 U. S. 183; Bowman v. Taylor, 2 Ad. & E. 278.

Particular Recitals. — The recital in a deed that a mortgage is a lien on land estops the grantee to deny it. Kennedy v. Brown, 61 Ala. 296; Smith v. Graham, 34 Mich. 302; Johnson v. Thompson, 129 Mass. 398; Parkinson v. Sherman, 74 N. Y. 88; Freeman v. Auld, 44 N. Y. 50. Or to deny the corporate character of the mortgagee. Hasenritter v. Kirchhoffer, 79 Mo. 239. But not, it is said, to show that there is no incumbrance in fact. Goodman

v. Randall, 44 Conn. 321. And a recital of a prior conveyance does not estop the grantee to claim under a paramount title. Baldwin v. Thompson, 15 Iowa, 504; Crane v. Morris, 6 Pet. U. S. 598; Jackson v. Carver, 4 Pet. (U. S.) 183.

A purchaser at a receiver's sale of property "subject to all legal liens and incumbrances thereon" is not estopped to contest the validity of a prior mortgage. Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548.

The parties to a deed bounding land on a street are estopped to deny the existence of the street in an action concerning the boundary. Bell v. Todd, 51 Mich. 21; Bartlett v. Bangor, 67 Me. 460; Parker v. Smith, 17 Mass. 413; Donohoo v. Murray, 62 Wis. 100. So of a private way shown on a plat referred to by the deed. Sheen v. Stothert, 29 La. Ann. 630; Fox v. Union Sugar Refinery, 109 Mass. 292. But not, it is said, to deny the *width* of the street or way. Walker v. Worcester, 6 Gray (Mass.) 548.

A grantee who accepts a conveyance of an undivided interest in a tract of land which contains a recital that it is in lieu of a previous deed conveying specific portions of the same land is estopped to claim under the previous deed. Emeric v. Alvarado, 64 Cal. 529.

The recital of the grant of letters patent binds the assignee or licensee in an action for an accounting or payment. Cutler v. Bower, 11 Q. B. 973.

A recital that the grantor resides on land estops the grantee to deny that it is the homestead. Williams v. Swetland, 10 Iowa, 51.

A recital that property is personal estops the parties to say that it is real. Ballou v. Jones, 37 Ill. 95.

It is said that the recital of a judgment is binding as to its validity. Blackburn v. Ball, 91 Ill. 434.

A recital that a party has delivered certain property estops him to deny the delivery. Nevett v. Berry, 5 Cranch, C. C. (U. S.) 291.

A widow styling herself widow and sole devisee is estopped to deny that she has elected to take under the will. Dundas v. Hitchcock, 12 How. (U. S.) 256.

Sureties on the bonds of administrators, guardians, agents, etc., are estopped to deny the due appointment of their principals. Gray v. State, 78 Ind. 68; s. c., 41 Am. Rep. 545; Phoenix Ins. Co. v. Findley, 59 Iowa, 591; Jones v. Gallatin, 78 Ky. 491; Norris v. State, 22 Ark. 524; Cutler v. Dickenson, 8 Pick. (Mass.) 386; Shroyer

Ordinarily, general recitals do not estop the parties from disputing the statements made in them.¹ The acknowledgment of the receipt of the consideration in a conveyance is not conclusive, however, between the parties.²

v. Richmond, 16 Ohio St. 455; *Williamson v. Woodman*, 73 Me. 163; *Bruce v. United States*, 17 How. (U. S.) 437.

The recital of a levy of execution in a delivery bond estops the parties to deny the levy in an action on the bond. *Hundley v. Filbert*, 73 Mo. 34.

In an action on a replevin bond, the obligors are bound by a specific recital that the property replevined was that of the defendant in an attachment. *Michell v. Ingram*, 38 Ala. 395; *Dresbach v. Minnis*, 45 Cal. 223; *Gray v. McLean*, 17 Ill. 404; *Dewey v. Field*, 4 Met. (Mass.) 381; *Bursley v. Hamilton*, 15 Pick. (Mass.) 40; *Dezell v. Odell*, 3 Hill (N. Y.) 215. Compare *Decherd v. Blanton*, 3 Sneed. (Tenn.) 373. See estoppel "from possession under another," *post*.

The recital that parties signing a bond to the sheriff are deputies binds them. *Cox v. Thomas*, 9 Gratt. (Va.) 312.

A surety is estopped to deny that his principal was dead when the instrument was executed, — *Collins v. Mitchell*, 5 Fla. 364, — or that he did not sign as principal when it so appears, and the holder took the paper ignorant of his true character. *Menaugh v. Chandler*, 89 Ind. 194. See 1 Pars. Notes and Bills, 233.

A statement of the power of a corporation, organized under public law to do certain acts, creates no estoppel. *Northern Bank v. Porter*, 110 U. S. 608.

But a corporation authorized by law is estopped by its recitals in deeds and bonds to say that the acts and conditions of its organization and subsequent action were not regularly performed. *Cromwell v. Sac*, 96 U. S. 51; *School Dist. v. Stone*, 106 U. S. 183; *Webb v. Herne Bay Com.*, L. R. 5 Q. B. 642. Compare *Starin v. Genoa*, 23 N. Y. 439; *Ontario v. Hill*, 99 N. Y. 324.

A grantor cannot deny the corporate character of his grantee. *Whitney v. Robinson*, 53 Wis. 309. See sub-title, Estoppel "by assuming to act in particular capacities," *post*.

A recital that the grantee was about to divert the waters of a certain creek flowing through the grantor's land in a deed granting the right of way to conduct the water over his land was held not to estop the grantor to deny the grantee's right to divert the waters. *Zimmer v. San Luis Water Co.*, 57 Cal. 221.

A party to a deed confirming a former one between other parties is not estopped

by the recitals of the former deed unless adopted by the language of the latter. *Doe v. Shelton*, 3 Ad. & E. 263.

Mistake. — A recital founded on mistake works no estoppel in equity. *Brooke v. Haynes*, L. R. 6 Eq. 25; *Jackson v. Allen*, 120 Mass. 64.

1. Recitals must be certain to work an estoppel. *Farrar v. Cooper*, 34 Me. 394; *Noble v. Cope*, 50 Pa. St. 17; *Muhlenberg v. Druckenmiller*, 103 Pa. St. 631; *Kepp v. Wiggett*, 10 C. B. 35.

A recital that the grantor is legally or equitably seized creates no estoppel. *Right v. Bucknell*, 2 B. & Ad. 278.

A recital excepting lands from the conveyance must be as definite and descriptive as the description required by law in a deed of conveyance. *McDonald v. Lusk*, 9 Lea (Tenn.), 654.

A recital of the existence of a mill-site does not estop a grantee to dispute its occupancy. *Farrar v. Cooper*, 34 Me. 394.

An indefinite recital in a replevin bond as to the amount of property replevied does not prevent a surety from showing what property was in fact replevied. *Miller v. Moses*, 56 Me. 128; *State v. Menert*, 2 Mo. App. 295.

An obligor may plead a set-off, although he has given a bond to secure the payment of the cause of action, not reserving the right of set-off. *Van Sandt v. Dowe*, 63 Iowa 594; s. c., 50 Am. Rep. 759.

But a recital in general terms may create an estoppel if the intention is clear. *Southeastern Ry. v. Warton*, 6 Hurl. & N. 520.

2. Either as to the amount received or the character of the consideration. *Mobile, etc., Ry. v. Wilkinson*, 72 Ala. 286; *Irvine v. McKeon*, 23 Cal. 472; *Coles v. Soulsby*, 21 Cal. 47; *Wilkinson v. Scott*, 17 Mass. 249; *Shepherd v. Little*, 14 Johns. (N. Y.) 210; *McCrae v. Purmost*, 16 Wehd. (N. Y.) 460; *Barter v. Greenleaf*, 65 Me. 405.

But it is said that the consideration cannot be denied to establish a resulting trust. *Mobile, etc., Ry. v. Wilkinson*, 72 Ala. 286.

But a recital of the receipt of the consideration is binding as against innocent purchasers from the vendee. *Turner v. Flinn*, 72 Ala. 632; *Levering v. Shockey*, 100 Ind. 558; *Chapman v. Miller*, 130 Mass. 289; *McMullin v. Glass*, 27 Pa. St. 151; *Waters's Appeal*, 35 Pa. St. 523; s. c., 78 Am. Dec. 354.

A description of the land as so many

*b. Title by Estoppel.*¹ — Generally, where a grantor without title makes a conveyance of land by deed, with covenants of warranty,² and subsequently acquires title to the property, the after-acquired title enures by way of estoppel to the benefit of the grantee and

acres is not conclusive. *Frank v. Coltraine*, 61 Miss. 606.

Fraud. — The grantor in a deed is estopped to say that the deed was in fraud of his creditors, and without consideration. *Dobbins v. Cruger*, 108 Ill. 188.

1. At the old common law, the feoffment, the fine, the common recovery, and the lease passed after acquired estates. Big. on Estop. (4 ed.) 377.

2. **What Covenants create this Estoppel.** Covenants of general warranty estop the grantor to claim an after-acquired estate. A covenant for quiet enjoyment is as effective as words of conveyance. *Smith v. Williams*, 44 Mich. 240; *Long Is. Rd. v. Conklin*, 29 N. Y. 572. See cases cited in the following note.

Covenants for further assurance estop the grantor to set up an after-acquired title. *Bennett v. Waller*, 23 Ill. 183; *Pierce v. Milwaukee, etc., Rd.*, 24 Wis. 553. See also, *Hope v. Stone*, 10 Minn. 141; *Chauvin v. Wagner*, 18 Mo. 531.

Covenants of good right to convey, and for quiet enjoyment, create this estoppel. *Wighman v. Reynolds*, 24 Miss. 675; *Foss v. Strachn*, 42 N. H. 40; *Trust and Loan Co. v. Ruttan*, 1 Duval (Kan.) 564; *Irvine v. Irvine*, 9 Wall. (U. S.) 618.

In Maine, covenants of non-claim work no estoppel as to after-acquired interests. *Pike v. Galvin*, 29 Me. 185; *Sweetser v. Lowell*, 33 Me. 452. Compare *Trull v. Eastman*, 3 Met. (Mass.) 121; *Rawle on Cov. for Title* (5th ed.), sec. 253.

The statutory covenants implied from the words "grant, bargain, and sell," create this estoppel. *D'Wolf v. Haydn*, 24 Ill. 525; *Pratt v. Pratt*, 96 Ill. 184. Compare *Chauvin v. Wagner*, 18 Mo. 531; *Butcher v. Rogers*, 60 Mo. 138.

A covenant "that if, at any time hereafter, I shall acquire any further or additional title to the said lot of land, the same shall ensue to [grantees] in proportion to the interests hereby conveyed," passed the after acquired title against a subsequent purchaser. *Phelps v. Kellogg*, 19 Ill. 132.

Limitations. — Where the covenant has been extinguished, the doctrine does not apply. *Goodell v. Bennett*, 22 Wis. 565.

So, where a covenant for seisin is satisfied by the transfer of an actual, though tortious, seisin, no estoppel is created. *Allen v. Sayward*, 5 Greenl. (Me.) 231; *Doane v. Willcutt*, 5 Gray (Mass.), 333.

Covenants of general warranty do not

preclude a husband from claiming a statutory homestead, existing at the time the deed was executed. *Silloway v. Brown*, 12 Allen (Mass.), 30; *Doyle v. Coburn*, 6 Allen (Mass.), 71.

Covenants of warranty do not estop the grantor from subsequently erecting a mill-dam below the land granted, and thereby flowing it under the mill statutes. *Dean v. Colt*, 99 Mass. 486.

So a covenant against claims from a certain source does not estop the grantor to set up a title obtained from a different source. *Quivey v. Baker*, 37 Cal. 471; *Lamb v. Kamm*, 1 Sawy. (U. S.) 238. See also *Comstock v. Smith*, 13 Pick. (Mass.) 116.

A grantor will not be estopped to assert a title subsequently acquired by himself by disseisin of his grantee and adverse possession for the period of the statute of limitations. *Stearns v. Hendersass*, 9 Cush (Mass.) 497; *Tilton v. Emery*, 17 N. H. 536; *Sherman v. Kane*, 46 N. Y. Super. Ct. 310; *Eddleman v. Carpenter*, 7 Jones L. (N. Car.) 437; *Smith v. Monter*, 11 Tex. 24.

Married Women. — Where a married woman joins in a deed of the husband's land merely to bar her dower, a title subsequently acquired by her will not enure to the benefit of the grantee. *Strawn v. Strawn*, 50 Ill. 33; *Schaffner v. Grutzmacher*, 6 Iowa, 137; *O'Neil v. Vandenburg*, 25 Iowa, 104; *Raymond v. Holden*, 2 Cush. (Mass.) 270; *Jackson v. Vandehyden*, 17 Johns. (N. Y.) 167.

Of course, a wife is not estopped by her husband's covenants to set up a title subsequently acquired. *Thompson v. Merrill*, 58 Iowa, 419.

In some States her covenants in a deed of her own land will not estop her to set up an after-acquired title. *Gonzales v. Hukil*, 49 Ala. 260; s. c., 20 Am. Rep. 282; *Schumaker v. Johnson*, 36 Ind. 33; *Thompson v. Merrill*, 58 Iowa, 419; *Nunnally v. White*, 3 Met. (Ky.) 593; *Hempstead v. Easton*, 33 Mo. 142; *Wadleigh v. Gliner*, 6 N. H. 18; *Hopper v. Demarest*, 1 Zab. (N. J.) 541; *Grout v. Townsend*, 2 Hill (N. Y.), 557; *Edwards v. Davenport*, 4 McCrary (U. S.) 34. See also statutes to same effect in Delaware, Illinois, Indiana, Michigan, Missouri, Oregon and Virginia; *Rawle on Cov. for Tit.* (5th ed.) sec. 251 n. Compare *Doane v. Willcutt*, 5 Gray (Mass.), 332; *Hill v. West*, 8 Ohio, 226; *Powell v. Monson, etc., Co.*, 3 Mason (U. S.), 347.

his privies.¹ In some States a general warranty in a quit-claim

1. *Blakeslee v. Mobile Ins. Co.*, 57 Ala. 205; *Watkins v. Wassell*, 15 Ark. 73; *Klumpe v. Baker*, 68 Cal. 559; *Dudley v. Cadwell*, 19 Conn. 226; *Doe v. Dowdall*, 3 Houst. (Del.) 369; s. c., 11 Am. Rep. 759; *O'Bannon v. Paremour*, 24 Ga. 403; *Wadhams v. Swan*, 109 Ill. 46; *Randall v. Lower*, 98 Ind. 255; *Thomas v. Stickle*, 32 Iowa, 72; *Dickerson v. Talbot*, 14 B. Mon. Ky. 164; *Smith v. Williams*, 44 Mich. 240; *Read v. Fogg*, 60 Me. 479; *Funk v. Newcomer*, 10 Md. 316; *Farnum v. Peterson*, 111 Mass. 148; *Hooper v. Henry*, 31 Minn. 264; *Mitchell v. Woodson*, 37 Miss. 578; *Hayes v. Tabor*, 41 N. H. 521; *Smith v. De Russey*, 29 N. J. Eq. 407; *Mickler v. Dillaye*, 15 Hun (N. Y.), 296; *Bell v. Adams*, 81 N. Car. 118; *Hart v. Gregg*, 32 Ohio St. 502; *Wilson v. McEwan*, 7 Oreg. 87; *Bailey v. Hoppin*, 12 R. I. 560; *Gaffney v. Peeler*, 21 S. Car. 55; *Robinson v. Douthit*, 64 Tex. 101; *Coal Creek Mining Co. v. Ross*, 12 Lea (Tenn.), 1; *Kelly v. Seward*, 51 Vt. 436; *Raines v. Walker*, 77 Va. 92; *Western Mfg. Co. v. Peytonia Cannel Coal Co.*, 8 W. Va. 406; *Mann v. Young*, 1 Wash. Ty. 454; *Wiesner v. Zann*, 39 Wis. 188; *Trust & Loan Co. v. Covert*, 32 U. Can. Q. B. 222; *Irvine v. Irvine*, 9 Wall. (U. S.) 617.

Statutes. — The law is extended in many States by statutes. See statutes of *Arkansas, Arizona, Colorado, California, Dakota, Georgia, Iowa, Illinois, Kansas, Mississippi, Missouri, Montana, Nevada, Nebraska, and Washington*; also *Rawle on Cov. for Title* (5th ed.) sect. 248 and note, where the statutes are collected and commented on. See also *Cocke v. Brogan*, 5 Ark. 693; *Frink v. Darst*, 14 Ill. 304; *Jones v. Reese*, 65 Ala. 134; *Vallejo Land Assoc. v. Viera*, 48 Cal. 572; *Gibson v. Chouteau*, 39 Mo. 536.

Attestation. — It has been held under a statute that a deed must be attested to raise an estoppel against a purchaser from the grantor, though not against the grantor himself. *Chamberlain v. Spargus*, 86 N. Y. 603; *Wood v. Chapin*, 13 N. Y. 509.

Mortgages. — The general rule applies to mortgages given with warranty to secure advances on the property. *Boone v. Armstrong*, 87 Ind. 168. But see *Bush v. White*, 85 Mo. 339. If the mortgagor is in fact a purchaser, and the mortgage is given to secure the purchase price, the rule does not apply, but he may dispute the mortgagee's title. *Randall v. Lower*, 98 Ind. 255; *Brown v. Phillips*, 40 Mich. 264; *Smith v. Connell*, 32 Me. 123; *Haynes v. Stevens*, 11 N. H. 28. Compare *Hitchcock v. Fortier*, 65 Ill. 239. See note "mortgages," ante.

In Partition. — It is said that in partition by writ there is an implied warranty of the common title, and a co-tenant cannot claim by paramount title subsequently acquired; but this rule does not obtain in partition *in pais* unless the deeds given contain warranties. *Weiser v. Weiser*, 5 Watts (Pa.), 279; *Rountree v. Deuson*, 59 Wis. 522. Compare *Walker v. Hall*, 15 Ohio St. 355.

Judicial Sale. — A deed of the party's property by a sheriff, etc., does not bar an after-acquired title. *Dougald v. Dougherty*, 11 Ga. 578; *Emerson v. Sansome*, 41 Cal. 552; *Frey v. Rawsons*, 66 N. Car. 466. See also *Flemmer v. Travellers' Ins. Co.*, 89 Ind. 164.

Tax-Title. — The rule does not apply to a tax-title for taxes assessed after the land was sold. *Ervin v. Morris*, 26 Kan. 664. But it does if the taxes were upon the land when conveyed. *Hannah v. Collins*, 94 Ind. 201.

Title in Trust. — The rule does not apply to a title taken in trust for a third party. *Fretelliere v. Hinds*, 57 Tex. 392; *Kelley v. Jenness*, 50 Me. 455; *Jackson v. Mills*, 13 Johns. (N. Y.) 463; *Burchard v. Hubbard*, 11 Ohio, 316.

Fraud. — The doctrine may apply though the deed was fraudulent. *Gibbs v. Thayer*, 6 Cush. (Mass.) 30.

Bankruptcy. — The estoppel created by covenants for title operates on the subsequently acquired estate of a bankrupt, though he has been discharged from personal liability on his contracts. *Stewart v. Anderson*, 10 Ala. 510; *Bush v. Cooper*, 26 Miss. 599; s. c., 18 How. (U. S.) 82; *Gregory v. Peoples*, 80 Va. 355.

Statute of Limitations. — A covenant will work an estoppel though the right of action on the covenant has been barred by the statute of limitations. *Cole v. Raymond*, 9 Gray (Mass.), 217.

Grantee's Consent. — When the grantee has been actually evicted, the after-acquired title of the grantor cannot, without the consent of the former, be made to enure to him by way of estoppel to defeat his right to recovery in an action on the covenants for title, or to reduce the measure of his damages. *Rawle on Cov. for Title* (5th ed.), sect. 258; *Burton v. Reeds*, 20 Ind. 87; *Blanchard v. Ellis*, 1 Gray (Mass.), 193; *Bingham v. Weiderwax*, 1 N. Y. 509; *Noonan v. Ilsley*, 21 Wis. 139.

Release or Quit-Claim. — A mere release or deed of quit-claim works no estoppel as to an after-acquired estate. *Tillotson v. Kennedy*, 5 Ala. 413; *Quivey v. Baker*, 37 Cal. 465; *Dart v. Dart*, 7 Conn. 256; *Bennett v. Waller*, 23 Ill. 182; *Locke v.*

deed has this effect;¹ in others, the operation of the warranty is limited to the estate actually granted at the time of the conveyance.²

The grantor is estopped to claim by an after-acquired title, though the deed contains no warranty, if the clear intention of the parties, as shown by the deed, appears to have been to convey a particular estate greater than the grantor possessed.³

Where no interest passed by a sealed lease, the grantor is estopped to claim against the lessee under a title subsequently acquired;⁴ but if an interest passed by the lease, there is no estoppel.⁵

In some States the claim of a grantee, under a deed made by a grantor without title, is superior to that of an innocent purchaser from the grantor after he acquired title;⁶ but in other States the second grantee's claim will prevail, if the grantor had possession of the premises at the time of the second conveyance.⁷

White, 89 Ind. 492; Scoffins v. Grandstaff, 12 Kan. 467; Bohon v. Bohon, 78 Ky. 408; Ham v. Ham, 14 Me. 351; Weed Sewing Machine Co. v. Emerson, 115 Mass. 554; Brown v. Phillips, 40 Mich. 264; Kimmel v. Benna, 70 Mo. 52; Harden v. Cullins, 8 Nev. 49; Bell v. Twilight, 6 Fost. (N. H.) 401; Smith v. De Russy, 29 N. J. Eq. 407; Jackson v. Littell, 56 N. Y. 108; Hart v. Gregg, 32 Ohio St. 502; Burston v. Jackson, 9 Oreg. 275; Doswell v. Buchanan, 3 Leigh (Va.), 365; Kent v. Watson, 22 W. Va. 561. Compare Code of Miss. (1880), sect. 1195. See Carter v. Bustamente, 59 Miss. 559.

The doctrine of title by estoppel is unknown in Mexican law. Bixby v. Bent, 59 Cal. 522.

1. Jones v. King, 25 Ill. 383; Steiner v. Baughman, 12 Pa. St. 106; Mills v. Catlin, 22 Vt. 98.

2. McBridge v. Greenwood, 11 Ga. 379; Graham v. Graham, 55 Ind. 23; Locke v. White, 89 Ind. 492; Holbrook v. Debo, 99 Ill. 372; Kinnear v. Lowell, 34 Me. 299; Sanford v. Sanford, 135 Mass. 314; Comstock v. Smith, 13 Pick. (Mass.) 116; Valle v. Clemens, 18 Mo. 486; White v. Brocaw, 14 Ohio St. 339; Brown v. Jackson, 3 Wheat. (U. S.) 449; Hawick v. Patrick, 119 U. S. 156; Perrin v. Perrin, 62 Tex. 477; Hall v. Chaffee, 14 N. H. 215; Adams v. Ross, 1 Vroom (N. J.), 509; Wynn v. Harman, 5 Grat. (Va.) 162.

3. King v. Rea, 56 Ind. 1; Hannon v. Christopher, 34 N. J. Eq. 459; Rutherford v. Stamper, 60 Tex. 447; Van Rensselaer v. Kearney, 11 How. (U. S.) 297. Compare Smiley v. Fries, 104 Ill. 416.

If the assertion of an interest is not inconsistent with the warranty or recital, there is no estoppel. Jacksonville, etc., Rd. v. Cox, 91 Ill. 500; General Finance Co. v. Liberator Society, 10 Ch. D. 15.

4. Trevivan v. Lawrence, 1 Salk. 276; 2 Ld. Raym. 1036; Big. on Estop. (4th ed.) 382.

5. Co. Litt. 47 p.; Big. on Estop. (4 ed.) 383; Blake v. Foster, 8 T. R. 487; Langford v. Selmer, 3 Kay & J. 220.

6. Knight v. Thayer, 125 Mass. 25; Cole v. Raymond, 9 Gray (Mass.), 217; Powers v. Patten, 71 Me. 583; Tift v. Munson, 57 N. Y. 97; Brown v. McCormick, 6 Watts (Pa.), 60.

But in the case of a common conveyance with warranty, the grantor is estopped to claim after-acquired interests as well where an interest passed by his conveyance as where none passed. House v. McCormick, 57 N. Y. 310.

Registry Acts.—The doctrine obtains in some States despite its antagonism to the registry acts. White v. Patten, 24 Pick. (Mass.) 324; Jarvis v. Aikens, 25 Vt. 635; McCusker v. McEvey, 9 R. I. 528. Compare Rawle on Cov. for Title (5th ed.), sect. 259; Calder v. Chapman, 52 Pa. St. 359; Way v. Arnold, 18 Ga. 181; Dodd v. Williams, 3 Mo. App. 278.

If the second grantee had notice of the former grant, he cannot claim against it. See Way v. Arnold, 18 Ga. 191; Doyle v. Petroleum Co., 44 Barb. (N. Y.) 244.

7. Jackson v. Bradford, 4 Wend. (N. Y.) 619; Buckingham v. Hanna, 2 O. St. 551; Chew v. Barnet, 11 S. & R. (Pa.) 389; Genl. Finance Co. v. Liberator Soc., 10 Ch. D. 15.

Notice by Possession.—It has been held that where the first grantee is in possession at the time of the second conveyance, the second grantee is bound by notice of his claim. Doe v. Dowdall, 3 Houst. (Del.) 369. Compare Rawle on Cov. for Title (5th ed.), sec. 260.

Heirs are estopped by the covenants of warranty of their ancestors, to claim property even by title received from other sources, if they took from such ancestors assets equal to the value of the property.¹

The general doctrine of title by estoppel applies to personal property.²

IV. By Matters in Pais. — 1. *By Conduct.* — *Equitable*³ *Estoppel.* — *a. Essential Elements.* — The essential elements of estoppel by conduct are: ⁴

1. There must have been a false representation, or a concealment of material facts; ⁵ but silence, when it is the duty of the party to speak, ⁶ is equivalent to concealment. The representation

1. *Carson v. New Bellevue Cem. Co.*, 104 Pa. St. 575; *Utterback v. Phillips*, 81 Ky. 62. But not if they did not receive assets equal to the value of the land at the time of the conveyance. *Chauvin v. Wagner*, 18 Mo. 531.

Where a tenant by courtesy conveyed land with full covenants of warranty, and afterwards died leaving assets equal in value to the land, it was held that his children were not estopped by his deed to assert their title to the land by inheritance from their mother. *Russ v. Alpaugh*, 118 Mass. 369; s. c., 19 Am. Rep. 464.

2. *Gardiner v. Suydam*, 7 N. Y. 357; *Harvey v. Harvey*, 13 R. I. 598; *Frazer v. Hilliard*, 2 Strobh. (S. Car.) 309; *Littlefield v. Perry*, 21 Wall. (U. S.) 205. Compare *Bryans v. Nix*, 4 M. & W. 775.

General Principles. — The general principles of title by estoppel as applied to deeds are thus stated by Mr. Rawle: —

"I. The doctrine of the passage of the after-acquired estate rests upon a principle which is or at times may be salutary, being intended to carry out the real intention of the parties that a certain particular estate was to be conveyed and received; and where that intention appears, the law will not suffer the grantor to defeat it.

"II. Such an intention may be deduced either from averments, recitals, or the like, or from the presence of covenants for title, and it is immaterial what particular covenants these may be so that they show the intention.

"III. But the intention is not necessarily deduced from the covenants, and may appear by other parts of the deed.

"IV. In many cases, to prevent circuitry of action, it may be innocently held that the estate actually passes.

"V. But this should not be suffered to work injustice by depriving the first grantee of his legal right of action, i. e., his option to sue for breach of covenant.

"VI. The doctrine may often properly apply when there is no right of action.

"VII. But the doctrine should never be applied against a purchaser without notice." Rawle on Cov. for Title (5th ed.), sec. 264.

3. "Equitable" estoppel is generally as available at law as in equity. *Copper Mining Co. v. Ormsby*, 47 Vt. 709; *Barnard v. German Seminary*, 49 Mich. 444. But see note on "Real Estate," post.

4. See *Griffith v. Wright*, 6 Colo. 248; *Parlman v. Young*, 2 Dak. 175; *Martin v. Angell*, 7 Barb. (N. Y.) 410; *Stevens v. Dennett*, 51 N. H. 333; *Blum v. Merchant*, 58 Tex. 400; *Big. on Estopp* (4 ed.) 552; 2 *Herman on Estop. and Res. Jud.* 906.

5. *Pittsburg v. Danforth*, 56 N. H. 272; *Griffith v. Wright*, 6 Colo. 248.

But the representation need not have been the sole inducement of the change in position. *McAleer v. Horsey*, 35 Md. 439.

Plaintiff purchased a ticket at Portland for Boston, having on it the words "Portland to Boston." He attempted to ride on the ticket from Boston to Portland, and was ejected from the train. In an action for such ejection, it was held that evidence that the plaintiff had theretofore been permitted to ride over the same road from Boston to Portland on a similar ticket, and that defendant's conductor on another train had expressed the opinion that the ticket was good either way, did not estop the defendant. *Keeley v. Boston, etc., Rd.* 67 Me. 163; s. c., 24 Am. Rep. 19.

6. *Studdard v. Lemmond*, 48 Ga. 100; *Markland Co. v. Kimmel*, 87 Ind. 560; *Janeson v. Janeson*, 66 Ill. 259; *Griffin v. Nichols*, 51 Mich. 575; *Niven v. Belknap*, 2 Johns. (N. Y.) 573; *Cady v. Owen*, 34 Vt. 598; *Wheeler v. New Brunswick Rd.* 115 U. S. 29.

The rule applies to a railroad where the directors knew that the president and secretary were contracting without authority, and they made no objection. *Texas, etc., Rd. v. Robards*, 60 Tex. 545. Acquiescence in the purchase of the property of one railroad company by another may estop

creditors to question the power to purchase. *Hervey v. Ill. Midland Ry.*, 28 Fed. Rep. 169.

Silence.—Where the party's rights in property sufficiently appear of record, mere silence upon his part is no violation of duty, and he is not estopped to assert his rights against others dealing with the property as another's. *Mayo v. Cartwright*, 30 Ark. 407; *Neal v. Gregory*, 19 Fla. 356; *Mason v. Philbrook*, 70 Me. 57; *Sulphine v. Dunbar*, 55 Miss. 232; *Rice v. Dewey*, 54 Barb. (N. Y.) 455; *Knouff v. Thompson*, 16 Pa. St. 357; *Kinginan v. Graham*, 51 Wis. 232.

But where a mortgagee, under a duly recorded mortgage, who stood by when the auctioneer, at a sale of the land, stated that it was unencumbered, and failed to correct the announcement, is estopped to assert his title against a purchaser relying on the representation. *Markham v. O'Connor*, 52 Ga. 183; s. c., 21 Am. Rep. 249.

There may be an estoppel by silence, where the representation is made by the party claiming the estoppel, as where a depositor was silent on receiving his pass-book from a bank, charging him with the payment of altered checks, until too late for the bank to take action. *Leather Manufacturer's Bank v. Morgan*, 117 U. S. 96.

A person is not estopped by his silence where there is no positive duty and opportunity to speak. *Bramble v. Kingsbury*, 39 Ark. 131; *Terre Haute Rd. v. Rodel*, 89 Ind. 128; *Viele v. Judson*, 82 N. Y. 32; *Diffenbach v. Vogeler*, 61 Md. 370; *Bull v. Rowe*, 13 S. Car. 355. See also *Mills v. N. J. Cent. Rd.* 41 N. J. Eq. 1.

In an action to recover possession of land held by an innocent purchaser who claimed title through a forged deed which had been of record five years with knowledge of the plaintiff, the delay of the plaintiff to attack the forged deed is not material if it be not relied upon as extinguishing the plaintiff's title by operation of the statute of limitations; and such delay does not estop the plaintiff to contest the validity of the deed. *Meley v. Collins*, 41 Cal. 663; s. c., 10 Am. Rep. 279.

Improvements on Land.—If one see another purchase land and make improvements thereon without warning him, he may be estopped to assert an adverse claim. *Anderson v. Hubble*, 93 Ind. 570; s. c., 47 Am. Rep. 394; *Bradley v. Luce*, 99 Ill. 234; *Wendell v. Van Rensselaer*, 1 Johns. Ch. (N. Y.) 344; *Chapman v. Chapman*, 59 Pa. St. 214. See also *Omaha, etc., Ry. v. Redick*, 16 Neb. 313.

The rule protects creditors who have been induced to give credit on the reliance of the debtor's title to land on which another has a secret incumbrance which he fraudulently conceals. *Trenton Banking Co. v. Duncan*, 86 N. Y. 222.

A city not objecting to the preliminary outlay for laying gas-pipes has been held estopped to deny the use of the streets for that purpose. *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106.

A municipal corporation which has allowed expensive buildings to be erected without warning, knowing that they were to be used for a purpose forbidden by a city ordinance, is estopped from asserting that ordinance. *Athens v. Georgia, etc., Rd.*, 72 Ga. 800.

A property owner who has acquiesced in annexation proceedings, and watched the outlay of money for public improvements, has been declared estopped to question the proceedings. *Strosser v. Fort Wayne*, 100 Ind. 443. So of highway proceedings, *State v. Wertzel*, 62 Wis. 184.

Where an offer of reward is made in a newspaper without authority, the alleged promisor is not estopped to deny his liability because he knew of the publication, and did not object to it. *Hugill v. Kinney*, 9 Oreg. 250; s. c., 42 Am. Rep. 801.

The owner of real estate is not estopped to deny the subdivision of his property into blocks by knowledge that a map showing such subdivision has been circulated through the country. *Sullivan v. Davis*, 29 Kan. 28.

A party may contradict the testimony of an adverse witness, though he failed to do so on two former trials. *McCormick v. Pa. Cent. Rd.*, 99 N. Y. 65.

Neglect to object to the use of water while there is abundance for all does not estop the riparian proprietor to object to such use at another time. *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185. But a plaintiff who stood by, and, without objection, saw a stream which formerly touched the corner of her premises, diverted at great expense, was denied a mandatory injunction restoring the stream to its original channel. *Slocumb v. Burlington, etc., Rd.*, 57 Ia. 675.

In an action by the indorsees of a note against the maker, it appeared that the payment of the note had been guaranteed by another person, which guaranty was, for all that appeared to the contrary, ample security. *Held*, that the maker was not estopped to set up his discharge in bankruptcy in defence of the action by reason of his having said nothing of the same, though present when the indorsee took the note. *Cambridge Inst. for Savings v. Littlefield*, 6 Cush. (Mass.) 210.

The owner of property which has been taken under execution against the person from whom he purchased it, and who has made known his claim to the constable, is not estopped to maintain an action against such officer, because at the sale he was silent when his vendor claimed the prop-

must be plain and certain,¹ and ordinarily in reference to past or present facts only;² not matters of law or opinion.³

2. The representations must have been made, or the concealment practised, with knowledge of the facts,⁴ unless the party was bound

erty as exempt. *Watson v. Knight*, 44 Ala. 352.

It is said that the owner of land is not bound to seek out one about to buy it from another, and advise him not to buy. *Bramble v. Kingsbury*, 39 Ark. 131. But there may be a duty to speak, though the one estopped is not present. *Anderson v. Hubble*, 93 Ind. 570; s. c., 47 Am. Rep. 394.

Silence at seeing a single act of trespass committed works no estoppel. *Terre Haute, etc., Rd. v. Rodel*, 89 Ind. 128.

Knowledge of Facts.—There can be no duty to speak if the party has no knowledge of his own rights. *Bringard v. Stellwagen*, 41 Mich. 54. Or of the act about to be taken. *Hays v. Reger*, 102 Ind. 524.

Possession.—Or ordinarily if the party is in open possession of the property involved. *Scates v. King*, 110 Ill. 456; *Howland v. Woodruff*, 60 N. Y. 73; *Hathaway v. Noble*, 56 N. H. 508; *Cunningham v. Milner*, 56 Ala. 522.

1. *Lawrence Univ. v. Smith*, 32 Wis. 587; *Tillotson v. Mitchell*, 111 Ill. 518; *Lash v. Rendell*, 72 Ind. 475; *Davenport Rd. v. Davenport Gas Co.*, 43 Ia. 301; *Townsend v. Todd*, 47 Conn. 190; *Bennett v. Dean*, 41 Mich. 472; *Moors v. Albro*, 129 Mass. 9; *Roach v. Brannon*, 57 Miss. 490; *Grinnan v. Dean*, 62 Tex. 218.

2. A representation looking to the future is generally a mere expression of opinion, or is a contract. See *Allen v. Rundle*, 50 Conn. 9; *Jackson v. Allen*, 120 Mass. 64; *Langdon v. Doud*, 10 Allen (Mass.), 433; *Turnipseed v. Hudson*, 50 Miss. 429; *Allen v. Hodge*, 51 Vt. 436. Compare *Simonton v. Liverpool Co.*, 51 Ga. 76.

Void Contract.—A promise within the statute of frauds cannot be made binding as an estoppel by acting upon it. *Brightman v. Hicks*, 108 Mass. 246. Nor can a contract void as against public policy. *Langan v. Sankey*, 55 Ia. 52. Nor, ordinarily, can a parol promise intended as one of the terms of a written contract, but not incorporated therein. *Insurance Co. v. Mowry*, 96 U. S. 544. But where there is fraud. See *Shields v. Smith*, 37 Ark. 47; *Kimball v. Ætna Ins. Co.*, 9 Allen (Mass.), 540.

. Where the mortgagee of land induced the son of the deceased mortgagor to remain on the land and care for it, and support the family of his father, upon a promise that he would not enforce the mortgage, and the son remained on the land which

grew valuable under his care, it was held that the mortgagee was estopped to enforce the mortgage. *Faxton v. Faxon*, 28 Mich. 159.

Where the owner of land induced another to rent it to a third person, promising not to interfere with the collection of the rent, he was declared estopped from so interfering. *Prime v. Davis*, 68 Ga. 138.

Where a surety has relied on the promise of the creditor made without consideration, that he would not enforce the collection of the debt temporarily or indefinitely, and has been induced thereby to neglect the means for his indemnity, the creditor will be estopped to bring an action to enforce collection. *White v. Walker*, 31 Ill. 422.

3. *Phelps v. Ill. Cent. Rd.*, 94 Ill. 548; *McGirr v. Sell*, 60 Ind. 249; *Hammer-sluough v. Kansas City Assoc.*, 79 Mo. 81; *Chatfield v. Simonson*, 92 N. Y. 209; *Birdsey v. Butterfield*, 34 Wis. 52. But see *Whitwell v. Winslow*, 134 Mass. 343.

Representations as to the value of an article work no estoppel unless the party relying thereon has a right to repose special confidence in the other, or the representation is of the essence of the contract. *Big-on Estop.* (4th ed.) 555; *Graves v. Lake Shore Rd.*, 137 Mass. 33.

4. So that if the representation is made by mistake or in ignorance, there is ordinarily no estoppel. *Clinton v. Haddam*, 50 Conn. 84; *Davis v. Bagley*, 40 Ga. 181; s. c., 2 Am. Rep. 570; *Gray v. Agnew*, 95 Ill. 315; *Lee v. Templeton*, 73 Ind. 315; *Watters v. Connelly*, 59 Iowa, 217; *Proctor v. Putnam Machine Co.*, 137 Mass. 159; *Frederick v. Missouri Riv., etc., Rd.*, 82 Mo. 402; *Van Ness v. Hadsell*, 54 Mich. 560; *Bull v. Rowe*, 13 S. Car. 355; *Turner v. Ferguson*, 58 Tex. 9; *Wright's Appeal*, 99 Pa. St. 425; *Fay v. Tower*, 58 Wis. 286.

And this may be true though the mistake is one of law. *Charlestown v. County Commissioners*, 109 Mass. 270.

A corporation was held not estopped by an assessment based on its own public report, the report having been made by mistake. *Chicago, etc., Ry. v. Auditor-Gen.*, 53 Mich. 79.

Where a warehouseman by mistake gave two receipts for grain, one of which came to the hands of an innocent holder after the grain had been delivered on the other, the warehouseman was permitted to show the mistake in an action for delivery on the second receipt. *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419.

to know them,¹ or his ignorance thereof was the result of inexcusable negligence.² In some States, long acquiescence is a substitute for knowledge of the facts at the outset.³

3. The party relying on the representation must have been ignorant of the facts.⁴ He is justified in acting on clear, positive

Boundaries.—The rule applies to mistakes in the settlement of boundaries where no conveyance is given. *Noble v. Chrisman*, 88 Ill. 186; *Evans v. Miller*, 58 Miss. 120; *Liverpool Wharf v. Prescott*, 7 Allen (Mass.), 494; *Thayer v. Bacon*, 3 Allen (Mass.), 163.

There must have been knowledge of the true lien by one party, and ignorance of it by the other acting upon the incorrect settlement, to estop the former from asserting his claim within the period of limitation. *Davenport v. Tarpin*, 43 Cal. 598; *Pitcher v. Dove*, 99 Ind. 175; *Lemmon v. Hartbrook*, 80 Mo. 13; *Evans v. Miller*, 58 Miss. 120; *Kirchner v. Miller*, 39 N. J. Eq. 355; *Raynor v. Timerson*, 51 Barb. (N. Y.) 517; *Reed v. McCourt*, 35 N. Y. 113; *Hass v. Plantz*, 56 Wis. 105; *Ramsden v. Dyson*, L. R. 1 H. L. 129. It makes no difference that the settlement is in writing if it does not amount to a conveyance. *Bradbury v. Corry*, 59 Me. 494.

Of course a party may be estopped on the ground that he *should* have known the correct line. *Greene v. Smith*, 57 Vt. 268; *Louks v. Kenniston*, 50 Vt. 116.

A verbal agreement made with knowledge of the facts and acted upon operates as an estoppel. *Keer v. Hitt*, 75 Ill. 51.

In Wisconsin there is no estoppel with regard to boundaries, if the true line can be ascertained by a survey. *Hartung v. Witte*, 59 Wis. 285.

The estoppel as to boundaries where there has been no conveyance does not operate to preclude a party from claiming under rights subsequently acquired. *Donaldson v. Hibner*, 55 Mo. 492; *Dillett v. Kemble*, 10 C. E. Green (N. J.) 66.

There is no estoppel unless there has been an actual or implied agreement. *Chapman v. Crooks*, 41 Mich. 595. A mere survey by adjoining owners, without any agreement, creates no estoppel. *Spring v. Hewston*, 52 Cal. 442. But a survey and marking of lines may estop the party making it. *Singleton v. Whiteside*, 5 Yerg. (Tenn.) 36.

Other Cases.—But it is said that the maker of a promissory note who informs a person about to purchase it that there is no defence to it will be estopped to assert any, though he was ignorant of the defence at the time. *Plummer v. Farmer's Bank*, 90 Ind. 386.

One who represents by words or other conduct that he has received notice of the

dishonor of commercial paper, and thereby induces another to purchase it, cannot afterwards deny having received such notice. *St. John v. Roberts*, 31 N. Y. 441; *Libbey v. Pierce*, 47 N. H. 309.

1. *Stone v. Great Western Oil Co.* 41 Ill. 85; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96; *Slim v. Croucher*, 1 DeG., F., & J. 518.

Forgetfulness.—Forgetfulness will not ordinarily prevent an estoppel. *Slim v. Croucher*, 1 DeG., F., & J. 518; s. c., 2 Giff. 37; *Bullis v. Noble*, 36 Iowa, 518; *Raley v. Williams*, 73 Mo. 310.

But where an infant sixteen years of age signed her mother's name to a deed of property at her request, she was not precluded thereby from afterwards claiming the property by virtue of a conveyance to herself ten or eleven years previous to the execution of such second deed, she having forgotten the first conveyance at the time. *Spencer v. Carr*, 45 N. Y. 406; s. c., 6 Am. Rep. 112.

2. *Griffith v. Wright*, 6 Colo. 248. See also *Raley v. Williams*, 73 Mo. 310; *Barstow v. Savage Mining Co.*, 64 Cal. 388; *Sutton v. Wood*, 27 Minn. 362; *Boynnton v. Braley*, 54 Vt. 92.

Ordinarily a director of a corporation can not prevent an estoppel by his representations concerning its acts by alleging his ignorance at the time. *Stone v. Great Western Oil Co.* 41 Ill. 85.

A person who signs an agreement without reading it is estopped to deny its obligation. *Taylor v. Fox*, 16 Mo. App. 527.

3. Especially in the case of boundaries where there has been a change in the position of the parties. *Columbet v. Pacheco*, 48 Cal. 395; *Chicago Ry. v. People*, 91 Ill. 251; *Diehl v. Zanger*, 39 Mich. 601; *Acton v. Dooley*, 74 Mo. 63; *Adams v. Rockwell*, 16 Wend. (N. Y.) 285; *Brackenridge v. Howth*, 64 Tex. 190; *Hagey v. Detweiler*, 35 Pa. St. 409; *State v. Wertzel*, 62 Wis. 184; *Susquehanna Ins. Co. v. Swank*, 102 Pa. St. 17; *Aldrich v. Billings*, 14 R. I. 233. See also *Kimball v. Lee*, 40 N. J. Eq. 403. *Compare Tice v. Derby*, 59 Iowa, 312.

And where acquiescence apart from knowledge creates no estoppel, at least the party claiming the estoppel should be entitled to his improvements. *St. Louis, etc., Co. v. Green*, 4 McCrary (U. S.), 232; *Dolde v. Vodicka*, 49 Mo. 98. *Compare Stackman v. Riverside Co.*, 64 Cal. 57.

4. *Williams v. Wadsworth*, 51 Conn.

representations, though he has means of knowing the truth of the matter.¹

4. The representation must have been made, or the concealment practised, with the intention that it should be acted upon;²

277; *Lash v. Rendell*, 72 Ind. 475; *Powell v. Rogers*, 105 Ill. 318; *Shillock v. Gilbert*, 23 Minn. 373; *Robbins v. Potter*, 98 Mass. 532; *Phinney v. Johnson*, 13 S. Car. 25; *Kingman v. Graham*, 51 Wis. 232. See also *Trenton Banking Co. v. Duncan*, 86 N. Y. 221.

The rule obtains where one makes improvements on another's land, knowing it to be such. *Steel v. Smelting Co.*, 106 U. S. 447.

The purchaser of chattels with knowledge of the true owner and circumstances cannot claim an estoppel because the owner was silent at the sale. *Canning v. Harlan*, 50 Mich. 320.

A creditor is not estopped to deny the truth of a recital in a note which he denied at the time of accepting the note, where the rights of innocent parties have not intervened. *Wright v. McPike*, 70 Mo. 175. Otherwise if innocent parties would be injured. *Prickett v. Sibert*, 75 Ala. 315.

One party cannot rely on a representation when another partner knew the truth of the matter. *Bigelow v. Heninger*, 33 Kan. 362.

A purchaser of land will be presumed to know that taxes upon the land were declared void, and that the law provided for a re-assessment. *Marco v. Fond du Lac County*, 63 Wis. 212.

Possession is notice to put a purchaser on inquiry. *Hendricks v. Kelly*, 64 Ala. 388. See note on "Silence," *ante*.

Recital in Simple Contract.—A recital in a simple contract which is not of the essence of the contract creates no estoppel. *Snowden v. Grice*, 62 Ga. 615; *Ferguson v. Milliken*, 42 Mich. 441. Otherwise perhaps if in the nature of a stipulation. *Stewart v. Metcalf*, 68 Ill. 19.

1. *Dodge v. Pope*, 93 Ind. 480; *Webster v. Bailey*, 31 Mich. 36; *David v. Park*, 103 Mass. 501; *Wannell v. Kem*, 57 Mo. 478; *Parham v. Randolph*, 4 How. (Miss.) 435; *Mead v. Bunn*, 32 N. Y. 275.

Record Notice.—Legal notice as distinguished from actual notice, or by registration, etc., will not prevent an estoppel, if the representation was positive and relied upon. *Evans v. Forstall*, 58 Miss. 30; *Peery v. Hall*, 75 Mo. 503; *David v. Park*, 103 Mass. 501; *Kiefer v. Rogers*, 19 Minn. 32.

2. *Planters' Ins. Co. v. Selma Bank*, 63 Ala. 585; *Fawcett v. New Haven Organ Co.*, 47 Conn. 224; *Robb v. Shephard*, 50 Mich. 189; *Allum v. Perry*, 68 Me. 232;

Zuchtmann v. Roberts, 109 Mass. 53; *McAdams v. Hawes*, 9 Bush (Ky.), 15; *Muller v. Pondir*, 55 N. Y. 325; *Parker v. Moore*, 59 N. H. 454; *Durant v. Pratt*, 55 Vt. 270; *Askins v. Coe*, 12 Lea (Tenn.), 672; *Freeman v. Cooke*, 2 Ex. 654.

Where the owner of property in reply to an inquiry stated that it belonged to another, and the officer levied upon it under an execution against such other person, the owner was not estopped to claim it, not having known the purpose of the inquiry. *Fountain v. Whelpley*, 77 Me. 132. *Compare* *Horn v. Cole*, 51 N. H. 287; s. c., 12 Am. Rep. 111. See also *Davidson v. Dwyer*, 62 Ia. 332.

Intent inferred.—But the intent may be a legal inference from the fact that the person misled would be injured were the estoppel not enforced. *Beebe v. Wilkinson*, 30 Minn. 548; *Vanneter v. Crossman*, 42 Mich. 465; *Hill v. Blackwelder*, 113 Ill. 283; *Raley v. Williams*, 73 Mo. 310; *Tiffany v. Anderson*, 55 Ia. 405; *Pitcher v. Dove*, 99 Ind. 175; *Stevens v. Dennett*, 51 N. H. 324; *Blair v. Wait*, 69 N. Y. 113.

The representation must be such as to induce a man of ordinary prudence to act thereon. *Hefner v. Vandolah*, 57 Ill. 520; *Howe Machine Co. v. Farrington*, 82 N. Y. 121.

Dedication to Public.—In order that a party should be estopped by acts in *pais* to deny a dedication of a way to the public, the intention to dedicate must be clear. *Holdane v. Cold Spring*, 21 N. Y. 474. But there may be such a dedication. *McCormick v. Baltimore*, 45 Ind. 512; *Shane v. Moberly*, 79 Mo. 41; *Beatty v. Kurtz*, 2 Pet. (U. S.) 566.

One who fences off land as a street, and sees others build with reference thereto without warning, may be estopped to deny a dedication. *Chicago v. Wright*, 69 Ill. 318.

Inquiries.—Where reliance is placed upon replies to inquiries, the latter must have been clear, and not misleading. *Kinney v. Whiton*, 44 Conn. 262; *Tillotson v. Mitchell*, 111 Ill. 518; *Fountain v. Whelpley*, 77 Me. 135; *Pierce v. Andrews*, 6 Cush. (Mass.) 4; *Durant v. Pratt*, 55 Vt. 270.

The maker of a promissory note told a prospective purchaser that it was "all right;" but as there was no evidence that he intended the representation to be acted upon, or that he did not believe that the plaintiff had already purchased the note, it

but negligence amounting to a breach of duty supplies the place of intent.¹

5. The other party must have been induced to act upon the representation or concealment.² His action must have been of

was held that he was not estopped to show an illegal consideration. *Andrews v. Lyon*, 11 Allen (Mass.), 349.

Representation must be voluntary.—One cannot claim an estoppel on account of representations which he entrapped another into making. *Calhoun v. Richardson*, 30 Conn. 210; *Sinnett v. Moles*, 38 Iowa, 25; *Gallagher v. People*, 91 Ill. 582; *Gray v. Gray*, 83 Mo. 106; *Wilcox v. Howell*, 44 N. Y. 398; *Stanford v. Lyon*, 37 N. J. Eq. 94.

Who may claim.—Ordinarily only the party to whom the representation was made can claim to have been misled thereby for the purpose of raising an estoppel. *Townsend Bank v. Todd*, 47 Conn. 190; *Mayenberg v. Haynes*, 50 N. Y. 675; *Durant v. Pratt*, 55 Vt. 270; *Peek v. Gurney*, L. R. 6 H. L. Car. 377. Compare *Horn v. Cole*, 51 N. H. 287; *Mitchell v. Reed*, 9 Cal. 204. But if the representation was intended to be general, one who is informed of and relies on it may claim the estoppel. *Kinney v. Whiton*, 44 Conn. 262; s. c., 26 Am. Rep. 462; *Quirk v. Thomas*, 6 Mich. 78.

A tax collector who gave a receipt for taxes on receiving a check was not estopped to show that the check was not paid, because a purchaser was induced by the receipt to pay the full consideration for the premises. *Kuhl v. Jersey City*, 8 C. E. Green (N. J.), 84.

1 *Griffith v. Wright*, 6 Colo. 248; *Greene v. Smith*, 57 Vt. 268; *Pence v. Arbuckle*, 22 Minn. 417; *Hardy v. Chesapeake Bank*, 51 Md. 562; *Manufacturers' Bank v. Hazard*, 30 N. Y. 226; *Horn v. Cole*, 51 N. H. 227; *Kingman v. Graham*, 51 Wis. 232; *Brant v. Virginia Coal Co.*, 93 U. S. 326; *Cornish v. Abington*, 4 Hurl. & N. 549.

The holder of a certificate of purchase of State land who has remained out of possession for forty-three years, and neglected to perfect his title, is estopped to claim against a subsequent occupying purchaser in good faith. *Bridenbaugh v. King*, 42 O. St. 410.

Negligence not amounting to a breach of duty will not supply the place of intent. *Greenfield Bank v. Stowell*, 123 Mass. 196; *Holmes v. Trumper*, 22 Mich. 427; *People v. Bank of North America*, 75 N. Y. 548.

2 *Daniels v. Equitable Ins. Co.*, 48 Conn. 101; *Powell v. Rogers*, 105 Ill. 318; *Palmer v. Meiners*, 17 Kan. 478; *Grover v. Blondell*, 70 Me. 190; *Sulphine v. Dunbar*, 55 Miss. 255; *Burke v. Adams*, 80 Mo. 504; *Monks v. Belden*, 80 Mo. 639; *Canning v.*

Brown, 50 Mich. 436; *Butchers' Assoc. v. Boston*, 139 Mass. 290; *McAbe v. Thompson*, 27 Minn. 134; *Marqueze v. Fernhadez*, 30 La. Ann. 195; *Lawrence v. Towle*, 59 N. H. 28; *Andrews v. Aetna Life Ins. Co.*, 85 N. Y. 334; *Woodruff v. Lounsberry*, 40 N. J. Eq. 545; *Askins v. Coe*, 12 Lea (Tenn.), 672; *Grigsby v. Caruth*, 57 Tex. 269; *Earl v. Stevens*, 57 Vt. 474; *Berwind v. Schultz*, 28 Fed. Rep. 110; *Cropper v. Smith*, 28 Ch. D. 700.

A dock-owner whose grantor petitioned for a bridge is not estopped to claim damages resulting from its proximity when the bridge company's action was not determined by the grantor's acts. *Maxwell v. Bay City Bridge Co.*, 46 Mich. 278.

Representations after Change in Position.—A representation made after the change of position works no estoppel. *McCall v. Powell*, 64 Ala. 254; *Behrens v. Germania Ins. Co.*, 64 Iowa, 19; *Straus v. Minzesheimer*, 78 Ill. 492; *Crossan v. May*, 68 Ind. 242; *Garlinghouse v. Whitwell*, 51 Barb. (N. Y.) 208. But though the contract was made before the representation, if performance was induced thereby, an estoppel arises. *Goeing v. Outhouse*, 95 Ill. 346.

A representation by the maker of a promissory note to an assignee thereof after assignment raises no estoppel. *Hoover v. Kilander*, 83 Ind. 420.

Representation not acted upon.—An account rendered not assented to does not estop the creditor to claim a larger amount. *Stryker v. Cassidy*, 76 N. Y. 50.

Municipal officers may show that they have charged themselves with indebtedness erroneously in their reports. *State v. Hauser*, 63 Ind. 155; *Van Ness v. Hadsell*, 54 Mich. 561.

An officer is not estopped by his return, if it has not been acted upon. *Rogers v. Cromack*, 123 Mass. 582; *Harris v. Kirkpatrick*, 6 Vroom. (N. J.) 392; *State v. Ogle*, 2 Houst. (Del.) 371; *Stimson v. Farnham*, L. R. 7 Q. B. 175. Compare *Dunklin v. Wilson*, 64 Ala. 162; *State v. Penner*, 27 Minn. 269.

Ordinarily the action must have been prompt. *Redwood Cemetery Assoc. v. Bandy*, 93 Ind. 246; *Baker v. Johnston*, 21 Mich. 319; *Hunter v. Sand Hill*, 6 Hill (N. Y.) 407; *Beatty v. Kurtz*, 2 Pet. (U. S.) 566; *Planters', etc., Co. v. Selma Bank*, 63 Ala. 585.

Where one obtains a judgment for tort he can claim no estoppel for the purpose

a character to result in substantial prejudice were he not permitted to rely on the estoppel.¹

b. Application of the Doctrine.—Where the owner or person having an interest in property represents another as the owner, or permits him to appear as such, or as having complete authority over it, he will be estopped to deny such ownership or authority against persons who, relying on his representations or silence, have purchased or acquired interests in the property.² And

of satisfying the judgment against one who has permitted the legal title to his property to be in the defendant. *Lillis v. Gallagher*, 39 N. J. Eq. 93.

An adjustment of a loss not accepted does not estop an insurance company to allege a breach of condition. *Murphy v. People's Ins. Co.*, 7 Allen (Mass.), 239; *Coloniuz v. Hibernia Ins. Co.*, 3 Mo. App. 56.

A person who has accepted and voted upon stock of a corporation may show that he holds it as collateral security only, if no one has been induced thereby to subscribe to the stock or give credit to the company. *Burgess v. Seligman*, 107 U. S. 20.

Acquiescence.—Simply permitting persons to enclose portions of the public streets does not estop the public to claim its rights therein. *Solberg v. Decorah*, 41 Iowa, 501; *Sheen v. Stothart*, 29 La. Ann. 630.

Participating in an election, and paying taxes authorized thereby, will not prevent the people from contesting the validity of the tax. *Cameron v. Stephenson*, 69 Mo. 373.

And generally acquiescence alone will not supply the place of evidence that the representation was acted upon. See *Hamlin v. Sears*, 82 N. Y. 327; *Williamson v. N. J.*, etc., Rd., 29 N. J. Eq. 311; *Lorentz v. Lorentz*, 14 W. Va. 809.

1. *Yates v. Hurd*, 8 Colo. 343; *Townsend Bank v. Todd*, 47 Conn. 190; *Leland v. Isenbeck*, 1 Idaho, 469; *Jamison v. Miller*, 64 Iowa, 402; *Anderson v. Hubble*, 93 Ind. 570; s. c., 47 Am. Rep. 394; *Michigan State Ins. Co. v. Soule*, 51 Mich. 312; *De-Mill v. Moffat*, 49 Mich. 125; *Malloney v. Horan*, 49 N. Y. 111; s. c., 10 Am. Rep. 335; *Voorhis v. Olmstead*, 66 N. Y. 113; *East v. Dolihite*, 72 N. Car. 562; *Zell's Appeal*, 103 Pa. St. 344; *Warder v. Baldwin*, 51 Wis. 450; *Knights v. Wiffen*, L. R. 5 Q. B. 660. The damages may be a reasonable presumption. *Cases supra*.

One who has a right to compensation for the care and support of his parents is not estopped to claim it by having declared after their death that he would make no such claim. *Botts v. Fultz*, 70 Ind. 396.

One who indicates that certain property belongs to an execution defendant is not

estopped to claim it as his own if the execution creditor was not injured by his representation. *Warder v. Baldwin*, 51 Wis. 450.

A husband is not estopped to demand curtesy by reason of having consented to his wife's devising land. *Roach v. White*, 94 Ind. 510.

A widow is not estopped to plead the statute of limitations by having made partial payments on a debt of her husband, not having taken out letters testamentary or of administration on his estate. *Lewis v. Ford*, 67 Ala. 143.

If the person claiming the estoppel was legally bound to do what he did, there is no estoppel in his favor. *Organ v. Stewart*, 60 N. Y. 413; *Turner v. Waldo*, 40 Vt. 51.

Fraud.—A vendor cannot say that a sale was without consideration and for the purpose of defrauding his creditors. *Bassett v. Shepardson*, 52 Mich. 3; *Bynum v. Miller*, 86 N. Car. 559; s. c., 41 Am. Rep. 467; *Peterson v. Brown*, 17 Nev. 172; s. c., 45 Am. Rep. 437.

2. Wrongful Sale.—*Powers v. Harris*, 98 Ala. 410; *Jowers v. Phelps*, 33 Ark. 465; *Winton v. Hart*, 39 Conn. 16; *Pool v. Lewis*, 41 Ga. 162; s. c., 5 Am. Rep. 526; *Roberts v. Davis*, 72 Ga. 819; *Osborn v. Elder*, 65 Ga. 360; *Miles v. Lefi*, 60 Ia. 168; *Stewart v. Munford*, 91 Ill. 58; *Bobbitt v. Shryer*, 70 Ind. 513; *Alexander v. Ellison*, 79 Ky. 148; *Sebright v. Moore*, 33 Mich. 92; *Chapman v. Pingree*, 67 Me. 198; *Rice v. Bunce*, 49 Mo. 231; s. c., 8 Am. Rep. 129; *Hawkins v. Methodist Church*, 23 Minn. 256; *Montague v. Weil*, 30 La. Ann. 50; *Horn v. Cole*, 51 N. H. 287; s. c., 12 Am. Rep. 111; *Howland v. Woodruff*, 60 N. Y. 73; *Redman v. Graham*, 80 N. Car. 231; *Burton's Appeal*, 93 Pa. St. 214; *Dunlap v. Gooding*, 22 S. Car. 548; *Kirk v. Hamilton*, 102 U. S. 68; *Pickard v. Sears*, 6 Ad. & E. 469, the leading case on equitable estoppel.

The rule applies where the owner of an unnegotiable chose in action confers upon another the apparent absolute ownership, and the latter sells the same to an innocent purchaser for value. *Hentz v. Miller*, 94 N. Y. 64; *Moore v. Metropolitan Bank*, 55 N. Y. 41; *Combes v. Chandler*, 33 O. St. 178.

Where one stood by and saw another

generally, where a person by word or conduct voluntarily induces another to act on a belief in the existence of a certain state of

purchase a receipt as a secret of trade without disclosing the fact that it had been communicated to him, and that he claimed the right to use it, it was *held* that he was estopped in equity from using the recipe. *Champlin v. Stoddart*, 30 Hun (N. Y.), 300.

If the principal knowing of proceedings to subject his property to demands against the agent, does not seek to intervene, he estops himself from afterwards claiming the property. *Murne v. Schwabacher*, 2 Wash. Ty. 191.

By Trustees, etc. — A *cestui que trust* not under disability is bound by a sale of the property by the trustee, made with his knowledge and apparent consent. *Regina v. Shropshire Union Co.*, L. R. 8 Q. B. 420; *Perkins v. Conant*, 29 Ill. 184. So is an heir by a sale made by the executor with his encouragement. *Favill v. Roberts*, 50 N. Y. 222. So is the owner of a chose in action by a sale thereof to an innocent purchaser by one to whom it has been intrusted with the indicia of ownership. *Combes v. Chandler*, 33 O. St. 178; *Moore v. Metropolitan Bank*, 55 N. Y. 41. So of mining stocks. See also *Hentz v. Miller*, 94 N. Y. 64; *Gass v. Hampton*, 16 Nev. 185.

Witnessing Conveyance. — Witnessing a deed of one's own property generally raises an estoppel. *Hale v. Skinner*, 117 Mo. 474; *Stevens v. Dennett*, 51 N. H. 324. But not unless the witness knows the contents of the instrument. *Coker v. Ferguson*, 70 Ala. 284.

Procuring one to witness a deed to land estops the grantor to deny the competency of the witness. *Hill v. Hill*, 53 Vt. 578.

Sale under execution, etc. — One who made no objection to a judgment improperly obtained against him, and a sale of real estate thereunder, is estopped to assert title against an innocent purchaser. *Weaver v. Lutz*, 102 Pa. St. 593. So of a sale under foreclosure proceedings. *Collier v. Pfennig*, 34 N. J. Eq. 22.

Ratification. — One who with knowledge accepts the proceeds of an unauthorized sale of his property is estopped to dispute the validity of the sale. *Goodman v. Winter*, 64 Ala. 410; *France v. Haynes*, 67 Iowa, 139; *Schenck v. Sautter*, 73 Mo. 46; *Moore v. Hill*, 85 N. Car. 218; *Field v. Doyon*, 64 Wis. 560. See also *Booth v. Wiley*, 102 Ill. 84.

Heirs joining in a deed of quit-claim with a trustee to confirm a former deed by the trustee of the ancestor's land are estopped to contest the validity of the former deed. *Valette v. Bennett*, 69 Ill. 632.

A creditor of the vendor of chattels may estop himself from denying the facts of

delivery and continued change of possession, by so recognizing the validity of the sale as to cause the buyer to spend money on the faith of such recognition. *Ercolle v. Franks*, 67 Cal. 137.

After-acquired Title. — A sheriff who has in his hands an execution binding on property, and induces an innocent purchaser to buy the property by representing that there are no liens upon it, cannot set up against such purchaser a title subsequently acquired at the execution sale. *Gill v. Denton*, 71 N. Car. 341; s. c., 17 Am. Rep. 8.

A person who sells personal property as his own is estopped to say that he had no interest in the property at the time of the sale. *Wortham v. Gurley*, 75 Ala. 356; *Keyes v. Scanlan*, 63 Wis. 345.

Real Estate. — A person may be estopped to claim title to land by his conduct in reference thereto. *Yates v. Hurd*, 8 Col. 343; *Pitcher v. Dove*, 99 Ind. 175; *Copeland v. Copeland*, 28 Me. 524; *Money v. Ricketts*, 62 Miss. 209; *Railroad v. Ragsdale*, 54 Miss. 200; *Wells v. Peirce*, 27 N. H. 303; *De Herques v. Marti*, 85 N. Y. 609; *Wendell v. Van Rensselaer*, 1 Johns. Ch. (N. Y.) 344; *Fielding v. DuBose*, 63 Tex. 631; *Dickerson v. Colgrove*, 100 U. S. 578; *Greene v. Smith*, 57 Vt. 268; 2 Herman on Estop. 1054 *et seq.*

A familiar example is parol dedication of land. *Lee v. Lake*, 14 Mich. 12; *Baker v. Johnston*, 21 Mich. 319.

A vendor of one of two lots was not permitted to deny a representation to the purchaser that there was an alley between them, although the deed made no allusion to the alley. *Kirkpatrick v. Brown*, 59 Ga. 450.

But there must be fraud, actual or constructive. *Burke v. Brewer*, 2 Met. (Mass.) 421; *Kelly v. Wagner*, 61 Miss. 299; 2 Herman on Estop. 1061.

It has been frequently *held* that an estoppel *in pais* is not available at law, particularly as the basis of the common-law ejectment. *Doe d. McPherson v. Walters*, 16 Ala. 714; *Thompson v. Campbell*, 57 Ala. 183; *Townsend Bank v. Todd*, 47 Conn. 190; *Nix v. Collins*, 65 Ga. 219; *Stockyards v. Wiggins Ferry Co.* 102 Ill. 514; *Wimmer v. Ficklin*, 14 Bush. (Ky.) 193; *DeMill v. Moffatt*, 49 Mich. 125; *Hayes v. Livingston*, 34 Mich. 384; s. c., 22 Am. Rep. 533; *Hamlin v. Hamlin*, 19 Me. 141; *Delaplaine v. Hitchcock*, 6 Hill (N. Y.), 14; *West v. Tilghman*, 9 Ired. (N. Car.) 163. But when not made the ground of a common-law ejectment, an estoppel *in pais* affecting the title to land is available at law by the weight of author-

facts, he will be estopped as against him to allege a different state of facts.¹

ity. *Davis v. Davis*, 26 Cal. 23; *Brown v. Wheeler*, 17 Conn. 345; *Pool v. Lewis*, 41 Ga. 162; *Hale v. Skinner*, 117 Mass. 474; *Bigelow v. Foss*, 59 Me. 162; *Stevens v. Dennett*, 51 N. H. 324; *Finnegan v. Carraher*, 47 N. Y. 493; *McAfferty v. Conover*, 7 Ohio St. 99; *Beaupland v. McKean*, 28 Pa. St. 124; *Spears v. Walker*, 1 Head (Tenn.), 166; *Halloran v. Whitcomb*, 43 Vt. 306; *Mariner v. Milwaukee, etc., Rd.*, 26 Wis. 84; *Kirk v. Hamilton*, 102 U. S. 68.

If the estoppel cannot be availed of at law, the proceedings may be enjoined in equity. *Society, etc., v. Lehigh Valley Rd.*, 32 N. J. Eq. 329; *Williams v. Jersey, Craig & P.* 91.

The facts of an estoppel *in pais* may sustain a bill for a conveyance of land. *Favill v. Roberts*, 3 Lans. 14; s. c., 50 N. Y. 222; *Goodman v. Winter*, 64 Ala. 410.

1. *Larkins v. Mead*, 77 Ala. 485; *Robinson v. Barnett*, 19 Fla. 670; s. c., 45 Am. Rep. 24; *Dodge v. Pope*, 93 Ind. 480; *Genoa v. Van Alstine*, 108 Ill. 555; *Caswell v. Fuller*, 77 Me. 105; *State v. Young*, 23 Minn. 549; *Union Sav. Assoc. v. Kehlor*, 7 Mo. App. 158; *Newman v. Mueller*, 16 Neb. 523; *Chalmers v. Turnipseed*, 21 S. Car. 126.

There is said to be no estoppel against showing that an act is void by statute. *Tibble v. Anderson*, 63 Ga. 41; *Rosebrough v. Ansley*, 35 Ohio St. 107. *Compare Payne v. Burnham*, 62 N. Y. 69; *Mason v. Anthony*, 3 Keyes (N. Y.), 609; *Wilson v. Western Land Co.* 77 N. Car. 445. See also *McKnight v. Pittsburgh*, 91 Pa. St. 273. And a party was held not estopped by an agreement based on a void statute. *Turnipseed v. Hudson*, 50 Miss. 429; s. c., 19 Am. Rep. 15.

A defendant is not estopped by a parol promise not to plead the statute of limitations if plaintiff will allow him further time. *Shapley v. Abbott*, 42 N. Y. 443; s. c., 1 Am. Rep. 548.

One who induces another to sign paper as surety cannot afterwards deny having signed as principal. *Bobbitt v. Shryer*, 70 Ind. 513; *Melms v. Werdehoff*, 14 Wis. 18.

The maker of a note, dated upon a week day, cannot allege against an innocent purchaser, that it was executed on Sunday. *Knox v. Clifford*, 38 Wis. 651; s. c., 20 Am. Rep. 28.

Validity of Debt, etc.—One liable on a note, bond, mortgage, or the like, who tells one desiring to purchase the same, that it has no defence, or that it is "good," or that he has no defence, etc., cannot against such purchaser allege want of con-

sideration, *non est factum*, usury, and the like. *Wilkinson v. Searcy*, 74 Ala. 243; *Plummer v. Farmers' Bank*, 90 Ind. 386; *Feltz v. Walker*, 49 Conn. 93; *McCreary v. Parsons*, 31 Kan. 447; *Hefner v. Dawson*, 63 Ill. 403; s. c., 14 Am. Rep. 123; *Weyh v. Boylan*, 85 N. Y. 394; s. c., 39 Am. Rep. 669; *Smyth v. Munroe*, 84 N. Y. 354; *Simpson v. Moore*, 5 Lea (Tenn.), 372; *Leugar v. Hazlewood*, 11 Lea (Tenn.), 539; *Rudd v. Matthews*, 79 Ky. 479; s. c., 42 Am. Rep. 231; *Bates v. Leclair*, 49 Vt. 229. So of an indorser who has acknowledged notice of dishonor. *St. John v. Roberts*, 31 N. Y. 441; *Libbey v. Pierce*, 47 N. H. 309. So of an acknowledgment of the validity of a judgment. *Cook v. McCahill*, 41 N. J. Eq. 69.

But the maker of a note, etc., is not precluded from using any defence arising subsequent to the representation. *Cloud v. Whiting*, 38 Ala. 57; *Plummer v. Farmers' Bank*, 90 Ind. 386. Nor does an estoppel arise if the holder has already taken the note. *Crossan v. May*, 68 Ind. 242.

Destruction of Deed.—A grantee who has destroyed his deed with the purpose of revesting the title in the grantor, is estopped to claim the title, if fraud would result. *Dukes v. Spangler*, 35 Ohio St. 119; *Farrar v. Farrar*, 4 N. H. 191; *Trull v. Skinner*, 17 Pick. (Mass.) 213. But there is no estoppel if no fraud would result. *Jeffers v. Philo*, 35 Ohio St. 173.

Public Improvements.—One moving for public improvements, and aiding in the preliminary proceedings, is estopped to deny that they are without authority. *In re Cooper*, 93 N. Y. 507; *Burlington v. Gilbert*, 31 Ia. 356; *Ferson's Appeal*, 96 Pa. St. 140. *Compare Strosser v. Ft. Wayne*, 100 Ind. 443; *Steckett v. East Saginaw*, 22 Mich. 104; *Long v. Columbus*, 39 O. St. 281.

Petitioners to a town to let certain work cannot object to a tax therefor, that the contract was irregular, if they knew of such fact at the time. *Patterson v. Baumer*, 43 Iowa, 477; *Motz v. Detroit*, 18 Mich. 495; *Kellogg v. Ely*, 15 O. St. 64. One who did not assent to irregularities is not estopped. *Taylor v. Burnap*, 39 Mich. 739; *Petition of Sharp*, 56 N. Y. 207; s. c., 15 Am. Rep. 415.

One who induces a town to build a bridge, knowing its necessary character, cannot recover for injuries to his land caused by changing the grade of the street for the approaches. *Justice v. Lancaster*, 20 Mo. App. 559.

A municipality has been allowed to deny the constitutionality of a law authorizing it

to levy a tax under which it had acted. *Loan Association v. Topeka*, 20 Wall. (U. S.) 655.

One who has accepted money in redemption of property cannot dispute the payor's right to redeem. *Goddard v. Renner*, 57 Ind. 532.

Further Illustrations.—A bill of sale, absolute on its face, cannot be shown to be conditional as against a creditor who attached the property on the faith of the bill of sale. *Dixon v. Blondin*, 58 Vt. 689. And a woman who acknowledged the ownership of a dog was held estopped to deny such ownership in an action against her for damages occasioned by it, if she knew that the inquiry was made for the purpose of fixing the liability. *Robb v. Shephard*, 50 Mich. 189. But it is said that one who induces another to garnishee him by admitting an indebtedness to the defendant is not estopped to dispute the indebtedness. *Warder v. Baker*, 54 Wis. 49. See also *Starry v. Korab*, 65 Iowa, 267.

A garnishee who induces the plaintiff to delay service by a promise not to pay the defendant until after notice to the plaintiff, is estopped to claim that he has since paid the defendant in full. *Ashworth v. Brown*, 15 Phila. (Pa.) 207.

A person cannot complain of injury from the flow of waters if he forbade the diversion of the same. *Griffin v. Lawrence*, 135 Mass. 365.

An attorney who advises his client to invest in a bad title cannot afterwards buy a better title, and assert it against him. *Gibbons v. Hoag*, 95 Ill. 45.

If an officer accepts a salary under a city ordinance, he will not be allowed to demand a larger salary under a previous ordinance. *Rau v. Little Rock*, 34 Ark. 303.

An employee who deliberately conceals a claim against his employer when business usage demands a full showing of his claims cannot afterwards assert it. *Gingress v. Iron Cliffs Co.*, 48 Mich. 413.

A person who directs another to sign a deed in his name in his presence, and induces others to act on it, cannot dispute its validity. *Goodell v. Bates*, 14 R. I. 65.

A company giving a written certificate that a certain person is entitled to a bond cannot deny the truth of the statement against the innocent assignee of the certificate. *Midland Rd. v. Hitchcock*, 37 N. J. Eq. 549.

A person is not estopped to show that an acceptance or promissory note is a forgery because he has paid other such acceptances or notes. *Cohen v. Teller*, 93 Pa. St. 123; *Commercial Bank v. Bernero*, 17 Mo. App. 313; *Morris v. Bethell*, L. R. 5 C. P. 47. Nor does the receipt of an account without objection prevent a debtor from pleading the statute of limitations.

Verrier v. Gillon, 97 Pa. St. 63. Nor does buying goods at a sale under a void execution estop the purchaser from maintaining an action against the officer for the wrongful sale, where the purchaser warned the officer against selling the goods. *Brayman v. Whitcomb*, 134 Mass. 525.

If one perform acts required by a written instrument, he cannot deny his execution thereof. *Boggs v. Olcott*, 40 Ill. 303.

Paying part of a claim does not estop supervision to refuse payment of the remainder. *People v. New York*, 1 Hill (N. Y.), 362.

A corporation may sue upon the bond of its officer for misappropriation of funds, although it has approved his accounts, and founded a report to the Legislature thereon. *Lexington, etc., Rd. v. Elwell*, 8 Allen (Mass.), 371.

A debtor who gives information upon which a creditor honestly makes the oath upon which the former is arrested is estopped from holding the creditor chargeable with a false oath. *Caswell v. Fuller*, 77 Me. 105.

One who may demand water under a contract, and gives notice that he requires a certain amount, cannot set up that he neither needed nor used the amount specified. *Brown v. Evans*, 18 Nev. 141.

Compromises.—Where two parties claimed the same land under a will, and with knowledge of all the facts collected and voluntarily divided the rents and profits, neither can subsequently recover therefor from the other. *White v. Rowland*, 67 Ga. 546; s. c., 44 Am. Rep. 731.

On a compromise between a principal maker of a note and part of his creditors, including a surety on the note but not the holder, if the surety agrees to receive the compromise payment he is estopped to deny his liability to the holder. *Irvine v. Adams*, 48 Wis. 468; s. c., 33 Am. Rep. 817.

Easements.—A person who sold a house having windows overlooking his adjacent lands, was held estopped from obstructing the windows, if they were necessary to give light and air to the house, but not if light and air could be obtained by opening other windows elsewhere. *Turner v. Thompson*, 58 Ga. 268; s. c., 24 Am. Rep. 497.

Where two parties agreed to build a wall, and after it was partly built one of them refused to continue the work, and the other completed it, the one so refusing was estopped to deny an easement for the wall. *Rindge v. Baker*, 57 N. Y. 209; s. c., 15 Am. Rep. 475.

A grantor who points out wrong lines to his grantee, and sees him build in reference thereto, is estopped. *Rutherford v. Tracy*, 48 Mo. 325; s. c., 8 Am. Rep. 104. See note "Improvements on Land," *ante*.

Patents. — A representation by an inventor that he did not intend to take out a patent on an invention, will estop him to assert his right against any one acting on the representation. *Pitt v. Hall*, 2 Blatchf. (U. S.) 229.

Obtaining a second patent for an invention estops the inventor to set up a prior inconsistent patent. *Barrett v. Hall*, 1 Mason (U. S.), 447. See also *Odiorne v. Amesbury Factory*, 2 Mason (U. S.), 28.

The vendor of a patent cannot set up its invalidity against his vendee. *Franks v. Kamp*, 17 Blatchf. (U. S.) 432.

A person who has advertised and sold articles as a useful invention, cannot deny the utility of the invention in an action against him for infringement. *Stanley v. Whipple*, 2 McLean (U. S.), 35.

Inconsistent Positions. — It has been said that one who secures an act of the Legislature, and accepts benefits thereunder, cannot question its constitutionality. *Ferguson v. Landram*, 5 Bush (Ky.), 230; s. c., 1 Bush, 548. But if no benefits have been received, there can be no such estoppel. *State v. Little Rock, etc., Rd.*, 31 Ark. 701; *Counterman v. Dublin*, 38 Ohio St. 515; *South Ottawa v. Perkins*, 94 U. S. 200.

One who has received money for another cannot deny his authority to receive, or the principal's claim. *McKee v. Monterey Co.*, 51 Cal. 275; *Hungerford v. Moore*, 65 Ala. 232; *Keyser v. Simmons*, 16 Fla. 268; *Iberia v. Serrett*, 31 La. Ann. 719; *Grattan v. Metropolitan Ins. Co.*, 80 N. Y. 281; *Morris v. State*, 47 Tex. 583; *Cavins v. O'Bleness*, 40 Wis. 469.

A trustee cannot set up the invalidity of the trust or appointment. *Harbin v. Bell*, 54 Ala. 389; *Damouth v. Klock*, 29 Mich. 289; *McClure v. Commonwealth*, 80 Pa. St. 167.

One sued as a stockholder in a corporation, having received benefits as such, cannot deny the validity of the incorporation. *Wheelock v. Kost*, 77 Ill. 296; *McCarthy v. Lavasche*, 89 Ill. 270.

One who has accepted preferred stock and interest thereon for years cannot deny the corporation's power to issue the same. *Branch v. Jesup*, 106 U. S. 468.

One contracting as principal is estopped to say that he was only an agent. *Reigard v. McNeil*, 38 Ill. 400.

One who refuses to carry out a contract on the ground that it is illegal, is estopped from afterwards raising the objection of non-compliance. *Meincke v. Falk*, 61 Wis. 623; 50 Am. Rep. 157.

The enforcing of the payment of taxes on property estops the State to claim the same. *American Emigrant Co. v. Iowa I. and Co.*, 52 Ia. 323; *Simplot v. Dubuque*, 49 Iowa, 630. But see *Rossire v. Boston*,

4 Allen (Mass.), 57; *Howard Co. v. Bullis*, 49 Iowa, 519.

A State having selected lands as indemnity lands under a congressional railroad grant, was held estopped to claim them under an earlier swamp-land act. *Hough v. Buchanan*, 27 Fed. Rep. 328.

A candidate at an election at an unauthorized voting-place is estopped to say that the election was invalid. *People v. Waite*, 70 Ill. 25.

Generally a party is not estopped by assuming a position forced upon him by the opposite party. *Potter v. Brown*, 50 Mich. 436; *Ayres v. Probasco*, 14 Kan. 175; *Cincinnati v. Cameron*, 33 Ohio St. 336.

Accepting Benefits of Legal Proceedings, etc. — A plaintiff who obtains a decree for divorce and alimony, and accepts the benefits thereof, cannot afterwards question the court's jurisdiction. *Ellis v. White*, 61 Iowa, 644.

One who accepts damages under condemnation proceedings cannot dispute the validity of the proceedings. *Pool v. Breese*, 114 Ill. 594; *Test v. Larsh*, 76 Ind. 452; *Moore v. Roberts*, 64 Wis. 538. Nor after judgment can park commissioners for the first time deny the title of the defendant. *South Park Commissioners v. Todd*, 112 Ill. 379.

A party cannot contest the validity of partition proceedings on the ground that he was a minor at the time, if since coming of age he has impliedly recognized the validity thereof. *Sewell v. Hebert*, 37 La. Ann. 155.

Acceptance of money under judgment may work estoppel in other cases. *Strong v. Irwin*, 22 Neb. 446. See also *Sutton's Appeal*, 112 Pa. 598. Compare *Catlin v. Wheeler*, 49 Wis. 507.

A widow consenting to the confirmation of a decree in partition cannot claim an interest adverse thereto. *Giddens v. Preshaw County*, 74 Ala. 471.

And generally a party accepting the benefit of a judgment is often estopped to deny its validity. *Kile v. Yellowhead*, 80 Ill. 208; *Sherman v. McKeon*, 36 N. Y. 266; *Carll v. Oakley*, 77 N. Y. 633. Compare *Morris v. Gasland*, 78 Va. 215; *Embrey v. Palmer*, 107 U. S. 8.

Inconsistent Position in Legal Proceedings generally. — A party cannot assume inconsistent positions in legal proceedings. *Dreyfous v. Adams*, 48 Cal. 131; *Long v. Fox*, 100 Ill. 43; *McQueen v. Gamble*, 33 Mich. 344; *Thurlough v. Kendall*, 62 Me. 166; *Callaway v. Johnson*, 51 Mo. 33; *Edwards's Appeal*, 105 Pa. St. 103.

Asking for a continuance waives lack of jurisdiction of the court. *Sargent v. Flaid*, 90 Ind. 501.

An agreement to treat one as a party is

The parties and their privies¹ only are bound by, or can take advantage of, an estoppel.²

binding. *Lawrence v. Ballou*, 50 Cal. 258. One who takes leave to amend his pleadings upon condition cannot object to the condition. *Smith v. Rathbun*, 75 N. Y. 122.

A party is bound by his election between tort and contract. *Finlay v. Bryson*, 84 Mo. 664; *Munroe v. Luke*, 1 Met. (Mass.) 459. See title "Election."

A party who insists that a building is a permanent improvement on land for the purpose of recovering the same in ejectment cannot claim otherwise to avoid paying the defendant the value thereof. *Zwiesch v. Walkins*, 61 Wis. 615.

After refusing to accept a judgment in his favor, and obtaining another less favorable, a party cannot claim the benefits of the former judgment. *Glover v. Benjamin*, 73 Ill. 42.

Solemn admissions of fact in open court are conclusive, unless leave to withdraw them is given. *People v. Stockton*, etc., Rd., 49 Cal. 414; *Cheney v. Selman*, 71 Ga. 384; *Hull v. Johnston*, 90 Ill. 604; *Compton v. Sandford*, 30 La. Ann. 838; *Smith v. Fowler*, 12 Lea (Tenn.), 163. But a person is not estopped by his admissions as a witness. *Wilkinson v. Wilson*, 71 Ga. 497. Compare *Folger v. Palmer*, 35 La. Ann. 743.

Admissions upon which instructions to the jury are based are binding. *Marquette Rd. v. Marcott*, 41 Mich. 433.

A party who objects to the introduction of competent evidence to prove a fact cannot afterwards say that the fact was not proved. *Thompson v. McKay*, 41 Cal. 221.

It has been said that demanding the right to close estops counsel from denying that the burden of proof is upon him. *Smith v. Haire*, 58 Ga. 446.

One who seeks to intervene in a suit cannot deny the jurisdiction of the court. *Jack v. D. & M. Rd.*, 49 Iowa, 627; *Buckley v. Stevens*, 29 Ohio St. 620.

A party may be permitted to change his position when no wrong would be done. *Pittsburgh*, etc., Ry. v. *Swinney*, 91 Ind. 399; *Green Bay Canal Co. v. Hewitt*, 62 Wis. 316.

1. Privies are bound by or may take advantage of an estoppel *in pais*. *East Ala. Ry. v. Tenn. & Coosa Riv. Rd.*, 78 Ala. 274; *Karnes v. Wingate*, 94 Ind. 594; *Timon v. Whitehead*, 58 Tex. 290; *Wood v. Seely*, 32 N. Y. 105; *Union Dime Sav. Inst. v. Wilmot*, 94 N. Y. 221; s. c., 46 Am. Rep. 137.

Where a person is estopped, his creditors attaching the property in question as his are estopped also. *Parker v. Critten-*

den, 37 Conn. 148. See also *International Bank v. Bowen*, 80 Ill. 541.

So it has been held that where there was an estoppel in favor of an officer who levied on and sold property, the estoppel might be claimed by a purchaser at the sale. *Kinney v. Mackey*, 85 Ill. 96.

One who purchased goods from another who had previously made a fraudulent assignment of them is estopped from impeaching the assignment. *Bynum v. Miller*, 86 N. Car. 559; s. c., 41 Am. Rep. 467.

One who marries the widow of a mortgagor, and goes into possession under an adverse title, is not estopped by the marriage to dispute the mortgage. *Gorton v. Roach*, 46 Mich. 294.

A tenant in common is not estopped by the acts of his co-tenant. *Ferson's Appeal*, 96 Pa. St. 140. But the act of one administrator may estop all. *Camp v. Moseley*, 2 Fla. 171.

The silence of an administratrix at a sale of the property of the intestate under a void *fi. fa.* will not estop the administrator *de bonis non*. *Sellers v. Cheney*, 70 Ga. 790.

An estoppel against one of several persons contesting a will does not estop the others. *Floyd v. Floyd*, 90 Ind. 130.

A widow is not estopped by the representation of the administrator made during her absence, that the land of the intestate sold by him was free from any claim of dower. *Coe v. Gerst*, 105 Ill. 342.

The act of an executor concerning land cannot estop the heir. *Shamleffer v. Peerless Mill Co.*, 18 Kan. 24.

A person contracting with an insane person cannot allege the insanity to defeat the contract. *Allen v. Berryhill*, 27 Iowa, 534; s. c., 1 Am. Rep. 309.

By Agent. — A party may be estopped by the act of his agent within the scope of the latter's authority. *Platter v. Elkhart*, 103 Ind. 360; *Fouque v. Burgess*, 71 Mo. 389; *Green v. Lycoming Ins. Co.*, 91 Pa. St. 387. A State may be estopped by the act of its officer in its private as distinguished from its governmental capacity. *Chicago v. Sexton*, 115 Ill. 230; *Cook v. Harner*, 108 Ill. 151.

2. A wife is not estopped by the representations of her husband, unless he is authorized to act as her agent. *Hall v. Callahan*, 66 Mo. 316; *Caldwell v. Hart*, 57 Miss. 596; *Kirkman v. Bank of Greensboro*, 77 N. Car. 394; *Watson v. Hewitt*, 45 Tex. 472.

A bank is estopped by the statement of its cashier, false in fact, to a surety on a note held by the bank, that the note is paid,

Generally, infants and married women not *sui juris* are not estopped to deny the truth of their representations;¹ but infants

intending the surety to so believe, and which he does believe and so changes his position toward his principal as to injure him. *Cocheco Natl. Bank v. Haskell*, 51 N. H. 116; s. c., 12 Am. Rep. 67.

It is said that the unauthorized assessment and collection of taxes on lands by ministerial officers, and the appropriation of the same to public use, will not estop the estate to claim the lands. *State v. Portsmouth Sav. Bank*, 106 Ind. 435.

An agent is not estopped personally by simply following the instructions of his principal. *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556.

Extent of Estoppel. — A representation is binding in its full natural import. *Guthrie v. Quinn*, 43 Ala. 561. And it extends to the legal consequences legitimately resulting therefrom. *Dodge v. Pope*, 93 Ind. 480. But its meaning cannot be enlarged to create an estoppel. *Seymour v. Page*, 33 Conn. 61; *McAfee v. Fisher*, 64 Cal. 246; *Murray v. Jones*, 50 Ga. 109; *Starry v. Korab*, 65 Ia. 399; *Barrett v. Joannes*, 70 Mo. 439; *Davis v. Bowmar*, 55 Miss. 571; *Adams v. Popham*, 76 N. Y. 410; *Swager v. Lehman*, 63 Wis. 399.

A representation that shares of stock are paid up must be understood to mean that they are paid in cash. *Burkinshaw v. Nicolls*, 3 App. Cas. 1004.

A party is not estopped by his consent to the building of a dam which proved a nuisance, unless he had reason to believe that a nuisance would be the result. *Corley v. Lancaster*, 81 Ky. 171.

A promise by the mortgagee to a purchaser from the mortgagor that he would release the mortgage on leave to make improvements, upon the faith of which improvements were made, do not estop the mortgagee to claim under another mortgage. *Barrett v. Johannes*, 70 Mo. 439.

Defendants, in response to a demand by an officer holding an attachment for a certificate of the property and credits of the attachment debtors in their hands, delivered an account current showing a balance to the credit of said debtors. In an action by the attachment creditors wherein they sought to recover an amount in excess of the balance so shown, *held*, that the only essential part of the account was that showing the balance; that while the items therein might be taken as admissions against defendants, they were not estopped thereby, but the same were open for explanation. *Almy v. Thurber*, 99 N. Y. 407.

A representation of *existing* facts cannot be extended to future events. *Planter's Ins. Co. v. Selma Bank*, 63 Ala. 585.

The representation cannot be divided for the purpose of creating an estoppel. *Irvin v. Nashville, etc., Ry.*, 92 Ill. 103.

2. *Gillespie v. Nabors*, 59 Ala. 441; *Lackman v. Wood*, 25 Cal. 147; *Unfried v. Huberer*, 63 Ind. 67; *Shivers v. Simmons*, 54 Miss. 520; *Lowell v. Daniels*, 2 Gray (Mass.), 161; *Merriam v. Boston, etc., Rd.*, 117 Mass. 241; *Powell's Appeal*, 98 Pa. St. 403; *Ackley v. Dygert*, 33 Barb. (N. Y.) 176; *Sautelle v. Carlisle*, 13 Lea (Tenn.), 391; *Schenck v. Stumpf*, 6 Mo. App. 381; *Mueller v. Kaessmann*, 84 Mo. 318; *McMorris v. Webb*, 17 S. Car. 558. See also *John v. Battle*, 58 Tex. 591.

Infants and Married Women. — An infant is not estopped by receiving money from the sale of lands, to claim the land on attaining his majority. *Gillespie v. Nabors*, 59 Ala. 441.

An infant is not estopped to deny a representation as to his age. *Wieland v. Kobick*, 110 Ill. 16; s. c., 51 Am. Rep. 676; *Buchanan v. Hubbard*, 96 Ind. 1; *Baker v. Stone*, 136 Mass. 405; *Conrad v. Lave*, 26 Minn. 389. *Compare Kilgore v. Jordan*, 17 Tex. 341.

When not under disability, married women are estopped by their representations as other persons. *Grim's Appeal*, 103 Pa. St. 375; *Bodine v. Killeen*, 53 N. Y. 93; *Levering v. Shockey*, 100 Ind. 558.

A representation by a *feme covert* that she is sole does not operate by way of estoppel to enable a person to sue her at law on the contract. *Klein v. Caldwell*, 91 Pa. St. 140; *Cupp v. Campbell*, 103 Ind. 213; *Liverpool Association v. Fairhurst*, 9 Ex. 422.

Where an infant *feme covert* joined with her husband in conveying her land, it was *held* that she was not estopped to maintain an action to recover the same ten years after attaining her majority. *Miles v. Lingerman*, 24 Ind. 385.

Where land was sold for the purpose of raising funds to educate an infant, with the consent of the infant and her mother, and the money was used for such purpose, it was *held* that the infant was not estopped to claim the land. *Schnell v. Chicago*, 38 Ill. 382.

A married woman who had executed with her husband an invalid agreement to convey real estate, and had received part of the purchase money with interest, was not estopped to claim the land, though possession had been taken under the agreement, and improvements made with her knowledge. *Glidden v. Strupler*, 52 Pa. St. 400.

And where a married woman joined with

of years of discretion, and married women, may be estopped in cases of pure tort.¹

Estoppel against estoppel sets the matter at large.²

2. *From Possession under Another.* — a. *Landlord and Tenant.*³ — Ordinarily, a tenant in possession,⁴ whether under a sealed⁵ or parol lease,⁶ or a mere license,⁷ cannot dispute his landlord's title.⁸

her husband in executing a mortgage of her separate estate, with blanks left for the amount, and the mortgagee's name, which were afterwards filled out, and the mortgage given to one who had no knowledge of the facts, she was held not estopped to contest the validity of the mortgage. *Drury v. Foster*, 2 Wall. (U. S.) 24.

1. *Whittington v. Wright*, 9 Ga. 23; *Patterson v. Lawrence*, 90 Ill. 174; *Cupp v. Campbell*, 103 Ind. 213; *Brantley v. Wolf*, 60 Miss. 420; *Flannigan v. Hambleton*, 54 Md. 222; *Davis v. Zimmerman*, 40 Mich. 24; *Heck v. Fisher*, 78 Ky. 643; *Hendershot v. Henry*, 63 Iowa, 744; *Carpenter v. Carpenter*, 10 C. E. Green (N. J.), 194; *Read v. Hall*, 57 N. H. 482; *Dukes v. Spangler*, 35 Ohio St. 119; *Powell's Appeal*, 98 Pa. St. 403; *Hall v. Timmons*, 2 Rich. Eq. (S. Car.) 120; *Fitzgerald v. Turner*, 43 Tex. 79.

In Georgia a married woman may be estopped in equity. *Dotterer v. Pike*, 60 Ga. 29; *Iverson v. Saulsbury*, 65 Ga. 724.

She may be estopped with regard to her separate estate, though the act is not a pure tort. *Rannels v. Gerner*, 80 Mo. 474; *Saratoga Bank v. Pruyn*, 90 N. Y. 250.

A married woman whose husband had been unheard of for seven years was held estopped by acts *in pais*. *Rosenthal v. Mayhugh*, 33 Ohio St. 155.

In some cases married women have been estopped by fraud connected with contract. *Patterson v. Lawrence*, 90 Ill. 174; *Reis v. Lawrence*, 63 Cal. 129; *Boyd v. Turpin*, 94 N. Car. 137; s. c., 55 Am. Rep. 597.

A wife who announced at a public sale of land that she would not claim dower therein was held estopped to so claim against the purchaser. *Connolly v. Brantler*, 3 Bush. (Ky.) 402. So, where she was fraudulently silent at a sale of property by a trustee. *Drake v. Glover*, 30 Ala. 382. So, where she joined her husband in inducing an innocent party to purchase an invalid mortgage of her separate estate. *McCullough v. Wilson*, 21 Pa. St. 436.

2. *Tibbets v. Shapleigh*, 60 N. H. 487.

3. Where the lease is sealed, the rules of estoppel by deed apply; but the rule that the tenant cannot dispute the landlord's title, is founded on permissive possession. See Big. on Estop. 449 *et seq.*

4. "Two conditions then are essential to the existence of the estoppel: first, possession; secondly, permission; when these

conditions are present the estoppel arises." Big. on Estop. (4th ed.) 452; *Hussman v. Wilke*, 50 Cal. 250; *Morrison v. Bassett*, 26 Minn. 235. But perhaps there will be an estoppel without possession, if the tenant does not show that he could not get possession. *Varnam v. Smith*, 15 N. Y. 327. Compare *Columbia v. Johnson*, 1 Mackey (D. C.), 51. Payment of rent ordinarily fixes the relation. *Dunshee v. Grundy*, 15 Gray (Mass.), 314; *Whalin v. White*, 25 N. Y. 462; *Jackson v. Wilkinson*, 3 B. & C. 414. See title, "Landlord and Tenant."

A tenant in possession is estopped, though the contract of lease was void. *Crawford v. Jones*, 54 Ala. 459.

After having openly surrendered possession, he may dispute the landlord's title. *Bertram v. Cook*, 44 Mich. 396; *Littleton v. Clayton*, 77 Ala. 571. Having openly surrendered possession, he may claim the premises by purchase of an outstanding title during the tenancy. *Gable v. Wetherholt*, 116 Ill. 313.

5. Formerly the lease must have been sealed to create an estoppel. *Davis v. Tyler*, 18 Johns. (N. Y.) 490; *Davis v. Shoemaker*, 1 Rawle (Pa.), 135; *Syllivan v. Stradling*, 2 Wils. 208.

6. *Varnam v. Smith*, 15 N. Y. 327; *Gray v. Johnson*, 14 N. H. 414; *Moore v. Beasley*, 3 Ohio, 294.

7. *Wilson v. Maltby*, 59 N. Y. 126; *Glynn v. George*, 20 N. H. 114; *Dills v. Hampton*, 92 N. Car. 565; *Hamilton, etc., Co. v. Hamilton, etc., Rd.*, 29 Ohio St. 341. See also *Henderson v. Miller*, 53 Mich. 590.

A devisee of the mortgagor who enters into possession under the mortgagee, keeping the premises in repair, paying taxes and enjoying the rents and profits without paying rent and without recognizing an absolute title in the mortgagee, is not estopped to dispute the mortgagor's title. *Sahler v. Signer*, 37 Barb. (N. Y.) 329.

8. *Caldwell v. Smith*, 77 Ala. 157; *Helena v. Turner*, 36 Ark. 577; *Fordyce v. Young*, 39 Ark. 135; *Granger v. Parker*, 137 Mass. 228; *Nims v. Sherman*, 43 Mich. 45; *Hatch v. Bullock*, 57 N. H. 15; *Betts v. Wurth*, 32 N. J. Eq. 82; *Terrett v. Cowenhaven*, 79 N. Y. 400; *James v. Russell*, 92 N. Car. 194; *Parker v. Hanson*, 12 Neb. 419; *Ward v. Ryan*, 10 Ir. R. C. L. 17; *Knight v. Smythe*, 4 Maule & S. 347.

The rule holds, though the tenant's lease has expired,¹ or though he was in possession when he acknowledged the tenancy,² or though the tenancy be under a deed which shows that the landlord has no title.³

But a tenant may show that he has purchased the landlord's title, or that under which the landlord claims,⁴ or that he has been evicted either actually or constructively,⁵ by title paramount,⁶ or that the landlord's title has expired in some other way.⁷ He

A vendor who takes possession under his vendee cannot dispute the latter's right to possession, though the conveyance was void. *Vancleave v. Wilson*, 73 Ala. 387.

It is said that a tenant who claims title to the premises is not estopped to show that the lessor's right is that of possession only. *Joehen v. Tibbetts*, 50 Mich. 33.

Pending an action to enforce the specific performance of a contract for the sale of certain lots, the plaintiff rented a building thereon which was not a fixture: *held*, that he was not estopped to enforce the contract. *Shuman v. Willets*, 17 Neb. 478.

A lessee obtaining possession by fraud is as much bound as a rightful lessee. *Bertram v. Cook*, 44 Mich. 396; *Johnson v. Baytup*, 3 Ad. & E. 188.

An administrator who takes possession of land under an order of the probate court, and with the consent of the heirs collects and charges himself with rents, cannot deny that they are assets. *Kothman v. Markson*, 34 Kan. 542.

Where lands in which the owner had a right of homestead were sold under execution against him, and he took a lease thereof from the purchaser, it was *held*, that though the right to claim the homestead still existed, he could not set it up in defence of an action to recover possession by the lessor. *Abbott v. Cromartie*, 72 N. Car. 292; s. c., 21 Am. Rep. 457.

Personal Property.—The general doctrine holds as to personal property. *Ryder v. Mansell*, 66 Me. 167.

1. *King v. Bolling*, 77 Ala. 594. Though the lease was by indenture. *Miller v. Lang*, 99 Mass. 13; *Nims v. Sherman*, 43 Mich. 45; *Morrison v. Bassett*, 26 Minn. 235; *Love v. Law*, 57 Miss. 596; *Bishop v. Lalouette*, 67 Ala. 197; *Bullen v. Mills*, 2 Ad. & E. 17. *Compare* Co. Litt. 47 b; *Page v. Kinsman*, 43 N. H. 328. See also *Snyder v. Hemmingway*, 47 Mich. 549.

2. *Jackson v. Ayres*, 14 Johns. (N. Y.) 224; *Prevot v. Lawrence*, 51 N. Y. 219; *Connell v. Bowdry*, 4 T. B. Mon. (Ky.) 392; *Patterson v. Hansel*, 4 Bush. (Ky.) 654; *Hawes v. Shaw*, 100 Mass. 187; *Cobb v. Arnold*, 8 Met. (Mass.) 398; *Tyler v. Davis*, 61 Tex. 674; *Bishop v. Lalouette*, 67 Ala. 197. *Compare* *Tewksbury v. Magraff*, 33 Cal. 237; *Franklin v. Merida*, 35

Cal. 558; *Fuller v. Sweet*, 30 Mich. 237; s. c., 18 Am. Rep. 122. And even in California the tenant is estopped to deny the landlord's title, unless he show a paramount title under which he claims. *Holloway v. Galliac*, 47 Cal. 474.

A tenant was not permitted to show that he was in possession in right of his wife prior to taking a lease from the landlord, and that during the term he had given notice that he would claim under his wife's title. *Miller v. Lang*, 99 Mass. 13.

A defendant who has entered into the use and occupancy of premises under a lease not under seal cannot, while still in possession, lawfully refuse to pay rent on the ground that he was the owner in fee of said premises when the lease was made. *Morrison v. Bassett*, 26 Minn. 235.

The general rule obtains though the person in possession was a trespasser. *Campan v. Lafferty*, 43 Mich. 429.

3. *Ordinarily* such is the rule. *Holt v. Martin*, 51 Pa. St. 499; *Duke v. Ashby*, 7 Hurl. & N. 600; *Delaney v. Fox*, 2 C. B. N. S. 768; *Morton v. Woods*, L. R. 4 Q. B. 293. *Compare* *Pargeter v. Harris*, 7 Q. B. 708.

If the action requires a *legal* estate to uphold it, the rule may be different. See *Big. on Estop.* (4th ed.) 481.

But when the tenant is bound to pay taxes, he cannot claim against his lessor under a tax-title for taxes he should have paid. *Haskell v. Putnam*, 42 Me. 244. And a tenant who is a lien creditor should not sell the property and buy it in without notice to the landlord. *Matthews's Appeal*, 104 Pa. St. 444.

4. *Ford v. Ager*, 2 Hurl. & C. 279; *Hilbourn v. Fogg*, 99 Mass. 11.

A tenant when sued for rent may show a title acquired by purchase at a trustee's sale under an incumbrance prior to the title of his landlord. *Carson v. Crigler*, 9 Ill. App. 83.

5. *Whalin v. White*, 25 N. Y. 462; *Ross v. Dysart*, 33 Pa. St. 452; *Grist v. Hodges*, 3 Dev. (N. Car.) 198; *Poole v. Whitt*, 15 M. & W. 571; 5 Am. L. Rev. 35.

6. *Morse v. Goddard*, 13 Met. (Mass.) 177.

7. See *Caldwell v. Smith*, 77 Ala. 157; *St. John v. Quitzow*, 72 Ill. 334; *Ryder v.*

may disclaim holding under the lessor's title, and after the statute of limitations has run may set up his adverse possession,¹ but not before.²

If the tenant was in possession when he acknowledged the tenancy, he may show that it was done through mistake or the fraud of the lessor,³ or that the one to whom he has attorned has no derivative title from the original lessor.⁴

This estoppel extends to those in privity with the lessor and lessee,⁵ and to those who are tenants by operation of law.⁶ Parties not *sui juris* are not estopped.⁷

b. Other Relations. — A person taking possession of lands under an executory contract of sale, is estopped to deny the title of the person under whom he enters,⁸ unless he has been evicted by paramount title, or has been compelled to acquire or connect himself with such title to prevent eviction.⁹ And a vendee of land, bought subject to condition, or upon which the purchase money has not been paid, cannot dispute the vendor's title to escape entirely the penalty of a broken condition, or the payment of the

Mansell, 66 Me. 167; Presstman v. Silljacks, 52 Md. 647; Emmes v. Feeley, 132 Mass. 346; Lamson v. Clarkson, 113 Mass. 348; s. c., 18 Am. Rep. 122; Hopcroft v. Keys, 9 Bing. 613; Claridge v. Mackenzie, 4 Man. & G. 143.

A tenant under a mortgagee cannot defeat recovery by showing a grant of letters of administration to himself on the estate of the deceased mortgagor, the solvency of the estate and extinguishment of mortgage debt by rents and profits. Farris v. Houston, 74 Ala. 162.

1. Zeller v. Eckert, 4 Hon. (U. S.) 289; Willison v. Watkins, 3 Pet. (U. S.) 43.

2. Whiting v. Edmunds, 94 N. Y. 309; Bryan v. Winburn, 43 Ark. 28.

3. Farris v. Houston, 74 Ala. 162; Franklin v. Merida, 35 Cal. 558; Carter v. Marshall, 72 Ill. 609; Wiggin v. Wiggin, 58 N. H. 285; Miller v. McBrier, 14 S. & R. (Pa.) 382; Shultz v. Elliott, 11 Humph. (Tenn.) 183; Tyler v. Davis, 61 Tex. 674; Swift v. Dean, 11 Vt. 323; Fenner v. Duplock, 2 Bing. 10; s. c., 9 Moore, 38. See also Fuller v. Sweet, 30 Mich. 237.

4. Hilbourn v. Fogg, 99 Mass. 11; Higgenbotham v. Barton, 11 Ad. & E. 307.

5. As sub-lessees. Norwood v. Kirby, 70 Ala. 397; White v. Barlow, 72 Ga. 887; Woodruff v. Erie Ry., 73 N. Y. 609; Barwick v. Thompson, 7 T. R. 488; London & N. W. Rd. v. West. L. R., 2 C. P. 553.

And similar relations. Otis v. McMillan, 70 Ala. 46; Pate v. Turner, 94 N. Car. 47; Dobson v. Culpepper, 23 Gratt. (Va.) 352; Bullen v. Mills, 2 Ad. & E. 17.

Persons in possession under the personal representative cannot dispute the title of

the heirs. Bishop v. Lalonde, 67 Ala. 197; Whitford v. Crooks, 50 Mich. 40.

6. The tenant by curtesy cannot dispute the wife's title. Morgan v. Larned, 10 Met. (Mass.) 50. And that the widow in possession is estopped to deny the heir's title. Bufferlow v. Newson, 1 Dev. (N. Car.) 208. See also Vance v. Johnson, 10 Humph. (Tenn.) 214.

7. *Trusts.* — The general rule applies to the possession of trustees under trusts which are the creatures of equity. Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90; Vance v. Johnson, 10 Humph. (Tenn.) 214; Willison v. Watkins, 3 Pet. (U. S.) 43.

General Rule. — And generally one who receives property as belonging to another cannot dispute his title thereto. Perryman v. Greenville, 51 Ala. 507; McKee v. Monterey Co., 51 Cal. 275; Keyser v. Simmons, 16 Fla. 268; Bunger v. Roddy, 70 Ind. 26; O'Halloran v. Fitzgerald, 71 Ill. 53.

8. Potts v. Coleman, 67 Ala. 221; Fitzgerald v. Spain, 30 Ark. 95; McMath v. Teel, 64 Ga. 595; Leshner v. Sherwin, 86 Ill. 420; Sanford v. Cloud, 17 Fla. 557; Eastham v. Anderson, 119 Mass. 526; Towne v. Butterfield, 97 Mass. 105; Pershing v. Canfield, 70 Mo. 140; Sayles v. Smith, 12 Wend. (N. Y.) 57; Winnard v. Robbins, 3 Humph. (Tenn.) 614; Lacy v. Johnson, 58 Wis. 414. Compare Baker v. Hale, 6 Baxt. (Tenn.) 46.

9. Green v. Dietrich, 114 Ill. 636, and cases cited in last note.

One in possession under a contract of purchase may show that the vendor's title was sold under execution against him, and that he has attorned to the purchaser in

price;¹ nor can he deny the validity of the deed under which alone he holds.²

An executor or administrator, let into possession of property, under the will or letters of administration, cannot dispute the title thereto of the testator or intestate.³

A devisee for life in possession, under the will, cannot be heard to say that the testator had not sufficient interest to create the estate.⁴

Ordinarily a mortgagor remaining in possession cannot deny the mortgagee's title.⁵

The bailee of goods, or the depository of money, cannot dispute the claim of the bailor or depositor,⁶ unless he has been dispossessed by superior right, or holds the goods or money subject to such right.⁷ The rule applies to the receiptor of goods attached by an officer.⁸

Assignees and licensees of patents cannot show the invalidity of the patents in actions for accountings or to recover royalties.⁹

good faith. *Beal v. Davenport*, 48 Ga. 165; s. c., 15 Am. Rep. 656.

1. *Strong v. Waddell*, 56 Ala. 471; *Bowers v. Keesecker*, 14 Iowa, 301; *O'Brien v. Wetherell*, 14 Kan. 616; *McMath v. Teel*, 64 Ga. 595; *Marsh v. Thompson*, 102 Ind. 272; *Bush v. Marshall*, 6 How. (U. S.) 284.

2. *Woburn v. Henshaw*, 101 Mass. 103.

3. *Irby v. Kitchell*, 42 Ala. 438; *Benjamin v. Gill*, 45 Ga. 110; *Fitts v. Cook*, 5 Cush. (Mass.) 596. So of guardians. *Burke v. Turner*, 90 N. Car. 588.

4. *Board v. Board*, L. R. 9 Q. B. 48; *Austee v. Helms*, 1 Hurl. & N. 232.

5. *Stewart v. Anderson*, 10 Ala. 508; *Turner v. First Natl. Bank*, 78 Ind. 19. But he may if the mortgage is void by statute. *Brewster v. Madden*, 15 Kan. 249. Or if he has obtained title by disclaimer and adverse possession. *Strong v. Waddell*, 56 Ala. 471; *Fisher v. Milmine*, 94 Ill. 328; *Higgenbotham v. Barton*, 11 Ad. & E. 307.

The estoppel extends to the benefit of a purchaser under a decree of foreclosure. *Leary v. New*, 90 Ind. 502.

6. *Tribble v. Anderson*, 63 Ga. 31; *Pulliam v. Burlingame*, 81 Mo. 111; s. c., 51 Am. Rep. 229; *Sinclair v. Murphy*, 14 Mich. 392; *Osgood v. Nichols*, 5 Gray (Mass.), 420; *Seneca v. Allen*, 99 N. Y. 539; *Bank v. Mason*, 95 Pa. St. 113; *The Idaho*, 93 U. S. 575.

A tax collector cannot set up the invalidity of a statute under which he has collected money, in bar of an action therefor. *Perryman v. Greenville*, 51 Ala. 507.

The keeper of a warehouse, who, on behalf of a municipal corporation, has collected a tax levied on goods consigned to

him, is estopped to deny the validity of the levy. *New Iberia v. Serrett*, 31 La. Ann. 719; s. c., 33 Am. Rep. 229.

7. *Cheesman v. Exall*, 6 Ex. R. 341; *Biddle v. Bond*, 34 L. J. Q. B. 137; and cases cited in last note. But it is said that the bailee cannot interpose a holding under an adverse superior claim, if he knew of the claim when he accepted the bailment. *Biddle v. Bond*, 34 L. J. Q. B. 137.

8. *Debach v. Minnis*, 45 Cal. 223; *Staples v. Fillmore*, 43 Conn. 510; *Case v. Shultz*, 31 Kan. 96; *Wolf v. Hahn*, 28 Kan. 588; *Linder v. Brock*, 40 Mich. 618; *Horn v. Cole*, 51 N. H. 287; s. c., 12 Am. Rep. 111; *Dezell v. Odell*, 3 Hill (N. Y.), 215; *Bell v. Shafer*, 58 Wis. 223. But his receipt does not estop the receiptor to claim the goods after he has surrendered them to the officer. *Williams v. Morgan*, 50 Wis. 548. Or if the officer never delivered the property to him. *Case v. Shultz*, 31 Kan. 96. And he may show that the amount recited in the receipt is incorrect. *Almy v. Thurber*, 12 Daly (N. Y.), 3. It seems that the surety on a redelivery bond is not estopped to claim an interest in the goods under a chattel mortgage. *Rathbone v. Boyd*, 30 Kan. 485.

9. *Jones v. Burnham*, 67 Me. 93; *Forn-crook Mfg. Co. v. Barnum Wire Works*, 54 Mich. 552; *Marston v. Swett*, 82 N. Y. 526; *Marsh v. Harris Mfg. Co.*, 63 Wis. 276; *Kinsman v. Parkhurst*, 18 How. (U. S.) 289.

But in an action on a note the licensee may show that the consideration therefor failed by reason of the invalidity of the patent. *Saxton v. Dodge*, 57 Barb. (N. Y.) 84.

3. *Assuming to act in Particular Capacities.* — *Corporations, Agency, etc.* — A person, or body of persons, by law¹ capable of acting in a particular capacity, cannot say that he or they have not qualified or organized in the manner prescribed by law to defeat the claims of those innocently dealing with him or them in such capacity.²

A corporation cannot set up defects in its organization³ or irregularities in its subsequent acts⁴ against the claims of innocent⁵ persons, unless the incorporation⁶ or act⁷ was unauthorized by law.

A person contracting with a corporation is estopped to deny its legal existence⁸ or its power to make the contract,⁹ unless the fact of the incorporation or power was stipulated for,¹⁰ or the making of the contract was prohibited by law,¹¹ or the person was

1. See Big. on Estop. (4th ed.) 525.

2. The rule applies to executors, officers, partnerships, corporations, etc. *Hill v. Huckabee*, 52 Ala. 155; *Duval v. Marshall*, 30 Ark. 230; *Oakland Paving Co. v. Rier*, 52 Cal. 270; *State v. Stone*, 40 Iowa, 547; *Meyer v. Wiltshire*, 92 Ill. 395; *State v. Spaulding*, 24 Kan. 11; *McClure v. Commonwealth*, 80 Pa. St. 167; *Morris v. State*, 47 Tex. 583.

3. *Lehman v. Warner*, 61 Ala. 455; *McCarthy v. Lavasche*, 89 Ill. 270; *Barboro v. Occidental Grove*, 4 Mo. App. 429; *Dooley v. Cheshire Glass Co.*, 15 Gray (Mass.), 494; *Atty-Gen'l. v. Simonton*, 78 N. Car. 57; *Hagerman v. Ohio Bldg. Assoc.*, 25 Ohio St. 186. *Compare* *Boyce v. Methodist Church*, 46 Md. 359.

4. *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542; *West v. Menard Agr. Board*, 82 Ill. 205; *Com. v. Reading Bank*, 137 Mass. 431; *Home Ins. Co. v. Sherwood*, 72 Mo. 461; *Eminence v. Grasser*, 81 N. Y., 52; *Gans v. Chicago*, etc., Ry., 60 Wis. 12; *Anthony v. Jasper*, 101 U. S. 693. *Compare* *Starin v. Genoa*, 23 N. Y. 439; *Ontario v. Hill*, 99 N. Y. 324.

Stockholders and tax-payers are estopped. *Thatcher v. People*, 98 Ill. 632; *Scovill v. Thayer*, 105 U. S. 143.

5. Where bonds show on their face that they were issued before the law authorizing them took effect, the purchaser is not protected. *McClure v. Oxford*, 94 U. S. 429.

6. Big. on Estop. (4th ed.) 525.

7. *McPherson v. Foster*, 43 Iowa, 48; *Schaeffer v. Bonham*, 95 Ill. 368; *Northern Bank v. Porter*, 110 U. S. 608.

But even where the act is *ultra vires*, if the corporation has received the benefits thereof, it may be estopped to contest its validity. *Ward v. Johnson*, 95 Ill. 215; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Railroad Co. v. McCarthy*, 96 U. S. 267. *Compare* *Counterman v. Dublin Township*, 38 Ohio St. 515.

A corporation doing business in a State where it was not organized is estopped when sued there to say that the carrying-on of such business was unauthorized. *Clay Ins. Co. v. Huron Salt Co.*, 31 Mich. 346.

A corporation cannot say that a person permitted to sign its bonds had no authority to so act. *Weyanwega v. Ayling*, 99 U. S. 112.

8. *Marion Bank v. Dunkin*, 54 Ala. 471; *Hasselman v. U. S. Mtge. Co.*, 97 Ind. 365; *Frick v. School Trustees*, 99 Ill. 167; *Franklin v. Twogood*, 18 Ia. 515; *Massey v. Building Assoc.*, 22 Kan. 624; *Stontimore v. Clark*, 70 Mo. 471; *Estey Mfg. Co. v. Runnels*, 55 Mich. 130; *Butchers' Bank v. McDonald*, 130 Mass. 264; *Eaton v. Aspinwall*, 19 N. Y. 119; *Close v. Glenwood Cemetery*, 107 U. S. 466. But recognizing a corporation as such has been said to be only *prima facie* evidence of the incorporation. *Hudson v. Green Hill Seminary*, 113 Ill. 618. And the incorporation may be denied, if the contract is by force of law only. *Marion Bank v. Dunkin*, 54 Ala. 471.

9. *Helena v. Turner*, 36 Ark. 577; *Imboden v. Etowah Mining Co.*, 70 Ga. 86; *Franklin v. Twogood*, 18 Ia. 515; *Hasselman v. U. S. Mortgage Co.*, 97 Ind. 365; *Teutonia Bank v. Wagner*, 33 La. Ann. 732; *St. Joseph Ins. Co. v. Hauck*, 71 Mo. 465; *French v. Donohoe*, 29 Minn. 111; *Tone v. Columbus*, 39 Ohio St. 281; s. c., 48 Am. Rep. 438; *Black River Rd. v. Clarke*, 25 N. Y. 208; *Cochran v. Arnold*, 58 Pa. St. 339; *Whitney v. Robinson*, 53 Wis. 309; *Cowell v. Spring Co.*, 100 U. S. 61; *Congregational Society v. Perry*, 6 N. H. 164. *Compare* *Chambers v. Faulkner*, 65 Ala. 448.

10. *Lehman v. Warner*, 61 Ala. 455; *Rikhoff v. Brown's Sewing Machine Co.*, 68 Ind. 388.

11. *Tone v. Columbus*, 39 Ohio St. 281; s. c., 48 Am. Rep. 438; *Semple v. Bank*, 5 Sawy. (U. S.) 93.

fraudulently induced to recognize the incorporation or power.¹ One who holds himself out as a stockholder in a corporation may be estopped to deny that he is such.²

One who permits himself to be treated as a partner may be estopped to dispute the partnership.³ And one who allows another to act as his agent may be bound by the representation.⁴

4. *Commercial Paper. — Indorsement, etc.* — The acceptance of a bill of exchange, though merely for the honor of the drawer,⁵ generally⁶ estops the acceptor in an action by an innocent holder for value after acceptance⁷ to dispute the genuineness of the signature of the drawer,⁸ and the existing capacity⁹ of the drawer and payee to draw and indorse the bill.¹⁰ But the acceptor is not estopped to show forgery or alteration in the body of the bill,¹¹ or forgery of the signatures¹² of the payee or other indorsers before

1. *Doyle v. Mizner*, 42 Mich. 332.

2. *Pullman v. Upton*, 96 U. S. 328. As by paying calls. *Boggs v. Olcott*, 40 Ill. 303; *Griswold v. Seligman*, 72 Mo. 110. Or voluntarily placing his name on the books of the corporation as the owner of stock. *Erskine v. Loewenstein*, 82 Mo. 301. But merely placing his name on the subscription-book may not estop one to deny that he is a subscriber. *Lathrop v. Kneeland*, 46 Barb. (N. Y.) 432.

Stockholders who have voted to increase the capital stock of a corporation, and have accepted such stock and dividends, are estopped to deny the validity of the increase in an action against them for the debts of the corporation. *Veeder v. Mudgett*, 95 N. Y. 295.

3. *Strecker v. Conn*, 90 Ind. 88; *Stimson v. Whitney*, 130 Mass. 591; *Sherrod v. Langdon*, 21 Ia. 518; *Vibbard v. Roderick*, 51 Barb. (N. Y.) 616; *Newell v. Nixon*, 4 Wall. (U. S.) 572.

One who induces others to deal with him as a member of a board of trade will not be permitted as against them to deny such membership. *Chicago Packing Co. v. Tilton*, 87 Ill. 547.

4. Or *vice versa*. *Stebbins v. Walker*, 46 Mich. 5; *James v. Russell*, 99 N. Car. 194; *Burton's Appeal*, 93 Pa. St. 214.

Signature in Blank. — One who leaves his signature to incomplete mercantile paper has been held bound by the act of the person filling the blank. See *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *Whitmore v. Nickerson*, 125 Mass. 496; *Angle v. North-western Ins. Co.*, 92 U. S. 330. But this is properly agency. See Big. on Estop. (4th ed.) 537.

A mortgagee indorsed his name with his seal on a mortgage, and parted with its possession. A satisfaction of the mortgage was thereafter written above his signature, without his knowledge, and duly recorded. The mortgagee was estopped to claim an

interest against an innocent purchaser. *Charleston v. Ryan*, 22 S. Car. 339; s. c., 53 Am. Rep. 713.

5. *Goddard v. Merchants' Bank*, 4 Comst. (N. Y.) 147; *Wilkinson v. Johnson*, 3 B. & C. 428; *Phillips v. Thurn*, 18 C. B. N. S. 694; s. c., L. R. 1 C. P. 463.

6. Where by custom it is the duty of the holder to inquire as to the genuineness of the drawer's signature, the acceptor is not estopped. *Ellis v. Ohio Life Ins. Co.*, 4 O. St. 628.

7. If the present holder held the bill before acceptance, the acceptor is not estopped. *McKleroy v. Southern Bank*, 14 La. Ann. 458.

8. *Price v. Neal*, 3 Burr. 1354.

But where the holder indorsed the bill before presentation to the drawee, it was held that the latter was not estopped to deny its genuineness, on the ground that such indorsement tended to put the drawee off his guard. *National Bank of North America v. Bangs*, 106 Mass. 441.

And if the holder of paper, upon presenting it to the drawee, withhold from him important information regarding its genuineness, the latter will not be estopped. *First National Bank v. Ricker*, 71 Ill. 439.

9. *Pitt v. Chappelow*, 8 M. & W. 616; *Braithwaite v. Gardiner*, 8 Q. B. 473; *Smith v. Marsack*, 6 C. B. 486. See also *Carrier v. Sears*, 4 Allen (Mass.), 386.

10. It admits also procuration to draw. *Robinson v. Yarnow*, 7 Taunt. 455.

One who admits that an acceptance is in his own handwriting for the purpose of inducing another to take the bill cannot afterwards deny the acceptance. *Goodell v. Bates*, 14 R. I. 65; *Rudd v. Matthews*, 79 Ky. 479. But see *Koons v. Davis*, 84 Ind. 387.

11. *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Clews v. Bank of New York*, 89 N. Y. 418.

12. *Canal Bank v. Bank of Albany*, 1 Hill

acceptance and *after*¹ the bill passed from the hands of the drawer.

The indorsement of a promissory note or bill of exchange estops the indorser in an action against himself² to deny the capacity³ of all prior parties and the genuineness⁴ of their signatures.

The execution of a negotiable note or bond is a warranty of the capacity of the payee to indorse the same.⁵ Negligence in drawing a note or bill does not estop the maker or drawer to show that it has been altered.⁶

The certification of a check creates an estoppel similar to that arising from the acceptance of a bill of exchange.⁷

One who receives negotiable paper as his own from an innocent holder for value cannot, after considerable time, claim that his signature was forged.⁸

5. *Parol Acknowledgment of Receipt.* — An acknowledgment of the receipt of money, or other property,⁹ not of the essence of the contract,¹⁰ is not binding if no innocent¹¹ party has been misled thereby.

(N. Y.), 287; *Hortsmann v. Henshaw*, 11 How. (U. S.) 177; *Beeman v. Duck*, 11 M. & W. 251.

1. If the drawer puts the bill into circulation with the payee's name indorsed, the acceptor warrants such signature. *Coggill v. American Bank*, 1 N. Y. 113; *Burgess v. Northern Bank*, 4 Bush (Ky.), 600; *Ford v. Meacham*, 3 Hill (S. Car.), 227; *Hortsmann v. Henshaw*, 11 How. (U. S.) 177.

But the drawee may show that the payee's signature was forged after the bill passed out of the drawer's hands. *Talbot v. Bank of Rochester*, 1 Hill (N. Y.), 295; *Burchfield v. Moore*, 3 El. & B. 683.

2. Not as a witness in an action against prior parties. *Townsend v. Bush*, 1 Conn. 260; *Haines v. Dennett*, 11 N. H. 180; *Williams v. Walbridge*, 3 Wend. (N. Y.) 415; *Jordaine v. Lashbrooke*, 7 T. R. 601. But see *Newell v. Holton*, 10 Gray (Mass.), 349. Compare *Freon v. Brown*, 14 Ohio, 482.

3. *Erwin v. Down*, 15 N. Y. 575.

The guarantor of a bond warrants the capacity of the obligee. *Remsen v. Graves*, 41 N. Y. 471.

4. *State Bank v. Fearing*, 16 Pick. (Mass.) 533. See also *Alleman v. Wheeler*, 101 Ind. 141.

5. *Drayton v. Dale*, 2 B. & C. 293.

6. *Greenfield Bank v. Stowell*, 123 Mass. 196; *Holmes v. Trumper*, 22 Mich. 427; *Swan v. North British Co.*, 2 Hurl. & C. 175. Compare *Redington v. Woods*, 45 Cal. 406; *Rainbolt v. Eddy*, 34 Iowa, 440; *Capital Bank v. Armstrong*, 62 Mo. 59; *Garrard v. Haddan*, 67 Pa. St. 82.

7. *Clews v. Bank of N. Y.*, 89 N. Y. 418; *Espy v. Bank of Cincinnati*, 18 Wall. (U. S.) 604. So a declaration that the check is good. *Irving Bank v. Wetherald*, 36 N. Y. 335; *Pope v. Bank of Albion*, 59 Barb.

(N. Y.) 226. And the authority of a bank teller to certify checks is presumed. *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 125; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604. Compare *Mussey v. Eagle Bank*, 9 Met. (Mass.) 306.

8. *Bank of United States v. Bank of Georgia*, 10 Wheat. (U. S.) 333. But the rule does not apply to the receipt of land warrants by Government officers. *Tyler v. Bailey*, 71 Ill. 34.

9. *Lapping v. Duffy*, 65 Ind. 229; *Van Ness v. Hadsell*, 54 Mich. 560; *Pitt v. Berkshire Ins. Co.*, 100 Mass. 500; *Ins. Co. of Penn. v. Smith*, 3 Whart. (Pa.) 520; *Marco v. Fond du Lac Co.*, 63 Wis. 212. Compare *Teutonia Ins. Co. v. Anderson*, 77 Ill. 384. So of a receipt in an insurance policy. *Baker v. Union Ins. Co.*, 43 N. Y. 283.

Ordinarily a bill of lading does not estop the parties to deny shipment. *Witzler v. Collins*, 70 Me. 290; *Hastings v. Pepper*, 11 Pick. (Mass.) 43; *Williams v. Wilmington Rd.*, 93 N. Car. 42; *Pollard v. Vinton*, 105 U. S. 7.

A party may show that there was a mistake in the scope of a release of claims. *Gilchrist v. Manning*, 54 Mich. 210.

An acknowledgment of the receipt of a premium in a policy of marine insurance is an exception to the rule. *Big. on Estop.* (4th ed.) 530.

10. *Goit v. National Ins. Co.*, 25 Barb. (N. Y.) 189; *Hoeger v. Chicago, etc., Ry.*, 63 Wis. 100.

One who signs a written agreement to do certain things in consideration of the receipt of a dollar cannot repudiate the agreement on the ground that in fact he did not receive the dollar. *Fargis v. Walton*, 51 N. Y. Super. Ct. 32.

11. If injury would result to an innocent

6. *Election.* — (See ELECTION.) One who has made a choice between two inconsistent or alternative rights or benefits is estopped to assert or claim the other.¹

7. *Waiver.* — (See WAIVER.) Where a party to a contract or transaction induces another to act upon the reasonable belief that he will waive certain rights or terms, he will be estopped to insist upon such rights or terms to the injury of the one misled by his conduct.²

party, there is an estoppel. *Turner v. Flinn*, 72 Ala. 532; *Parr v. Miner*, 42 Ill. 179; *Armour v. Mich. Cent. Rd.*, 65 N. Y. 111; *Miller v. Sullivan*, 26 Ohio St. 630; *McNeil v. Hill, Woolw.* (U. S.) 96; *Knights v. Wiffen*, L. R. 5 Q. B. 660. But see *Second National Bank v. Walbridge*, 19 Ohio St. 419.

The person claiming the estoppel must be justified in acting on the receipt, and the party giving it must have contemplated that it might be acted upon. *Kuhl v. Jersey City*, 8 C. E. Green (N. J.), 84.

As against an innocent assignee for value, a warehouseman is bound by his receipt. *Stewart v. Phoenix Ins. Co.*, 9 Lea (Tenn.), 104.

The acceptance of a receipt for money paid which shows that it was applied to a particular debt does not estop the payer to show that he directed the application to be made upon another debt. *Eylar v. Read*, 60 Tex. 387.

1. See title "Election." See also *Lee v. Templeton*, 73 Ind. 315; *Stoddard v. Cutcompt*, 41 Ia. 329; *Succession of Monette*, 26 La. Ann. 26; *Watson v. Watson*, 128 Mass. 152; *Kunzie v. Wixom*, 39 Mich. 384; *Steinbach v. Relief Ins. Co.*, 77 N. Y. 498; *Scholey v. Rew*, 23 Wall. (U. S.) 331: note on "inconsistent positions," *ant.*

2. Though the rights or terms are known to both parties. *Longfellow v. Moore*, 102 Ill. 289; *Giddens v. Crenshaw*, 74 Ala. 471; *Daniels v. Edwards*, 72 Ga. 196; *Keyes v. Scanlan*, 63 Wis. 345; *Haney v. Roy*, 54 Mich. 635; *Westheimer v. Phillips*, 11 Neb. 54. See also *Winchester Mfg. Co. v. Funge*, 109 U. S. 651.

If no action has been induced by the alleged waiver, no estoppel arises. *Henry v. Gilliland*, 103 Ind. 177.

Insurance Policies. — A frequent illustration is the waiving of the terms of policies of insurance by underwriters. *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Sims v. State Ins. Co.*, 47 Mo. 54; s. c., 4 Am. Rep. 311; *Elliott v. Lycoming County Mut. Ins. Co.*, 66 Pa. St. 22; s. c., 5 Am. Rep. 323.

If an insurance company makes no objection to the proofs of loss offered, but objects to making payment on other grounds, it will be estopped to say that the proofs are not regular. *Blake v. Exchange Ins. Co.*,

12 Gray (Mass.), 265; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Cannon v. Home Ins. Co.*, 53 Wis. 585.

But an underwriter may show a breach of warranty in the policy, although he stated another particular ground of defence. *Devens v. Mechanics Ins. Co.*, 83 N. Y. 168.

Where an underwriter has usually sent notices of the times and places of payment of premiums, and fails to do so, by reason of which a premium is not paid at the stipulated time, he is estopped to deny liability on the policy. *Insurance Co. v. Eggleston*, 96 U. S. 572.

Giving a single notice would ordinarily have no such effect. *Insurance Co. v. Mowry*, 96 U. S. 544.

Other Illustrations. — Payments by one town to another for the support of a pauper without denial of liability does not create an estoppel. *Norridgewock v. Madison*, 70 Me. 174.

A party who encourages another to make improvements on his lands will be estopped on revocation of the license to claim the sole benefit of the improvements. *Malley v. Thalheimer*, 44 Conn. 41; *Cook v. Pridgen*, 45 Ga. 331; *Lane v. Miller*, 27 Ind. 534; *Graw v. Bayard*, 96 Ill. 146; *Griffin v. Lawrence*, 135 Mass. 365; *Wilbur v. Goodrich*, 34 Mich. 84; *Fremont Ferry Co. v. Dodge County*, 6 Neb. 18; *Groton Bank v. Batty*, 30 N. J. Eq. 126; *Brooks v. Curtis*, 50 N. Y. 639; s. c., 4 Lans. 283; *Miller v. Brown*, 33 O. St. 547; *Cumberland, etc., Rd. v. McLanahan*, 59 Pa. St. 23; *First Natl. Bank v. Hammond*, 51 Vt. 203; *McLean v. Dow*, 42 Wis. 610; *Baker v. Humphrey*, 101 U. S. 494.

A statutory or constitutional provision may be thus waived. *In re Cooper*, 93 U. S. 507.

A party may be estopped by his consent to the construction put upon a lease by another. *Daniels v. Edwards*, 72 Ga. 196.

A party may be estopped by abandonment to claim a homestead right. *Keyes v. Scanlan*, 63 Wis. 345.

An execution debtor who induces one to purchase his property at the execution sale may be estopped to allege irregularities therein. *Youngblood v. Cunningham*, 38 Ark. 571.

V. Pleading. — Probably in the absence of any statute¹ an estoppel by record or deed is available though not pleaded,² especially where no opportunity to plead it was offered.³

At common law the facts constituting an estoppel *in pais* need not be pleaded;⁴ but the rule has been changed by statute in some States.⁵

ESTOVERS, OR BOTES. — An allowance of wood for fuel, repairs, and the like; the term "estovers" being derived from the French word *estoffer*, to furnish, and *bote*, which is of Saxon derivation, being used by us as synonymous with estovers. When the allowance is for fuel, it is called house-bote, and some times fire-bote; when for making and repairing the instruments of husbandry, plough-bote and cart-bote; when for repairing hedges and fences, it is termed hay-bote or hedge-bote. However, the term *bote* and its compounds, though technically proper, have in modern times somewhat fallen out of use.⁶

Silence. — But mere silence is rarely such a waiver as to create an estoppel where both parties know the facts. *Atlanta v. Gate City Gas Co.*, 71 Ga. 106; *Maxwell v. Bay City Bridge Co.*, 46 Mich. 278; *Gawtry v. Leland*, 40 N. J. Eq. 323.

1. See *Greaves v. Middlebrooks*, 59 Ga. 862; *Burlington, etc., Rd. v. Harris*, 8 Neb. 140; *Hanson v. Chiatovich*, 13 Nev. 140.

2. *Foye v. Patch*, 132 Mass. 105; *Fowlkes v. State*, 14 Lea (Tenn.), 14; *Insurance Co. v. Harris*, 97 U. S. 331; *Big. on Estop.* (4th ed.) 668. *Compare* *Goddard's Case*, 2 Coke R. 4; *Fanning v. Insurance Co.*, 37 Ohio St. 344.

3. *Clink v. Thurston*, 47 Cal. 21; *Foye v. Patch*, 132 Mass. 105; *Gans v. St. Paul Ins. Co.*, 43 Wis. 108.

4. *Coleman v. Pearce*, 26 Minn. 123; *Turnipseed v. Hudson*, 50 Miss. 429; s. c., 19 Am. Rep. 15; *Mayer v. Ramsey*, 46 Tex. 371; *Freeman v. Cooke*, 2 Ex. 654; *Chitty's Prec.* 407.

5. *Clouser v. Jones*, 100 Ind. 123; *Phillips v. Van Schack*, 37 Iowa, 229; *Wood v. Nichols*, 33 La. Ann. 744; *Bray v. Marshall*, 75 Mo. 327; *Dale v. Turner*, 34 Mich. 405; *Warder v. Baldwin*, 51 Wis. 450.

"A plea of estoppel *in pais* by misrepresentation should show: 1. That the party sought to be estopped has made a representation with the intention of influencing the conduct of the pleader in a manner inconsistent with the claim set up. 2. That the misrepresentation was known by the party making it to be false, and that the pleader did not know that it was false, but, on the contrary, believed it to be true. 3. That the pleader has acted on such act or declaration. 4. That he will be prejudiced by allowing the truth of the admission to be disproved." *Big. on Estop.* (4th ed.) 679.

An estoppel, if pleaded, should be pleaded with certainty. *Ashley v. Foreman*, 85 Ind. 55; *Troyer v. Dyar*, 102 Ind. 396; *Robbins v. Magee*, 76 Ind. 381; *Gilbreath v. Jones*, 66 Ala. 129; *Texas Banking Co. v. Hutchins*, 53 Tex. 61.

A plea of estoppel should pray that the other side be not admitted to make use of what the estoppel excludes. *Whitemore v. Stephens*, 48 Mich. 573.

It has been held, that when the general issue is pleaded, the estoppel need not be pleaded in reply, but otherwise if there is a special plea in defence. *Hayes v. Va. Protection Assoc.*, 76 Va. 225. See also *Knight v. Mut. Life Ins. Co.*, 14 Phila. (Pa.) 187.

A plea of estoppel *in pais* on the ground that the owner of property stood by and gave his assent to the sale, should charge such fact clearly and directly, not upon information and belief. *Jones v. Cowles*, 26 Ala. 612.

For precedents in pleading, see *Big. on Estop.* (4th ed.) 693 *et seq.*

Authorities for Estoppel. — *Herman on Estoppel and Res Judicata* (1886); *Bigelow on Estoppel* (4th ed. 1886). For title by estoppel, see *Rawle on Covenants for Title* (5th ed.), chap. 11. By record, see *Freeman on Judgments*. Respecting commercial paper, see *Randolph on Commercial Paper*.

6. 1 Steph. Com. 256.

The alimony allowed by the common law to the wife in the case of divorce *à mensa et thoro* is sometimes called her estovers, for which, if the husband refuses payment, there is, besides the ordinary process of excommunication, a writ at common law *de estoveriis habendis*, in order to recover it. 1 Bl. Com. 441.

ESTRAYS.—Cattle whose owner is unknown.¹ Any beasts may be estrays that are by nature tame or reclaimable, and in which there is a valuable property.²

ESTREPEMENT, WRIT OF.—A common-law writ, for the prevention of waste.³ See **WASTE**.

ET AL.⁴

As used by Bracton the word *estovers* signifies any kind of aliment. The Stat. 6 Edw. I, c. 3, puts it as an allowance for meat or cloth. The modern acceptation of the word, if one it have, refers to house-bote, hay-bote, and plough-bote. Chitty's Note, 1 Bl. Com. 441.

Every tenant for life or years, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable *estovers*, or *botes*, 2 Bl. Com. 122, 144.

Common of Estovers is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. 2 Bl. Com. 35. The liberty which every tenant for life or years has, of common right, to take necessary *estovers* in the lands which he holds for such estate, seems to be confounded, in most of the text-books, with right of common of *estovers*. Yet they appear to be essentially different. The privilege of the tenant for life or years is an exclusive privilege, not a commonable one. Right of common of *estovers* seems properly to mean a right appendant or appurtenant to a messuage or tenement, to be exercised in lands not occupied by the holder of the tenement. Chitty's Note, 2 Bl. 35.

1. 2 Kent Com. 359. It is generally held, that, in order to constitute an *estray*, the owner of the animal must be unknown. *Roberts v. Barnes*, 27 Wis. 422; *Walters v. Glats*, 29 Iowa, 437; *Shepherd v. Hawley*, 4 Oreg. 206; *Lyman v. Gipson*, 18 Pick. (Mass.) 426. But this is not a universal rule. *Worthington v. Brent*, 69 Mo. 205. It seems that the *estray* laws of Texas "might very properly apply to cases where the owner, although known, might be remote, or where he would not follow and reclaim his animals that had wandered off, with reasonable diligence." *State v. Apel*, 14 Tex. 431.

2. 1 Bl. Com. 297, 298.

Constitutionality of Estray Laws.—A statute allowing animals running at large in a public highway to be taken by any person and publicly sold by a public officer, and providing that after the expenses of the proceedings and of keeping the animals are paid, the remainder shall be paid over to their owner, who shall also be allowed a certain time within which to redeem them, is not unconstitutional as divesting the title

to property without due process of law *Campau v. Langley*, 39 Mich. 451. See also *Stewart v. Hunter* (Oregon), 16 Pac. Rep. 877.

3. Bouv. Law. Dict.

The writ of *estrepement* lay at the common law, after judgment obtained in any action real, and before possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in lands which were determined to be no longer his. To prevent waste pending the suit, the statute of Gloucester gave another writ of *estrepement pendente placito*, commanding the sheriff firmly to inhibit the tenant "*ne faciat vastum vel estrepementum pendente placito dicto indiscusso*," 3 Bl. Com. 225, 226.

4. Under a statute that provides that a "summons shall state the parties to the action," where there are several parties defendant, it is not sufficient to give the name of one in the summons, followed by the words *et al.* *Lyman v. Milton*, 44 Cal. 630.

If on an appeal from a judgment in favor of two or more parties, the bond required to be given by the appellants be made payable to one of the appellees *et al.*, the expression *et al.* will be considered as referring to all the other appellees, and the bond will be available to all of them. *Bacchus v. Moreau*, 4 La. An. 313; *Conery v. Webb*, 12 La. An. 282. But see *Etc. as Descriptive of the Obligees in a Bond*, under **ET CETERA**.

In a decree of foreclosure of a mortgage, the two defendants, A. and B., were described in the caption as "*A. et al.*" In the body of the decree it was stated that "the foregoing defendants" were duly served with notice. B. was not expressly named as a defendant in any portion of the decree preceding these words. But he was so named in the latter part of the decree. The court held, "We take notice that it [*et al.*] means the other defendant in the case as shown by the petition. This, together with the fact that B. is expressly named later in the decree as defendant, and that the decree purports to bar him, leaves no doubt that the court regarded him as one of the defendants referred to by the abbreviation, and intended to be understood as finding that he had been duly served with notice." *Toliver v. Morgan* (Iowa), 34 N. W. Rep. 858.

ET CETERA.—These words, and also the contraction “etc.,” or “&c.,” denote “and others of the like kind,” “and the rest,” “and so on.”¹

EVENT.—The consequence of any thing, the issue, conclusion, end; that in which an action, operation, or series of operations terminates.²

EVERY.³

1. Worcester's Dict.; followed in *Agate v. Lowenbein*, 4 Daly (N. Y.), 62; *Lathers v. Keogh*, 39 Hun (N. Y.), 576.

A demise was of the whole of one building and the three upper floors of the adjoining building, with the privilege of using the stairway of the latter building “for the carrying in and out of ashes, coal, and so forth.” There was free access to and from the three floors of the latter building through the first building. It was *held* that the use of the phrase “and so forth” which means the same as *et cetera*, gave the lessee no right to use the stairway of the latter building as the principal entrance to the floors above. *Agate v. Lowenbein*, 4 Daly (N. Y.), 62.

Under a contract for the sale of real estate, which provided that the apportionment between the vendor and vendee of “rents, interest, etc.,” should be made as if the contract had actually been carried out on a certain date, it was *held* that “etc.” did not include taxes. *Lathers v. Keogh*, 39 Hun (N. Y.), 576.

A testator bequeathed “all his furniture, etc., with his six freehold houses,” to his wife. It was *held* that the testator's water-works' company shares did not pass under the “etc.” *Barnaby v. Tassell*, L. R. 11 Eq. 362.

In an action for work done for the defendant, the plaintiff, to support an item in his bill of particulars for “sixty-one days' work on house, etc., 122,” may prove days' work done in grading the ground about the house, if the defendant has not moved for a more definite specification. *Hayes v. Wilson*, 105 Mass. 21.

In an action to recover damages for the breach of a contract by which B. and C. agreed to purchase a steamboat from A. provided, upon trial, they were “satisfied with the soundness of her machinery, boilers, etc.,” it was *held* that the term “etc.” meant “other material parts of the boat,” and that the defendants had a right to refuse to be satisfied, if the boat was unsound in any material and substantial portion of her hull or machinery.” *Gray v. Central R. Co.*, 11 Hun (N. Y.), 70.

Etc. as Descriptive of the Obligees in a Bond.—In a bond given by A. to secure the costs of a suit in chancery brought by

him against B., C., and D., the obligees were described as “B., etc., and all the officers of the M. circuit court.” In an action by B. on the bond, it was *held* that C. and D. were not obligees, and that B. was right in not joining them with him in the action. *Ham's Admin. v. Tichener*, 3 Mon. (Ky.) 196. But see *Bacchus v. Moreau*, 4 La. An. 313, under *ET AL.*

Et Cetera in Pleading.—See *And so Forth*, under *AND*.

2. Webster's Dict.; adopted in *Fitch v. Bates*, 11 Barb. (N. Y.) 473.

3. Under a statute which gives to “every person indicted” for offences of a certain sort a right to challenge peremptorily four of the jurors impanelled for his trial, where several persons are jointly indicted, each is entitled to four peremptory challenges. *Washington v. State*, 17 Wis. 147.

A testator directed his trustees to purchase lands to be settled, on the death of the eldest son of J. S. without issue (which happened), “to the use of every son of J. S. then living, or who should be born” in testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his decease to the use of such son's first and every other son successively in tail male, and, on failure of such issue, to the use of the testator's right heirs. It was *held* that the younger sons of J. S. took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross remainders over. Said the court, “By the words ‘to the use of every son now living, or who shall come into existence,’ it is clear that every son who was then living, or who should come into existence, must take an interest in this fund.” *Surtees v. Surtees*, L. R. 12 Eq. Cas. 400. But in *Allgood v. Blake*, L. R. 7 Exch. 339, it was *held* that the words “all and every the issue of my body,” used in a will as descriptive of those who were to take, did not import that all were to take at the same time, but were satisfied by all taking in succession. “We do not think,” said the court, “the words ‘all and every’ in themselves, when applied to issue, necessarily import distribution. . . . The words

EVERY THING.¹

EVICTION.

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I. Definition.—Eviction is the legal deprivation of the possession of land.²

'son or sons' (excluding the next generation) [which were the words used in *Surtees v. Surtees*, *supra*], are very different from the word 'issue,' which takes in all descendants; and the naming a time when the objects of the gift were to be ascertained, to the exclusion of others coming within the description [as was done in that case], seems to refer to a separate interest in each of them."

Every of Them.—A testator gave his residuary estate upon trust, in case he left no child him surviving, for his wife for life, if she should so long continue his widow; but if she should marry again, upon trust to pay one-half of the dividends, and after her death to pay the whole thereof, to the testator's brother and sister during their joint lives, equally to be divided; and after the death of either of them, the said brother and sister, to pay the same wholly to the survivor for life, and after the decease of "every of them, his wife, brother, and sister," the testator declared that the trust-fund and the dividends thereof were to be held in trust for the children of his brother. It was *held* that a moiety of the income that accrued after the second marriage of the widow, and between the death of the survivor of the brother and sister and that of the widow (who survived them) neither belonged to the widow, nor was undisposed of, but belonged to the brother's only child. "Dr. Johnson tells us in his dictionary," said the Lord Chancellor, "that 'every' was formerly spelt 'everich'; that is, 'every each,' and that the true meaning is, 'each one of all.' The word may be used in this sense, although other lexicographers may give another meaning to it. And the testator certainly did not intend to die intestate as to any particle of his property." *Brown v. Jarvis*, 2 DeG. F. & J. 168.

By indenture tripartite between A. 1, B. 2, C. 3, A., a tenant for life, demised to C.; and C. covenanted with B. (a receiver) and other, the receiver or receivers for the time being, and to and with such other person who, for the time being, should be entitled to the freehold, and "to and with every of them." A. died. It was *held* that A.'s executrix could not maintain covenant for breach in her testator's lifetime, but

that the action was joint, and survived to B. *Mansfield, Ch. J.*: "It is urged for the plaintiff that 'to and with every of them' means 'with each of the two separately,' but it would be very strange if it were so: it means 'with every of the receivers, and with the person entitled, jointly.'" *Southcote v. Hoare*, 5 Taunt. 87.

A bond executed by two obligors containing the following clause, "for the true payment whereof we do bind ourselves, our heirs, executors, administrators, and every of them," is joint and several. *Besore v. Potter*, 12 S. & R. (Pa.) 154; *Wood v. Hummel*, 4 Watts. (Pa.) 50. But if the obligors expressly declare themselves jointly bound, the clause above quoted is not sufficient to convert the bond into a joint and several obligation. *Moses v. Libenguth*, 1 Rawle (Pa.), 255.

1. The words "every thing I am possessed of I leave to my sister for life," used in a will, are sufficient to give the sister a life estate in real estate acquired after the date of the will. *In re Methuen & Blore's Contract*, L. R. 16 Ch. Div. 696.

2. The definition given in the text is the original and technical meaning given to the word; but more recent decisions have greatly changed its character, and its scope has been very much broadened. Indeed, it is extremely difficult, at the present day, to define with technical accuracy what is an eviction. In later cases the word has been used to denote that which formerly it was not intended to express. Formerly, it was used only to denote an expulsion by the assertion of a title paramount and by process of law, and in the language of pleading the party was said to be expelled, removed, and put out, while the derivation of term means a dispossession by judicial course. The term "eviction" is now applied to almost every class of expulsion or amotion. A few of the earlier American cases assert the old doctrine, that the dispossession must be by process of law; but these cases have long since been overruled, and the doctrine now is, that an eviction need not be by process of law, provided the occupant yields the possession to the person having the legal title, or who may be adjudged to be the rightful owner; or, if such owner, the premises being vacant,

It is distinguished from ouster,¹ which is technically an expulsion without process of law, and differs from ejectment in that the latter goes to the title as well as the possession.

II. Classification.—An eviction may be actual, as where there is a physical expulsion, or constructive, which, although an eviction in law, does not deprive the injured party of actual occupancy.² Again, the eviction may be total, as where there is a complete exclusion, or partial, as where there is a disturbance of the free and uninterrupted use of the land, though without actual expulsion therefrom, or the loss of the possession of some part of the granted premises.

III. What constitutes Eviction.—**I. Of Tenant.**—Aside from an actual expulsion,³ any act on the part of a landlord which so disturbs the tenant's possession of demised premises as to compel an abandonment of same,⁴ or which deprives him of their beneficial enjoyment,⁵ either in whole or in part, or any entry of the

enters into possession. *St. John v. Palmer*, 5 Hill (N. Y.), 599; *Booth v. Starr*, 5 Day (Conn.), 282; *Leary v. Durham*, 4 Ga. 593; *Green v. Irving*, 54 Miss. 450.

1. In pleading an eviction, an ouster must usually be alleged. *Vernam v. Smith*, 15 N. Y. 327; *Kerr v. Shaw*, 13 Johns. (N. Y.) 236.

2. There cannot be a constructive eviction, however, without an abandonment of possession. *Boreel v. Lawton*, 90 N. Y. 293; *DeWitt v. Pierson*, 112 Mass. 8.

3. It will be observed that the essence of eviction, according to its strict technical meaning, consists in dispossession, and not in the withholding of possession; in the taking away from the tenant the whole or some part of the demised premises of which he was in possession, and not in refusing to put him into the possession of that which by the terms of the agreement he ought to enjoy. *Ethridge v. Osborn*, 12 Wend. (N. Y.) 529.

4. *Leadbeater v. Roth*, 25 Ill. 587; *Hoever v. Fleming*, 91 Pa. St. 322; *Rogers v. Ostrom*, 35 Barb. (N. Y.) 523; *Jackson v. Eddy*, 12 Mo. 209; *Cromilin v. Theiss*, 31 Ala. 412. Alterations creating exposure and great annoyance are equivalent to eviction. *Rogers v. Ostrom*, 35 Barb. (N. Y.) 523. But mere acts of petty trespass, however annoying, will not have that effect. *Edgerton v. Page*, 20 N. Y. 281. A tenant is supposed to have a full and adequate remedy for any invasion of his possession by way of trespass, in an action for damages, and so, notwithstanding the disturbance may be injurious to his quiet enjoyment of the property, where it does not amount to exclusion or constructive expulsion, it will not be taken as an eviction. This will always be the rule where, despite such acts, the tenant remains in the occupancy of the property.

5. There are a variety of circumstances which are deemed such a disturbance of possession as to constitute an eviction, short of physical force or legal process.

Creation of Nuisance.—Thus the creation of a nuisance in another portion of the same building, or in the vicinity of the leased premises, whereby the beneficial enjoyment of the leasehold is impaired or interrupted, whether such nuisance be erected by the landlord himself or by some other person under his authority, will amount to an eviction. *Royce v. Guggenheim*, 106 Mass. 201; *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727. And it is immaterial whether the nuisance arises from acts of commission or omission. *Alger v. Kenedy*, 49 Vt. 109. The use of parts of the same building for the purpose of prostitution has been held to amount to a constructive eviction. *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260; *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727. But to have this effect the nuisance must be created or continued by the landlord himself, or some person acting under his consent or authority.

Defective Repair.—A neglect on the part of the landlord to make repairs on the leased premises, even though such neglect may tend to make the property untenable, will seldom amount to eviction. *Diggs v. Maury*, 23 La. Ann. 59; *Bussman v. Ganster*, 72 Pa. St. 285; *Coddington v. Dunham*, 35 N. Y. Sup'r Ct. 412. And in the cases where it has been permitted to have that effect, the lack of repairs tended to create a nuisance; as where drains were allowed to choke up and become offensive. *Alger v. Kenedy*, 49 Vt. 109. And see *Scott v. Simons*, 54 N. H. 426.

Shutting off Water.—Where the use of water is a privilege or easement which con-

landlord upon said premises in such a manner as to unfit them for the purposes for which they were leased,¹ will amount to an eviction of the tenant.

But to constitute an eviction by the landlord, there must be something more than a mere trespass.² The acts of interference must consist of something of a grave and permanent character, done with the intention of depriving the tenant of the enjoyment of the premises.³

stitutes a part of the demised premises, the deprivation of the tenant of the use of such water is such a disturbance of possession as to create an eviction. *West Side Savings Bank v. Newton*, 76 N. Y. 616. But it seems that the non-supply of water, caused by a leak in a pipe outside of the demised premises, whereby the closets and basins on the demised premises become useless, will not amount to an eviction or furnish grounds for an abandonment of the property, where there has been no interference by the landlord with the supply of water, and no covenants on his part to maintain such supply or keep the premises in repair. *Coddington v. Dunham*, 35 N. Y. Sup'r Ct. 412.

Eviction per Minus.—An interference by the landlord, though consisting merely of verbal communications, may, under certain circumstances, be properly construed into an eviction. Thus, where a landlord threatened a tenant to prosecute him in case the latter should sublet a hall, which the tenant under the lease had a right to do, this was *held* to be sufficient evidence of an eviction *per minus* upon which to sustain a verdict for the tenant in an action for rent. *Doran v. Chase*, 2 Rep. 195. So, also, where the landlord forbid the under tenant to pay any more rent to his immediate lessor; this, unexplained, would amount to an eviction. *Leadbeater v. Roth*, 25 Ill. 587.

1. *Halligan v. Wade*, 21 Ill. 470. Where the landlord, without the consent of the tenant, erected a building in the back-yard of the premises leased, the effect of which was to render unfit for use two rooms used by the tenant; *held*, that the latter might treat the act as an eviction. *Royce v. Guggenheim*, 106 Mass. 201; s. c., 8 Am. Rep. 322. So, also, where he erected a wall under the eaves of the demised building. *Sherman v. Williams*, 113 Mass. 481; s. c., 18 Am. Rep. 522.

2. Wrongful acts of a landlord do not in law amount to an eviction where there is neither an actual nor constructive expulsion of the tenant from any part of the demised premises. *Bennett v. Bittle*, 4 Rawle (Pa.), 339; *Campbell v. Shields*, 11 How. Pr. (N. Y.) 165. This is so of any act which amounts only to a mere trespass, but does not interfere with the substantial

enjoyment of the property. *Lounsberry v. Snyder*, 31 N. Y. 514. Thus, where a landlord made repeated entries upon the premises, carrying away crops, cutting down trees, and removing a cook-stove from the house, *held*, although acts of trespass, not to amount to an eviction of the lessee. *Bartlett v. Farrington*, 120 Mass. 284. And see *Elliott v. Aikin*, 45 N. H. 30; *Fuller v. Ruby*, 10 Gray (Mass.), 285. The distinction between a trespass and an eviction is said to be found in the fact whether the act of the landlord is of such a character as to deprive the tenant of the beneficial use of the premises for any considerable time, or is merely temporary. *Wilson v. Smith*, 5 Yerg. (Tenn.) 379; *Edgerton v. Page*, 20 N. Y. 281; *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Hipple v. De Pine*, 51 Ill. 528.

3. Acts of a landlord in interference with the tenant's possession, to constitute an eviction, must clearly indicate an intention on the part of the landlord that the tenant shall no longer continue to hold the premises. *Morris v. Tillson*, 81 Ill. 607; *Hayner v. Smith*, 63 Ill. 430.

A., a tenant of certain premises under a lease from B., was temporarily absent therefrom, though still in possession; and during his absence, B. entered the premises, removed A.'s goods therefrom, and had a new lock put on the door. Upon his return the tenant could not enter the premises, and did not attempt to do so, but B. continued in possession until the end of the term. *Held*, that this was an eviction. *Burr v. Cattnach*, 6 Atl. Rep. (Pa.) 118. And so if the landlord after obtaining possession leases the property to another. *Dobbins v. Duquid*, 65 Ill. 464. It does not seem, however, that there should be any expressed intention on the part of the landlord to expel the tenant, or indeed that he should have any such real intention; but the legal effects of his acts should be such as would warrant a jury in finding that he did so intend. *Sherman v. Williams*, 113 Mass. 481; s. c., 18 Am. Rep. 522.

Intention of Landlord a Question of Fact.—As there are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to

An invasion of the possession of the tenant by a third person, with the consent and by the authority of the landlord, will operate as an eviction.¹ And the same effect will result from the neglect of the landlord to protect his tenant from the encroachments of others, whenever such protection is a duty.² So also, if the tenant yields possession of the demised premises, in consequence of a judgment for the recovery of possession to the person adjudged to be the rightful owner of the paramount title, it is an eviction.³

Where a tenant voluntarily yields the whole or a part of the leased premises to another, there is no eviction,⁴ nor will the tenant be held to have been constructively evicted, where, notwithstanding there may have been disturbing interferences, he has continued to remain in the possession of the entire premises during the full term of the lease.⁵

eviction, but which may be either acts of trespass or eviction, according to the intention with which they are done, it follows that, whether the acts complained of amount to an eviction, depends upon circumstances, and is a question in all cases for the jury; thus it was *held* that it was a question of fact as to whether the landlord in putting in water-pipe and a pump and sink in an upper room of the demised premises, without the consent of the tenant, had constructively evicted such tenant, and that the solution of the question depended on the intention with which it was done, as shown by the facts and circumstances. *Lynch v. Baldwin*, 69 Ill. 210.

1. As where the landlord sold a portion of the demised premises to a railroad company, and, by his permission and consent, the company entered into that portion before the rent became due by the terms of the lease, and they deprived the tenant of its use and occupancy. *Held*, that this was an eviction of that portion of the premises, although the company was not justified in taking possession. *Halligan v. Wade*, 21 Ill. 470.

2. Where a landlord demised certain premises for sleeping-rooms, owning but three of the walls, and no easement on the fourth, the roof being built upon and against the fourth wall, when the owner of the fourth wall in raising his building necessarily broke in the roof of the demised premises, and rendered them unfit for use, *held*, that it was the lessor's duty, when the owner of the fourth wall raised his building, to protect his tenant, and that this disturbance of the premises was equivalent to an eviction. *Bently v. Sill*, 35 Ill. 414.

3. A judgment alone, however, is not sufficient; the possession must be disturbed or yielded. This distinction will reconcile the authorities which otherwise may seem conflicting. The rule to be gathered from

all the authorities, and which accords with good sense, is that a person cannot remain in possession of premises, and still claim that he has been turned out; nor, when a judgment of a competent court has determined that he shall deliver possession to a particular person, need he wait to be forcibly ejected. He can acquiesce in the judgment of the court, and voluntarily obey its mandate. *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370. But see *St. Romes v. New Orleans*, 16 Reporter, 77.

So, if a tenant of the mortgagor, upon foreclosure and sale of the premises, abandons the possession to the purchaser, it is deemed an eviction by one having paramount title, — *Simers v. Saltus*, 3 Denio (N. Y.), 214, — and it was *held* in this case that he was not obliged to remain in possession and pay rent to the purchaser to whom the lease had been assigned, and who offered to continue it to the end of the term.

Whether a tax sale amounts to an eviction, *quære*. *Shell v. Walker*, 54 Iowa, 386.

4. Nor will proof of such fact sustain a plea of failure of consideration of a note given for rent in advance. *Lettick v. Honnold*, 63 Ill. 335.

5. An eviction cannot take place without an actual expulsion or an abandonment of the whole or some part of the premises. *Gilhooley v. Washington*, 4 N. Y. 217; *DeWitt v. Pierson*, 112 Mass. 8. There are many circumstances which may justify the tenant in abandoning the premises, and which, in connection with the abandonment, will support a plea of eviction by the landlord, although there was no actual entry or physical disturbance of the tenant's possession; but there can be no constructive eviction without a surrender of the possession. It would be manifestly unjust to permit the tenant to remain in possession, and when sued for the rent to sustain the

2. *Of Vendee.*—Any actual entry and dispossession, adversely and lawfully made under paramount title, will be an eviction.¹ An involuntary loss of possession by reason of the hostile assertion of an irresistible title, will constitute an eviction;² and any disturbance of the free and uninterrupted use of land, though without actual expulsion therefrom, will have the same effect in law.³ Thus an entry to foreclose is, without actual ouster, an eviction,⁴ though the mere existence of a mortgage encumbrance will not have that effect.⁵

The paramount title need not be established by judgment before a vendee will be authorized, to surrender possession, for the vendee is not required to be at the trouble and expense of a lawsuit to resist paramount title or claim to land.⁶ Nor need there be an actual dispossession; if the paramount title is so asserted that he

plea of eviction by proof that there were circumstances which would have justified him in leaving the premises. *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 N. Y. 293. It would seem, therefore, that though the acts of interference, if acted upon by the tenant, might have amounted to an eviction, yet if he still continued to remain in possession, he would be liable for the rent. *Boston, etc., R. R. Co. v. Ripley*, 13 Allen (Mass.), 421; *Jackson v. Eddy*, 12 Mo. 209; *Crommelin v. Thiess*, 31 Ala. 412; *Elliott v. Aikin*, 45 N. H. 30.

1. *Sprague v. Baker*, 17 Mass. 585; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416; *Mason v. Cooksey*, 51 Ind. 519.

The earlier cases all held that there must be a dispossession, as distinguished from a withholding of possession, to constitute a legal eviction. The law required an expulsion, actual or constructive; and unless there had been some deprivation of this character, no action would lie on the covenants of the deed as for an eviction. The rule had its origin and was first announced at a time when conveyances of land were made by livery of seizin, and possession always accompanied the transfer of the title. The later authorities hold that the rule has no application where the covenantee has not been able to obtain possession for the reason that another was in possession at the time; and that where a covenantee is kept out by means of a superior title, this is equivalent to an eviction, and gives effect to a covenant. *Shattuck v. Lamb*, 65 N. Y. 499. And see *Curtis v. Deering*, 12 Me. 499; *Park v. Bates*, 12 Vt. 381; *Loomis v. Bedell*, 11 N. H. 74; *Small v. Reeves*, 14 Ind. 164.

2. As the loss of one-third of the premises granted set off to the widow of the grantor. *Terry v. Drabenstadt*, 68 Pa. St. 400.

3. As the existence and use of a private

way over granted premises, and to which they are subject. *Rea v. Minkler*, 5 Lans. (N. Y.) 196. The diversion of part of the water of an irrigating creek. *Dalton v. Bowker*, 8 Nev. 190.

4. Where premises conveyed by a deed containing covenants of general warranty and quiet enjoyment are sold under the foreclosure of a prior mortgage, such foreclosure sale is an eviction. *Cowdrey v. Coit*, 44 N. Y. 382; *Smith v. Dixon*, 27 Ohio St. 471. And this, too, although the grantee in the deed himself becomes the purchaser, and, having sold his bid to a third person, surrenders possession upon such person receiving a deed from the officer making the sale. *Cowdrey v. Coit*, 44 N. Y. 382.

5. *Clark v. Lineberger*, 44 Ind. 223. To constitute an eviction, there must be a valid sale under the mortgage.

6. As a rule, it is only necessary that there shall have been some hostile assertion of the paramount title to which possession was yielded, or which was bought in. That a suit shall have been instituted is not necessary; but it is essential that the true owner shall have given notice, in some way, of his intention to assert his claim. The covenantee cannot, merely because he has ascertained that some other person holds a title superior to his own, abandon that possession which he received from the covenantor, and claim an eviction. It is not sufficient that he shall be satisfied that the outstanding title is the true one, and, if asserted, cannot be resisted; because, in point of fact, it may never be asserted, or, if asserted in the future, the flow of time may have so ripened his possession that he can successfully combat it. Good faith, therefore, to his vendor, requires that he shall stand his ground until, in some way, he is called upon to surrender. *Green v. Irving*, 54 Miss. 450; *Scriven v. Smith*, 100 N. Y. 471.

must yield or leave, the vendee may purchase or lease of the true owner, and this will be considered a sufficient eviction to constitute a breach of the covenants of the deed.¹

IV. Effect of Eviction. — 1. *Of Tenant.* — An eviction of a tenant by the landlord or a stranger, at any time during the term, will discharge the tenant from the further payment of rent.² In case of partial eviction, if the eviction is made by a stranger, the rent will be apportioned;³ but if by the landlord himself, and the tenant is kept out of possession of that part, the whole rent will be discharged.⁴ In such event the tenant is under no legal obligation to pay rent for the balance, though he continues to enjoy it.⁵ But should the tenant after eviction again repossess and occupy the premises, it would seem that the obligation to pay rent is revived.⁶

Where the tenant is evicted by a stranger, the rent being due in instalments, such eviction is a bar to the recovery of any rent that may have accrued since the last instalment became due, but not to any instalment that may have matured before eviction.⁷

An eviction may also be the proper ground for an action for damages, where such eviction has also been coupled with a trespass, and where the evidence tends to show that such damages were the natural and proximate consequences of the trespass and eviction complained of.⁸

1. McGary v. Hastings, 39 Cal. 360.

2. Leadbeater v. Roth, 25 Ill. 587; Halligan v. Wade, 21 Ill. 470; Edgerton v. Paige, 20 N. Y. 281; Lounsbury v. Snyder, 31 N. Y. 514; McClurg v. Price, 59 Pa. St. 420; Alger v. Kennedy, 49 Vt. 109; Holmes v. Guion, 44 Mo. 164.

Or if the landlord, by any act of his, renders the lease unavailing to the tenant, he is thereby exonerated from the terms and conditions of such lease. Halligan v. Wade, 21 Ill. 470. If the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended. Lynch v. Baldwin, 69 Ill. 210. If the landlord takes possession of any part of the demised premises, without the consent of the tenant, the latter is thereby released from liability to pay any rent whatever, even for the portion of which he remains in undisturbed occupancy. Smith v. Wise, 58 Ill. 141; Hayner v. Smith, 63 Ill. 430.

The rule, that an actual expulsion is not necessary to an eviction that will excuse payment of rent, applied where a tenant, after beginning to comply with a sheriff's order to vacate, accepted a lease from the plaintiff in the writ of restitution against the landlord. Montanye v. Wallahan, 84 Ill. 355.

3. Colburn v. Morrill, 117 Mass. 262; Halligan v. Wade, 21 Ill. 470; Tunis v. Grady, 22 Gratt. (Va.) 109.

4. The rule applied in a case of an oral lease of four rooms, to bar the landlord's action for the rent of three. Colburn v. Morrill, 117 Mass. 262. And see Tunis v. Grady, 22 Gratt. (Va.) 109.

5. Although there is no legal obligation resting upon a tenant to pay any rent for the demised premises, where he has been evicted from the possession of a part of them, yet there is a moral obligation; and if, under the sense of that moral obligation, the tenant executes his note, he will be held liable to pay it. Anderson v. Chicago, etc., Ins Co., 21 Ill. 601.

6. Martin v. Martin, 7 Md. 368. But see Hunter v. Riley, 43 N. J. L. 480.

7. Thus, where a lease, by its terms, was to continue until the termination of a certain suit in ejectment, and the lessee was dispossessed by a writ of restitution, issued in such suit before its final termination, it was held that the lessor, in the absence of any fraud on his part in procuring the lease, was entitled to recover all instalments of rent which had matured before the lessee was evicted. Pepper v. Rowley, 73 Ill. 262.

8. Shaw v. Hoffman, 25 Mich. 162.

The adjudications in New York establish the following rules, relative to interference by landlords with the rights of their tenants: (1) Where the tenant is evicted without the wilful or voluntary agency of the landlord,

2. *Of Vendee.*—An eviction of a vendee creates a right of action in his favor against the vendor, as for a breach of the covenants in the deed under which he claims, and under which he entered into possession. But should the vendee have neglected to secure himself by proper covenants, he is without remedy.¹

An eviction is primarily a breach of the covenant of quiet enjoyment, but it is also a breach of the covenant of general warranty, for the true meaning of the covenant of general warranty is, that the grantor shall not be dispossessed by the force of a superior title, and in effect, therefore, it is the same as that of quiet enjoyment, extending both to the possession and the title.² As a general rule, the measure of damages for a breach of the covenant is the price paid for the land, with interest,³ and if nothing has been paid as the price of the land, the damages are nominal.⁴ See COVENANTS.

EVIDENCE.—**Introductory Note.**—The following article upon the law of evidence consists of Sir James Fitzjames Stephens's "Digest of the Law of Evidence" (fourth English edition) with annotations. This method of presenting the law upon this subject has been adopted because it is believed that Mr. Justice Stephens's Digest is universally accepted as containing the most

from the whole or some part of the demised premises, if the eviction is from the whole premises, the tenant is not chargeable with rent; but if it is from part of the premises, the law requires the rent to be apportioned, so that the tenant shall be liable to pay for such portions of the premises as he retains. (2) Where the landlord commits acts of trespass which interfere more or less with the beneficial enjoyment of the premises, but which leave the demised premises intact, and do not deprive the tenant of any part of them, so that, though he may be injured, he is not thereby dispossessed, the rule is, inasmuch as the wrongful act of the landlord stops short of depriving the tenant of any portion of the premises, the trespass is no defence against the liability for rent; and the tenant's sole remedy therefor is an action for damages therefor against the wrongdoer. (3) Where the landlord enters wilfully upon and expels the tenant, actually or constructively, from a part of the demised premises, the rule is, that the whole rent is suspended during the term, though the tenant continue in possession of the residue. Johnson v. Oppenheim, 12 Abb. Pr. (N. Y.) 449.

1. Laugherty v. McLean, 14 Ind. 106; Barkhamstead v. Case, 5 Conn. 528.

2. Rindskopf v. Loan Co., 58 Barb. (N. Y.) 36; Rea v. Minkler, 5 Lans. (N. Y.) 196.

3. Price v. Deal, 90 N. Car. 290; West v. West, 76 N. Car. 45; McGary v. Hastings,

39 Cal. 360. A covenantor of title is bound by a judgment of eviction against the person to whom the covenant has run, where such covenantor appeared and defended the action, or was duly notified so to do. Wendel v. North, 24 Wis. 223. And in the absence of any showing of fraud or collusion, such covenantor, who has neglected to defend, will not be permitted, in an action brought upon the covenants to prove that the judgment of eviction was not upon an adverse or superior title, even though the covenantee, to save himself from eviction under the judgment, purchased the outstanding title. McConnell v. Downs, 48 Ill. 271. But unless the covenantor had notice of the ejectment suit, either oral or written, from the covenantee, in time to appear and defend, he is not estopped by a judgment of eviction against the covenantee from proving title in himself. Somers v. Schmidt, 24 Wis. 417.

Where the eviction is caused by an entry to foreclose, the measure of damages is the amount of the mortgage debt and interest, if that is less than the full value of the estate. Furnas v. Durgin, 119 Mass. 500.

4. West v. West, 76 N. Car. 45. So, also, nominal damages will only be allowed where there has been no actual eviction, or the vendee has not given up possession to a person having and asserting a paramount title, or has not bought in such title. Mason v. Cooksey, 51 Ind. 519.

clear and concise statements of the law of evidence extant. The author's illustrations and the English citations have been retained. To many of the "articles" are added notes collecting the American cases, and stating the American rules when they differ from the English. To those "articles" which are not annotated, have been added cross-references to separate branches of the subject which are given a distinct treatment in this work, as BURDEN OF PROOF, BOOKS AS EVIDENCE, CHARACTER IN EVIDENCE, DECLARATIONS IN EVIDENCE, HEARSAY EVIDENCE, JUDICIAL NOTICE, EXPERT AND OPINION EVIDENCE, PRIVILEGED COMMUNICATIONS, WITNESSES, WRITTEN INSTRUMENTS, etc.

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I. Relevancy.—1. *Definition of Terms* (Art. 1).—In this book the following words and expressions are used in the following senses, unless a different intention appears from the context: “*Fudge*” includes all persons authorized to take evidence, either by law or by the consent of the parties.¹ “*Fact*” includes the fact that any mental condition of which any person is conscious exists.² “*Document*” means any substance having any matter expressed or described upon it by marks capable of being read.³

“*Evidence*” means (1), statements made by witnesses in court, under a legal sanction, in relation to matters of fact under inquiry: such statements are called oral evidence; (2), documents pro-

1. See JUDGE.

2. See FACT.

3. See WRITTEN INSTRUMENTS.

duced for the inspection of the court or judge: such documents are called documentary evidence.¹

"*Conclusive Proof*" means evidence upon the production of which, or a fact upon the proof of which, the judge is bound by law to regard some fact as proved, and to exclude evidence intended to disprove it.

"*A Presumption*" means a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.²

The expression "*facts in issue*" means, —

(1) All facts which, by the form of the pleadings in any action, are affirmed on one side and denied on the other.

(2) In actions in which there are no pleadings, or in which the

1. Other writers have defined evidence as follows: "Any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact." 1 Benth. Jud. Ev. 17.

"The word evidence signifies in its original sense the state of being evident, i.e., plain, apparent, or notorious. But, by an almost peculiar inflection of our language, it is applied to that which tends to render evident or to generate proof. This is the sense in which it is commonly used in our law-books, and will be used throughout this work." Best's Prin. Ev. (Cham.) 6.

"Evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." 1 Greenl. Ev. (14th ed.) § 1.

2. The term "presumption," in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative, of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning, from something proved or taken for granted. It is, however, rarely employed in jurisprudence in this extended sense. Like "presumptive evidence," it has there obtained a restricted legal signification, and is used to designate an inference, affirmative or disaffirmative, of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed, or admitted, or established by legal evidence to the satisfaction of the tribunal. Best's Prin. Ev. (Cham.) 306.

A presumption of law is a judicial postulate that a particular predicate is universally assignable to a particular subject. A presumption of fact is a logical argument from a fact to a fact; or, as the distinction is sometimes put, it is an argument which

infers a fact otherwise doubtful from a fact which is proved. Hence, a presumption of fact, to be valid, must rest on a fact in proof. Wharton's Crim. Ev. (9th ed.) § 707.

Presumptions of law are such as are conclusive or absolute; that is, such as are not permitted to be overcome by proof that the fact is otherwise, or such as are termed disputable presumptions, that is, such as admit of contrary proof, but which, in the absence of all opposing evidence, make a *prima facie* case, and throw the burden of proof on the other party. *Snediker v. Everingham*, 3 Dutch. (N. J.) 150. They are conclusive when the law makes an inference so peremptorily that it will not allow it to be overturned by any contrary proof, however strong. And they are disputable when the law makes an inference which will stand until invalidated by proof. *Lyon v. Guild*, 5 Heisk (Tenn.), 182.

In *Welch v. Sackett*, 12 Wis. 257, a presumption is defined to be an inference as to the existence of one fact from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, it is necessary that there be a previous experience of the connection between the known and inferred facts, of such a nature that as soon as the existence of the one is established, admitted, or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject.

For judicial definitions of the terms "presumption," "presumption of fact," and "presumption of law," see also *Bow v. Allentown*, 34 N. H. 365; *Insurance Co. v. Weide*, 11 Wall. (U. S.) 441; *Oaks v. Weller*, 16 Vt. 71; *King v. Burdett*, 4 B. & A. 161; *Hilton v. Bender*, 69 N. Y. 75; *Jackson v. Marford*, 7 Wend. (N. Y.) 62; *Cronan v. New Orleans*, 16 La. Ann. 374.

form of the pleadings is such that distinct issues are not joined between the parties; all facts from the establishment of which the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any such case, would by law follow.

The word "*relevant*" means, that any two facts to which it is applied are so related to each other, that, according to the common course of events, one either taken by itself, or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other.¹

2. *Facts in Issue and Relevant to the Issue.*

a. *Facts in Issue and Facts Relevant to the Issue may be proved* (Art 2). — Evidence may be given in any proceeding of any fact in issue, and of any fact relevant to any fact in issue, unless it is hereinafter declared to be deemed to be irrelevant; and of any fact hereinafter declared to be deemed to be relevant to the issue, whether it is or is not relevant thereto.²

Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case.³

1. The meaning of the word "*relevant*," as applied to testimony, is, that it directly touches upon the issue which the parties have made by the pleadings so as to assist in getting at the truth. It comes from the French *reliever*, which means to assist. *Platner v. Platner*, 78 N. Y. 95.

2. Best's Prin. Ev. (Cham.) 257; Greenl. Ev. (14th ed.) § 51.

Chamberlayne, in his American edition of Best's Principles of Evidence, § 251, note, takes exception to the above and other portions of Stephen's work relating to the admissibility of evidence. He says, "Legal relevancy is assumed by Mr. Justice Stephen throughout the digest of evidence to be the sole rational test of admissibility; that the two, relevancy and admissibility, are, or ought to, be co-extensive and interchangeable terms. This is certainly a mistake. Public policy, considerations of fairness, the practical necessity for reaching speedy decisions, these, and similar reasons, cause constantly the necessary rejection of much evidence entirely relevant; and they must continue to do so. All admissible evidence, as has been said *supra*, is relevant; but all relevant evidence is not therefore admissible. A communication to a legal adviser, or a criminal confession improperly obtained, may undoubtedly be relevant in a high degree. They are none the less inadmissible."

It is not necessary that the evidence bear directly upon the point in issue: if it constitutes a link in the chain of proof, or

tends to prove the issue, it is sufficient, although considered alone it might not justify a verdict. Greenl. Ev. (14th ed.) § 51a. *Sanders v. Stokes*, 30 Ala. 432; *Columbus, etc., Co. v. Semmes*, 27 Ga. 283; *Farwell v. Tyler*, 5 Iowa, 535; *Haughey v. Strickler*, 2 Watts & Serg. (Pa.) 411; *Tams v. Bullitt*, 35 Pa. St. 308; *State v. McAllisters*, 11 Shepl. (Me.) 139; *Tucker v. Peaslee*, 36 N. H. 167; *Jones v. Vanzandt*, 2 McLean (U. S.), 611; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Comstock v. Smith*, 20 Mich. 338; *Willoughby v. Dewey*, 54 Ill. 266; *Lake v. Munford*, 4 Sm. & Marsh. (Miss.) 312; *Belden v. Lamb*, 17 Conn. 441.

Neither is it essential that its relevancy appear when the evidence is offered. If it will be afterwards rendered material by other evidence, it may be admitted. If not subsequently connected with the issue, it may be taken from the consideration of the jury. *Van Buren v. Wells*, 19 Wend. (N. Y.) 203; *Moppin v. Aetna Axle Co.*, 41 Conn. 271; *United States v. Flowery*, 1 Sprague's Dec. (U. S.) 109; *Harris v. Holmes*, 30 Vt. 352; *Crenshaw v. Davenport*, 6 Ala. 390; *Abney v. Kingsland*, 10 Ala. 355; *Yeatman v. Hart*, 6 Humph. (Tenn.) 375; and no exception lies to the ruling of the presiding judge as to the order of introducing evidence at a trial. *Com. v. Dam*, 107 Mass. 210; *Weidler v. Farmer's Bank*, 11 S. & R. (Pa.) 134.

3. *Relevant Testimony excluded on Account of Remoteness. — Instances.* — In an action for carnally knowing the plaintiff by

b. Relevancy of Facts forming Part of the Same Transaction as the Facts in Issue (Art. 3).—A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of inquiry which may be in issue.

Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue, although it may not be actually in issue, and although, if it were not part of the same transaction, it might be excluded as hearsay.

Whether any particular fact is, or is not, part of the same transaction as the facts in issue, is a question of law upon which no principle has been stated by authority, and on which single judges have given different decisions.

When a question as to the ownership of land depends on the application to it of a particular presumption capable of being rebutted, the fact that it does not apply to other neighboring pieces of land similarly situated, is deemed to be relevant.¹ (See *RES GESTÆ*.)

force, and giving her a venereal disease, evidence that some months before the alleged assault the defendant slept one night in a house of ill-fame, may properly be excluded as immaterial. *Morrisey v. Ingham*, 111 Mass. 63.

On the trial of an action to avoid a deed upon the ground of mental incapacity of the grantor at the time of its execution, evidence of the condition of his mind a year afterwards may be excluded in the direction of the judge, as too remote. *White v. Graves*, 107 Mass. 325.

The possession of stolen property may be of such property, and so long after the theft, as to justify the judge in rejecting the fact, as, though relevant, of inappreciable weight. *Sloan v. People*, 47 Ill. 76; *Jones v. State*, 26 Miss. 247. Or it may be left as a question for the jury, whether, upon all the facts, the possession affords any presumption connecting the prisoner with the crime. *State v. Hodge*, 50 N. H. 510; *State v. Brewster*, 7 Vt. 122; *Rex v. Cokin*, 2 Lew. C. C. 235.

But the court cannot reject proof of a fact as immaterial if the question as to whether it is immaterial or not depends upon proof of another fact. The proper course in such a case is to submit the proof of both facts to the jury. *Day v. Sharp*, 4 Whart. (Pa.) 339.

But Judge cannot concern himself with **Weight of Evidence** except in certain cases where the testimony comes from tainted sources, as in the case of accomplices and false witnesses, where he may caution, but cannot exclude. 1 Greel. Ev. § 49 n.; *Underwood v. McVeigh*, 23 Gratt. (Va.) 409; *Paulette v. Brown*, 40 Mo. 52; *Callanan v.*

Shaw, 24 Iowa, 441; *Mead v. McGraw*, 19 Ohio St. 55; *Blanchard v. Pratt*, 37 Ill. 243; *Collins v. People*, 98 Ill. 584.

See JUDGE.

1. Illustrations to Art. 3.—(a) The question was, whether A. murdered B. by shooting him.

The fact that a witness in the room with B. when he was shot saw a man with a gun in his hand pass a window opening into the room in which B. was shot, and thereupon exclaimed, "There's Butcher!" (a name by which A. was known), was allowed to be proved by Lord Campbell, L. C. J. *R. v. Fowkes*, Leicester Spring Assizes, 1856. *Ex relatione O'Brien*, Serjt.

Since the last edition of this work was published, I have referred to the report of this case in the "Times" for March 8, 1856, where the evidence of the witnesses on this point is thus given:—

"*William Fowkes*: My father got up the window, and opened it, and shoved the shutter back. He waited there about three minutes. It was moonlight, the moon about the full. He closed the window, but not the shutter. My father was returning to the sofa when I heard a crash at the window. I turned to look, and hooted, 'There's Butcher!' I saw his face at the window, but did not see him plain. He was standing still outside. I aren't able to tell who it was, not certainly. I could not tell his size. While I was hooting, the gun went off. I hooted very loud. He was close to the shutter, or thereabouts. It was only about eight inches. *Lord Campbell*: Did you see the face of the man? *Witness*: Yes, it was moonlight at the time. I have a belief that it was the butcher. I

c. Acts of Conspirators (Art. 4).—When two or more persons conspire together to commit any offence or actionable wrong, every thing said, done, or written by any one of them, in the execution or furtherance of their common purpose, is deemed to be so said, done, or written by every one, and is deemed to be a relevant fact as against each of them; but statements as to measures taken in the execution or furtherance of any such common purpose are not deemed to be relevant as such as against any conspirators except those by whom or in whose presence such statements are made. Evidence of acts or statements deemed to be relevant under this article may not be given until the judge is satisfied, that, apart from them, there are *prima facie* grounds for believing in the existence of the conspiracy to which they relate.¹ (See CRIMINAL CONSPIRACY.)

believe it was. I now believe it from what I then saw. I heard the gun go off when he went away. We heard him run by the window through the garden towards the park."

Upon cross-examination the witness said that he saw the face when he hooted, and heard the report at the same moment. The report adds, "The statement of this witness was confirmed by Cooper, the policeman (who was in the room at the time), except that Cooper saw nothing when William Fowkes hooted 'there's Butcher at the window!' He stated he had not time to look before the gun went off. In this case the evidence as to W. Fowkes's statement could not be admissible, on the ground that what he said was in the prisoner's presence, as the window was shut when he spoke. It is also obvious that the fact that he said at the time, 'There's Butcher' was far more likely to impress the jury than the fact that he thought it was not true that the person he saw was the butcher."

(b) The question was, whether A. cut B.'s throat, or whether B. cut it herself.

A statement made by B., when running out of the room in which her throat was cut, immediately after it had been cut, was not allowed to be proved by Cockburn L. C. J. R. v. Bedingfield, Suffolk Assizes, 1879 (14 C. C. C. 341). The propriety of this decision was the subject of two pamphlets: one, by W. Pitt Taylor, who denied; the other, by the Lord Chief Justice, who maintained it.

(c) The question was, whether A. committed manslaughter on B. by carelessly driving over him.

A statement made by B. as to the cause of his accident, as soon as he was picked up, was allowed to be proved by Park, J., Gurney, B., and Patterson, J.; though it was not a dying declaration within article 26. R. v. Foster, 6 C. & P. 325.

7 C. of L.—3

(d) The question is, whether A., the owner of one side of a river, owns the entire bed of it, or only half the bed at a particular spot. The fact that he owns the entire bed a little lower down is deemed to be relevant. Jones v. Williams, 2 M. & W. 326.

(e) The question is, whether a piece of land by the roadside belongs to the lord of the manor, or to the owner of the adjacent land. The fact that the lord of the manor owned other parts of the slip of land by the side of the same road is deemed to be relevant. Doe v. Kemp, 7 Bing. 332; 2 Bing. N. C. 102; Stephen's Dig. Ev. art. 3.

1. Illustrations to Art. 4.—(a) The question is, whether A. and B. conspired together to cause certain imported goods to be passed through the custom-house on payment of too small an amount of duty.

The fact that A. made in a book a false entry, necessary to be made in that book in order to carry out the fraud, is deemed to be a relevant fact as against B.

The fact that A. made an entry on the counterfoil of his check-book, showing that he had shared the proceeds of the fraud with B., is deemed not to be a relevant fact as against B. R. v. Blake, 6 Q. B. 137-140.

(b) The question is, whether A. committed high treason by imagining the king's death; the overt act charged is, that he presided over an organized political agitation calculated to produce a rebellion, and directed by a central committee through local committees.

The facts that meetings were held, speeches delivered, and papers circulated in different parts of the country, in a manner likely to produce rebellion by and by, the direction of persons shown to have acted in concert with A. are deemed to be relevant facts as against A., though he was not present at those transactions, and took no part in them personally.

An account given by one of the conspira-

d. Title (Art. 5). — When the existence of any right of property, or of any right over property, is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right, or which shows that its exercise was disputed, or which is inconsistent with its existence, or renders its existence improbable, is deemed relevant.¹ (See TITLE.)

e. Custom (Art. 6). — When the existence of any custom is in question, every fact is deemed to be relevant which shows how, in particular instances, the custom was understood and acted upon by the parties then interested.² (See USAGE and CUSTOM.)

f. Motive. — Preparation. — Subsequent Conduct. — Explanatory Statements (Art. 7). — Where there is a question whether any act was done by any person, the following facts are deemed to be relevant; that is to say, —

Any fact which supplies a motive for such an act, or which constitutes preparation for it.

Any subsequent conduct of such person apparently influenced by the doing of the act, and any act done in consequence of it by or by the authority of that person.³

tors in a letter to a friend, of his own proceedings in the matter, not intended to further the common object, and not brought to A.'s notice, is deemed not to be relevant as against A. *R. v. Hardy*, 24 S. T., *passim*. But see particularly 451-453, Stephen's Dig. Ev., art. 4.

1. Illustrations to Art. 5. — (a) The question is, whether A. has a right of fishery in a river.

An ancient *inquisitio post mortem*, finding the existence of a right of fishery in A.'s ancestor's licenses to fish granted by his ancestors, and the fact that the licensees fished under them, are deemed to be relevant. *Rogers v. Allen*, 1 Camp. 309.

(b) The question is, whether A. owns land. The fact that A.'s ancestors granted leases of it is deemed to be relevant. *Doe v. Pulman*, 3 Q. B. 622-623-626 (citing *Duke of Bedford v. Lapes*). The document produced to show the lease was a counterpart signed by the lessee. See *post*. Art. 64.

(c) The question is, whether there is a public right of way over A.'s land.

The facts that persons were in the habit of using the way, that they were turned back, that the road was stopped up, that the road was repaired at the public expense, and A.'s title-deeds showing that for a length of time, reaching beyond the time when the road was said to have been used, no one had power to dedicate it to the public, are all deemed to be relevant. Stephen's Dig. Ev. art. 5.

2. Illustrations to Art. 6. — (a) The question is, whether, by the custom of borough-English as prevailing in the manor of C., A. is heir to B.

The fact that other persons, being tenants of the manor, inherited from ancestors standing in the same or similar relations to them as that in which A. stood to B., is deemed to be relevant. *Muggleton v. Barnett*, 1 H. & N. 282. For a late case of evidence of a custom of trade, see *Ex parte Powell*, *In re Mathews*, L. R. 1 Ch. D. 501; Stephen's Dig. Ev. art. 6.

3. Illustrations to Art. 7. — (a) The question is, whether A. murdered B.

The facts that, at the instigation of A. B. murdered C. twenty-five years before B.'s murder, and that A. at or before that time used expressions showing malice against C., are deemed to be relevant, as showing a motive on A.'s part to murder B. *R. v. Clewes*, 4 C. & P. 221.

(b) The question is, whether A. committed a crime.

The fact that A. procured the instruments with which the crime was committed is deemed to be relevant.

(c) A. is accused of a crime.

The facts that, either before or at the time of or after the alleged crime, A. caused circumstances to exist tending to give to the facts of the case an appearance favorable to himself, or that he destroyed or concealed things or papers, or prevented the presence or procured the absence of persons who might have been witnesses, or

suborned persons to give false evidence, are deemed to be relevant. *R. v. Patch*, Wills Circ. Ev. 230.

(d) The question is, whether A. committed a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, and the manner in which he conducted himself when statements on the subject were made in his presence and hearing, are deemed to be relevant. Common Practice.

(e) The question is, whether A. suffered damage in a railway accident.

The fact that A. conspired with B., C., and D. to suborn false witnesses in support of his case is deemed to be relevant (*Moriarty v. London, etc., R. Co.*, L. R. 5 Q. B. 314. Compare *Gery v. Redman*, L. R. 1 Q. B. D. 161), as conduct subsequent to a fact in issue tending to show that it had not happened.

Evidence to show Motive Admissible.—

On the trial of an indictment for the malicious burning of a building, after it has appeared that the defendant has conveyed the building to his sons, subject to a mortgage made by him, they assuming to pay the mortgage note, evidence that, a month before the fire, the defendant suggested to an insurance broker that there should be an increase of insurance on the building, is admissible to show that he had a motive to commit the offence. *Commonwealth v. Bradford*, 126 Mass. 42.

On a trial for the murder of a woman in a house where she lived, an accomplice testified that the defendant and others also murdered the woman's husband at the same time and place, and afterwards took and carried away money which was on the premises, *held*, that in view of this testimony, evidence that the defendant knew of the existence of this money, and where it was kept, was admissible in order to show motive for perpetrating the crime. *Ettinger v. Com.*, 98 Pa. St. 338.

In an action to set aside alleged fraudulent conveyances made by a judgment debtor, a witness for plaintiff testified to the pendency of an action against the judgment debtor at the time of the conveyances, and to an attempt, upon the part of his attorney, to delay the recovery of judgment therein, *held*, that a refusal to strike out such evidence was not error; that the evidence was proper as showing motive; and that the debtor might fairly be presumed to have had notice of the proceedings on the part of his attorney. *Wright v. Nostrand*, 94 N. Y. 31.

On a trial for murder of the prisoner's wife, evidence that the prisoner had ex-

hausted his bank deposit, *held* to be admissible to show that his destitute circumstances were the motive of his desiring to return to live with her. *Sayres v. Commonwealth*, 88 Pa. St. 291.

On a trial of B. for murder of his wife, parol evidence that a suit for divorce had been pending, wherein she was plaintiff and he defendant, *held* to be admissible. *Binns v. State*, 66 Ind. 428.

But the existence of ill feeling as a motive for the commission of crime will not alone justify submitting to a jury the question of the guilt of a person entertaining such feeling. It becomes material only when offered in connection with other evidence proper to be submitted, showing that the person charged with such ill feeling was in fact implicated in the commission of the crime. Evidence to show motive must not be too remote. *Commonwealth v. Abbott*, 130 Mass. 472.

Upon trial of an indictment for assault and battery with intent to kill, the prosecution gave in evidence certain notes purporting to have been made or indorsed by H., the complainant, also a book of account: these, the witness producing them testified, came lawfully into his possession, at the prisoner's house, and in his presence. Testimony was then given by H. and others, showing that the signatures of H. to the notes were forged. *Held*, that the evidence was properly received, as showing motive, although it tended to prove the commission of another crime. *Pontius v. People*, 82 N. Y. 339.

And see, generally, as to the admission of evidence to show motive. *McCue v. Commonwealth*, 78 Pa. St. 185; *State v. Dickson*, 78 Mo. 438; *Commonwealth v. Ferrigan*, 44 Pa. St. 386; *Pierson v. People*, 79 N. Y. 424; *Reinhart v. People*, 82 N. Y. 607.

Evidence to show Preparation for an Act.—

"Evidence of preparation is always admissible for the prosecution; evidence to explain it is always admissible for the defence. Among the facts admissible as affording in this way a basis of induction, are the purchasing, the collecting, the fashioning, instruments of mischief, . . . and of which a familiar illustration is to be found in the admission of evidence on a trial for burglary to prove that the defendant had manufactured or procured the burglarious instruments. Under the same head, fall cases where the evidence shows a repairing to the spot destined to be the scene of crime, and acts done with the view of paving the way to the guilty enterprise. For the same purpose it is admissible, on an indictment for arson, to prove a prior insurance of the property, as well as other attempts to destroy it, the object being to defraud the underwriters." *Whart.*

g. Statements accompanying Acts. — Complaints. — Statements in Presence of a Person (Art. 8). — Whenever any act may be proved, statements accompanying and sustaining that act made by or to the person doing it may be proved if they are necessary to understand it.¹ (See *RES GESTÆ*.)

In criminal cases, the conduct of the person against whom the offence is said to have been committed, and in particular the fact that he [she] made a complaint soon after the offence to persons to whom he [she] would naturally complain, are deemed to be relevant; but the terms of the complaint itself seem to be deemed to be irrelevant.² (In this country this rule is applicable only to cases of RAPE. See that title. See also CRIMINAL PROCEDURE, sub-title *Evidence*.)

When a person's conduct is in issue, or is deemed to be relevant to the issue, statements made in his presence and hearing by

Crim. Ev. (9th ed.) § 753, citing *State v. Pike*, 65 Me. 111; *State v. Curran*, 51 Iowa, 112; *Long v. State*, 52 Miss. 23; *Howard v. State*, 8 Tex. App. 53; *Taylor v. State*, 14 Tex. App. 340; *People v. Larned*, 3 Seldon (N. Y.), 445; *Commonwealth v. Wilson*, 2 Cush. (Mass.) 590; *State v. Morris*, 47 Conn. 179; *People v. Winters*, 29 Cal. 658; *Commonwealth v. Costley*, 118 Mass. 1; *Commonwealth v. Bradford*, 126 Mass. 42; *Commonwealth v. McCarthy*, 119 Mass. 354.

See the titles of specific crimes, as *HOMICIDE*, etc.

Evidence of Subsequent Conduct. — As to attempts to procure false testimony, manufacturing evidence, corrupting witnesses, etc., see CRIMINAL PROCEDURE, vol. 4, p. 860-861.

Evidence of the defendant's manner and conduct when arrested, and comments upon the same made by a third person at the time, in the presence and hearing of the defendant, is admissible against him. *People v. Ah Fook*, 64 Cal. 380.

In an action to recover damages for an injury to a hired horse by immoderate driving, evidence is competent to prove that the defendant, immediately after the injury charged, made an assignment of all his property. *Banfield v. Whipple*, 10 Allen (Mass.), 29.

Where the question was as to whether one person received a certain sum for another, *held*, that a deposit ticket made out by the former, showing a deposit by him of about the same amount on the day of the alleged receipt, was proper evidence. *Harrington v. Ketellas*, 92 N. Y. 40.

An agreement giving a right to remove a building which is put upon the land of another may be shown from the subsequent dealings of the parties. *Morris v. French*, 106 Mass. 326.

1. Illustration to Art. 8. — (a) The question is, whether A. committed an act of bankruptcy, by departing the realm with intent to defraud his creditors.

Letters written during his absence from the realm, indicating such an intention, are deemed to be relevant facts. *Rawson v. Haigh*, 2 Bing. 99; *Bateman v. Bailey*, 5 T. R. 512.

(b) The question is, whether A. was sane.

The fact that he acted upon a letter received by him is part of the facts in issue. The contents of the letter so acted upon are deemed to be relevant, as statements accompanying and explaining such conduct. *Wright v. Doe d. Totham*, 7 A. & E. 324-5 (per Denman, C. J.).

Other statements made by such persons are relevant or not according to the rules as to statements hereinafter contained. See Art. 14-31, *post*. Stephen's Dig. Ev. Art. 8.

In *Eighmy v. People*, 79 N. Y. 546, the question was, whether a paper which A. destroyed was his will, and what was his intent in destroying it. It was *held*, that statements made by A. at the time of the destruction, that the paper was his will, and giving his reasons for the act, were deemed to be relevant. But statements made after the destruction were deemed not to be relevant; and see *Waterman v. Whitney*, 11 N. Y. 157.

2. Illustrations. — The question is, whether A. was ravished. The fact that shortly after the alleged rape she made a complaint relating to the crime, and the circumstances under which it was made, are deemed to be relevant, but not (it seems) the terms of the complaint itself. *R. v. Walker*, 2 M. & R. 212.

The fact that, without making a complaint, she said that she had been ravished, is not deemed to be relevant as conduct

which his conduct is likely to have been affected, are deemed to be relevant facts.¹

under this article, though it might be deemed to be relevant (e.g.) as a dying declaration under Art. 26.

1. *R. v. Edmunds*, 6 C. & P. 164; *Neil v. Jakle*, 2 C. & P. 709.

Admissions by Silence. — With reference to Criminal Law, see "Confessions," 16, *Inferred from Silence or Demeanor*, see also "Criminal Procedure," "Hearsay Evidence."

As a general rule, the declarations of one party made in the presence of the other, and not denied by that other, are admissible as evidence for the former. *Black v. Hicks*, 27 Ga. 522; *Hagenbaugh v. Crabtree*, 33 Ill. 225; *Bailey v. Woods*, 17 N. H. 365; *Corser v. Paul*, 41 N. H. 24; *McClenkin v. McMillan*, 6 Pa. St. 366; *Wells v. Drayton*, 1 Mill. (S. Car.) Const. 111; *Hendrickson v. Millier*, 1 Mill. (S. Car.) Const. 296. Also, declarations relating to the subject-matter of a suit made by a third person, in the presence of a party to the suit, and to which such party had an opportunity to reply, but did not, are admissible in evidence against him. And such evidence cannot be controlled by proof of different declarations subsequently made by the same person (who died before the trial) to others. *Boston, etc., R. Co. v. Dana*, 1 (Gray), Mass. 83; *Turner v. Yates*, 16 How. (U. S.) 14.

Where a sheriff, at a sale on execution, acts under the direction of two creditors holding different executions, the instructions given to him by either in the presence of the other are properly received in evidence in a suit between them growing out of the sale. *Smith v. Hill*, 22 Barb. N. Y. 656.

At a sale of joint property, an assertion by one of the joint owners, made in the presence of the others, and not dissented from by them, is binding upon all. *Andress v. Lee*, 1 Dev. & B. (N. Car.) Eq. 318.

But this rule does not apply if the person be incapable of hearing or understanding the statements, though these are made in his presence. *Lanergan v. People*, 39 N. Y. 39; *Tufts v. Charlestown*, 4 Gray (Mass.), 537. And especially is this true when the person against whom the admission is used is a foreigner. In such a case it should be made to appear that the conversation was explained to him by an interpreter, so that he was in a position to understand fully the statements to which he ought to have replied. *Wright v. Maseras*, 56 Barb. (N. Y.) 521.

But in an action upon a contract which

the plaintiff made through an interpreter, statements concerning the contract by the interpreter, in the name of the plaintiff, are admissible against the latter, without proof that they were truly the plaintiff's statements. *Camerlin v. Palmer*, 10 Allen (Mass.), 539.

Where declarations were offered in evidence as having been made in the presence of a party who was partially intoxicated, and not contradicted by him, it was properly left to the jury to ascertain whether the party was too much intoxicated to understand the statement when made. *State v. Perkins*, 3 Hawks. (N. Car.) 377.

The acquiescence, also, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. *Allen v. McKeen*, 1 Sumn. (U. S.) 313; *Carter v. Bennett*, 4 Fla. 283. The circumstances, too, must not only be such as afforded him an opportunity to speak or act, but such also as would properly call for some action or reply from men similarly situated. *Brainard v. Buck*, 25 Vt. 573; *Hersey v. Burton*, 23 Vt. 685; *Lawson v. State*, 20 Ala. 65; *Rolfe v. Rolfe*, 10 Ga. 143; *Boston & W. R. Co. v. Dana*, 1 Gray (Mass.), 83; *Commonwealth v. Harvey*, 1 Gray (Mass.), 487; *Commonwealth v. Kenney*, 12 Metc. (Mass.) 235; *Commonwealth v. McDermott*, 123 Mass. 440; *Commonwealth v. Walker*, 13 Allen (Mass.), 570; *Whitney v. Houghton*, 127 Mass. 527. Thus, if the statements were given in evidence in a judicial proceeding he is not at liberty to interpose when and how he pleases, though a party; and hence he is not concluded by them. *Sutherland v. McGlaughlin*, 1 Carr & Marsh, 429; *Melen v. Andrews*, 1 M. & M. 336; *Allen v. McKeen*, 1 Sumn. (U. S.) 313; *Martin v. Root*, 17 Mass. 222; *Hovey v. Hovey*, 9 Mass. 216; *Jones v. Morrell*, 1 Car. v. Kir. 266; *Melen v. Andrews*, 1 Mood. & Walk. 336; *Neil v. Jakle*, 2 Car. & Kir. 709; *Faileur v. Hastings*, 10 Ves. 123; *Toulmins v. Copeland*, 3 Yon., etc., 625; *Peele v. Merchants' Insurance Co.*, 3 Mason. (U. S.), 81; *Abercrombie v. Allen*, 29 Ala. 281; *Hudson v. Harrison*, 3 Brod. & Bing. 97. In an action by S. against a stage-company to recover damages for injuries sustained by the upsetting of a coach, the physician of S. was called by him as a witness to prove the value of his professional services as an element of damages. In a subsequent action, brought by the physician against S. to recover for his services, the plaintiff offered proof of what he himself had testified as to their value upon the former trial, in con-

nection with the fact that plaintiff was present and heard the evidence, and made no objection to its corrections, *held*, that the evidence was inadmissible; that S. was not estopped from denying the truth of the evidence by having used it upon the former trial, for the reason that plaintiff had not been thereby influenced to do any act to his injury, and that S. was not bound by it, as an admission, for the reason that upon the circumstances he was not called upon to admit or deny its truth. *Wilkins v. Stidger*, 22 Cal. 232.

Where the servant of A. goes to a house to get possession of a chattel which A. has the right to take in a peaceable manner, evidence that the owner of the house, immediately after the entrance of the servant, said to a third person, in the hearing of the servant, but not in his presence, that the servant had entered against his will, and had pushed him aside, and that the servant, who was on his way up-stairs to get the chattel, said nothing in reply, is incompetent, as an admission of the truth of the charge, in an action against A. for such assault. In this case the court said, "What the plaintiff said was not addressed to them (the servants), and cannot be said to have called for a reply. In estimating the proper inference to be drawn from silence, full allowance must be made for attending circumstances. The defendant's servants were on their way to Newton's apartment to perform the manual labor of carrying away an article of furniture; and it was hardly to be expected, or certainly it was not a matter of course, that, after they had effected an entrance into the house, they should stop on their way to have a conversation, and perhaps an altercation, with the plaintiff as to the manner of such entrance." *Drury v. Hervey*, 126 Mass. 519.

Where a defendant has been arrested by virtue of an order of arrest issued upon *ex parte* affidavits averring fraud in the contraction of the debt sued upon, his omission to make a motion to vacate the order cannot be considered as an admission of the truth of the averments, and does not make the affidavits competent evidence upon trial of the action. *Talcott v. Harris*, 93 N. Y. 567. And see *Brainard v. Buck*, 25 Vt. 573; *Corser v. Paul*, 41 N. H. 24; *Rolfe v. Rolfe*, 10 Ga. 143.

It must also appear that the party knew of the subject matter, or had means of knowing. *Edwards v. Williams*, 3 Miss. 846; *Pierce v. Goldsberry*, 35 Ind. 317.

And where a person is inquired of as to matters which may affect his pecuniary interests, he has the right to know whether the party making the inquiry is entitled to make it as affecting any interest which he represents, and for the protection of which he requires the information sought; and

unless he is fairly informed upon these points, he is not bound to give information, and will not be affected in his pecuniary interests in consequence of refusal. *Hackett v. Callender*, 32 Vt. 97.

A lessee cannot show his damages by a failure of the lessor to repair according to his covenant, by proving his own declarations in the presence of the lessor, made, in stating his estimate of the repairs necessary, before the contract was made, it not appearing that the lessor assented to it. *Hill v. Bishop*, 2 Ala. 320.

In an action of trespass, *held*, that evidence that a large company had each made oath before a magistrate of his innocence of the trespass, except the defendant, who refused, was *held* wholly inadmissible. *Mattox v. Boys*, 5 Dana (Ky.) 461.

The silence of a tenant for life, when remarks are made in his presence in disparagement of his title, is no evidence against his remainderman. *McGregor v. Wait*, 10 Gray (Mass.) 72.

The defendant, upon being charged with an assault, denied it; about an hour afterwards, in the presence of two additional persons, the plaintiff again charged him with it in different language. *Held*, that the first charge being at once denied was no evidence against him; that his silence under the second charge was not necessarily an admission, but was to be considered by the jury with reference to the circumstances under which it was made. *Jewett v. Banning*, 21 N. Y. 27.

A witness stated, in the presence of a party, what he had understood from another to be the terms of a contract; and the party replied that "he never told his trades." *Held*, that such reply was no admission of the correctness of such statement, but, on the contrary, rebutted all inference of admission. *Vail v. Strong*, 10 Vt. 457.

In an action for assault and battery, there being no direct evidence that the injury was caused by the defendant, two witnesses testified, that shortly after the injury was inflicted they heard the plaintiff charge the defendant with causing it, and did not hear the defendant deny it. Two other witnesses testified, that about an hour before this they heard the same charges made by the plaintiff, and the defendant denied it. The presiding judge instructed the jury, that if the plaintiff charged the defendant with having committed the assault, and he at the same time denied it, it furnished no evidence against him; but, if he remained silent when so charged, the jury might regard it as an admission that he was guilty, or give it such weight as they might think it entitled to; that the jury would not probably conclude that the defendant, after he had once emphatically denied the accusation, would be called upon to deny it again if

h. Facts necessary to explain or introduce Relevant Facts (Art. 9).

— Facts necessary to be known to explain or introduce a fact in issue, or relevant, or deemed to be relevant, to the issue, or which support or rebut an inference suggested by any such fact, or which establish the identity of any thing or person whose identity is in issue, or is, or is deemed to be, relevant to the issue, or which fix

the accusation were repeated; but that it was left to the jury, under the rules which had been stated as to remaining silent, to give such weight to the defendant's silence, when the charge was repeated, as they thought it entitled to. *Held*, that there was no objection to these instructions; the evidence being such that the jury would be justified in believing that the two conversations took place on different occasions. *Jewett v. Banning*, 23 Barb. (N. Y.) 13.

Distinction between Statements made by Party interested and Stranger. — "A distinction has been taken between declarations made by a party interested, and a stranger; and it has been *held*, that what one party declares to the other, without contradiction, is admissible evidence; what is said by a third person may not be so. It may be impertinent, and best rebuked by silence; but if it receives a reply, the reply is evidence. . . . If the declarations are those of third persons, the circumstances must be such as called on the party to interfere, or at least, such as would not render it impertinent in him to do so. Therefore, where, in a real action, upon a view of the premises by a jury, one of the chain-bearers was the owner of a neighboring close, respecting the bounds of which the litigating parties had much altercation, their declaration in his presence was *held* not to be admissible against him in a subsequent action respecting his own close." 1 Greenl. Ev. (14th ed.) § 199, citing *Moore v. Smith*, 14 Serg. & R. (Pa.) 388.

In *Larry v. Sherburne*, 2 Allen (Mass.), 34, the court (*per Bigelow, C. J.*) says, "It is true that there are cases where a party may be affected in his rights by proof of a silent acquiescence in the statements of others. But such evidence is always to be received and applied with great caution, especially where it appears, as in this case, that the statements are made, not by a party to the controversy, but by a stranger. There are many cases where the intervention of a third person may properly be deemed unnecessary, and his statements be regarded as impertinent and immaterial. To them no reply need be made, and no inference can be drawn from the fact that they are received in silence. Of this nature is an offer by a third person to pay a debt

to a party who claims that it is due to him solely from another person, against whom he is seeking to enforce it. A mere omission to reply to such an offer cannot legitimately be taken as an admission which can in any way affect the right of the party to maintain an action against him whom he seeks to charge as his original debtor." And see *Hildreth v. Martin*, 3 Allen (Mass.), 371; *Fenno v. Weston*, 31 Vt. 345.

What the magistrate before whom an assault and battery was investigated, said to the parties, was *held* inadmissible in a subsequent civil action for the same assault. *Child v. Grace*, 2 C. & P. 193.

The Rule to be cautiously applied. — In 1 Greenl. Ev. (14th ed.) 258, note *a*, it is said, "The former rule of evidence, that one's silence shall be construed as a virtual assent to all that is said in his presence, is susceptible of great abuse, and calls for a course of conduct which prudent and quiet men do not generally adopt. If that rule be sound to the full extent as laid down by some of the early cases, it would be in the power of any evil-disposed person to always ruin his adversary's case by drawing him into a compulsory altercation in the presence of chosen listeners, who would be sure to misrepresent what he said. Nothing could be more unjust or unreasonable. Hence, in more recent cases, the rule in some States has undergone very important qualifications. The mere silence of one, when facts are asserted in his presence, is no ground of presuming his acquiescence, unless the conversation were addressed to him under such circumstances as to call for a reply. The person must be in a position to require the information, and he must ask it in good faith, and in a manner fairly entitling him to expect it, in order to justify any inference from the mere silence of the party addressed. If the occasion or the nature of this demand, or the manner of making it, will reasonably justify silence, in a discreet and prudent man, no unfavorable inference therefrom should on that account be made against the party. And whether the silence be any ground of presumption against the party will always be a question of law, unless there is conflict in the proof the attending circumstances. *Mattocks v. Lyman*, 16 Vt. 113; *Vail v. Strong*, 10 Vt. 457; *Gale v. Lincoln*, 11 Vt. 152."

the time or place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively.¹

1. Illustrations to Art. 9. — (a) The question is, whether a writing published by A. of B. is libellous, or not.

The position and relations of the parties at the time when the libel was published may be deemed to be relevant facts, as introductory to the facts in issue.

The particulars of a dispute between A. and B. about a matter unconnected with the alleged libel are not deemed to be relevant under this article, though the fact that there was a dispute may be deemed to be relevant if it affected the relations between A. and B. Common Practice, see "Libel."

(b) The question is, whether A. wrote an anonymous letter, threatening B., and requiring B. to meet the writer at a certain time and place to satisfy his demands.

The fact that A. met B. at that time and place is deemed to be relevant, as conduct subsequent to and affected by a fact in issue.

The fact that A. had a reason, unconnected with the letter, for being at that place, is deemed to be relevant, as rebutting the inference suggested by his presence. *R. v. Barnard*, 19 St. Tri. 815.

(c) A. is tried for a riot, and is proved to have marched at the head of a mob. The cries of the mob are deemed to be relevant, as explanatory of the nature of the transaction. *R. v. Lord George Gordon*, 21 St. Tri. 250.

(d) The question is, whether a deed was forged. It purports to be in the reign of Philip and Mary, and enumerates King Philip's titles.

The fact that at the alleged date of the deed, Acts of state and other records were drawn with a different set of titles, is deemed to be relevant. *Lady Joy's Case*, 10 St. Tri. 615.

(e) The question is, whether A. poisoned B. Habits of B. known to A., which would afford A. an opportunity to administer the poison, are deemed to be relevant facts. *R. v. Donellan*, Wills Circ. Ev. 192.

(f) The question is, whether A. made a will under undue influence. His way of life, and relations with the persons said to have influenced him unduly, are deemed to be relevant facts. *Boyse v. Rossborough*, 6 H. L. C. 42-58.

What is Admissible to explain or introduce Relevant Facts. — Upon the issue whether goods were sold to the defendants or to a third party, it is competent for the plaintiff to prove, that immediately prior to the sale he had been directed not to trust such third party, because he was not responsible; and he may prove it by the party giving him the information. *Bronner v. Frauenthal*, 37 N. Y. 166.

In an action against several persons, upon an account arising from stock transactions claimed by plaintiff to have been joint transactions on the part of defendants, but claimed by one of the defendants to have been several, *held*, that evidence that said defendant had a private account running at the same time was competent as a circumstance tending to show that the other account was joint and not several. *Quincy v. White*, 63 N. Y. 370.

Upon the question whether A. was employed by B., the conduct of A. during the term of such employment inconsistent with the theory of such employment is deemed to be a relevant fact. *Miller v. Irish*, 63 N. Y. 652.

In an action for breach of promise of marriage, evidence of such conduct and behavior as are customary between persons under contract of marriage, is admissible to prove the existence of such contract. *Wagenseller v. Simmers*, 97 Pa. St. 465.

On the trial of an indictment for larceny of goods, afterwards found in a trunk, a receipt to the defendant for rent, also found there, and signed by a man who testifies that he gave it to the defendant personally, is admissible in evidence against him, with instructions that it is not to be regarded by the jury unless they have other evidence connecting the defendant with the offence. *Commonwealth v. Annis*, 15 Gray (Mass.), 197.

On the issue whether the defendant agreed to deliver to the plaintiff a certain horse or a more valuable one in exchange for a chattel of the plaintiff's, evidence that the plaintiff's chattel was, and was known by the parties to be, of much less value than the more valuable horse, is admissible. *Norris v. Spofford*, 127 Mass. 85.

At the trial of an indictment for burglary, evidence that the defendant was in the neighborhood the day before the night

of the burglary; that he made inquiries about purchasing tobacco, in a manner which showed that they were pretexts; and that he had an apparent connection with two other strangers, — is admissible, in connection with the testimony of the owner of the house entered, that the defendant was at the house on said day, and that the burglary was committed by two men; although the defendant admits at the trial that he was at the house on said day. *Commonwealth v. Williams*, 105 Mass. 62.

Upon the issue whether a certain infant child, who was killed while on his way from England to this country, was domiciled in New York State at the time of his death, the fact that the infant's father, having resided in England, had lived in New York several months prior to the infant's death, and had come there for the purpose of making his home and living in that State, is deemed to be relevant. *Kennedy v. Ryall*, 67 N. Y. 379.

Evidence is admissible to show that a person has for several years been living at a rate of expenditure far beyond his apparent means, as tending to confirm other evidence of dishonesty in appropriating the property of his employer. *Hackett v. King*, 8 Allen (Mass.), 144.

In an action against a husband for jewelry purchased by his wife, evidence that the husband wore diamonds, and kept a fast horse, and had paid for silk dresses bought by her, is admissible to show that the articles purchased were necessities. *Raynes v. Bennett*, 114 Mass. 424.

Upon the question whether a party is insane, evidence is admissible to show that his father, mother, or other blood relation, is, or has been, insane. *State v. Hoyt*, 47 Conn. 518.

In an action for seduction, the fact that others "kept company" with the prosecutrix, is relevant to the issue. *Stinehouse v. State*, 47 Ind. 17.

On the trial of an action for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he is the owner of the houses, or the real principal, evidence is relevant that other persons had received orders from the defendant to do work at the same houses, without showing that the plaintiff knew of those orders at the time he did his work. But if the orders had been to do work upon other houses, it seems they would not have been relevant. *Woodman v. Buchanan*, L. R. 52 B. 285.

On the question of a party's adultery, the fact that he associated with prostitutes is relevant. *Ciocci v. Ciocci*, 29 L. J. Pr. & Mat. 60.

In *Dowling v. Dowling*, 10 Ir. C. Law, 241, it was *held*, that in an action for money lent, the poverty of the lender was relevant.

Same. — What is not Admissible. — In an action against an executor to recover a note of long standing, signed by his testator, payment of the note cannot be proved by evidence that it was the testator's habit to pay his debts promptly, or that another person had agreed to pay them for him, or that he made a list of his debts in which the note in question was not included. *Abercrombie v. Sheldon*, 8 Allen (Mass.), 532.

In an action to recover for personal injuries caused by the defendant's car, in which plaintiff was a passenger, leaving the track, alleged to have occurred on account of the defective condition of such track, *held*, that the admission of evidence, on behalf of the plaintiff, of the condition of the road at a point half a mile distant from the place of the accident, and evidence that new ties were subsequently put in at points in the neighborhood of the accident, was erroneous. *Reed v. New York Cent. R. Co.*, 45 N. Y. 574.

Evidence of a habit of a maker of a note to gamble when drunk, is not admissible to show that a promissory note made by him was given for money lost at play. *Thompson v. Bowie*, 4 Wall. (U. S.) 463.

Upon the question whether a credit for goods sold was given to the defendant or his son, evidence that the son had no property at the time of the sale, and was entirely irresponsible, is not deemed to be relevant. *Green v. Disbrow*, 56 N. Y. 334.

A child of tender years was injured by a passenger railway-car. The court permitted plaintiffs to ask a witness how many hours the drivers and conductors on the railway were employed for each day, for the purpose of showing that the driver of the car which injured the child was physically unable to discharge his duty at the time of the accident. *Held*, that this was error. *Phil. City Pass. R. Co. v. Henrice*, 92 Pa. St. 431.

In an action to recover the value of the labor of the plaintiff's intestate for several years before his death, where the defendant has introduced evidence to show that by reason of confirmed intemperance and a chronic bodily disease his labor was not worth more than his board and clothing, and such small sums of money as were furnished to him for holidays, evidence is inadmissible, in reply, to show the amount and value of his labor the year before he commenced working for the defendant, and that there was no visible change for the worse in his health and habits thereafter. *Graves v. Jacobs*, 8 Allen (Mass.), 141.

On a trial for murder, evidence of particular exhibitions of violent, ungovernable temper on the part of the deceased is inadmissible. *Eggler v. People*, 56 N. Y. 642.

In an action against a physician for malpractice, the fact that he has never called

3. *Occurrences Similar to, but Unconnected with, Facts in Issue.* —
a. Similar but Unconnected Facts (Art. 10). — A fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith, in any of the ways specified in Arts. 3-9, both inclusive, is deemed not to be relevant to such fact, except in the cases specially excepted in this chapter (Arts. 11, 12, and 13).¹

for his pay is irrelevant. *Baird v. Gillett*, 47 N. Y. 186.

An offer of a railroad company to pay a person's funeral expenses is not relevant to the question whether that person was injured by its negligence. *Campbell v. Chicago, etc., R. Co.*, 45 Iowa, 76 S. C. 17.

Evidence that the complainant in a bastardy suit was in the habit of associating with young men whose reputation for chastity was bad, is irrelevant and inadmissible. *Eddy v. Gray*, 4 Allen (Mass.), 435.

The fact that A. was an infidel or an atheist is irrelevant to the question whether he committed suicide. *Gibson v. Am. Mut. Life Ins. Co.*, 37 N. Y. 580.

The social standing of the parties is irrelevant to a question of breach of contract. *Rowland v. Dawe*, 2 Murphy (N. Car.), 347.

1. *Illustrations to Art. 10.* — (*a*) The question is, whether A. committed a crime. The fact that he formerly committed another crime of the same sort, and had a tendency to commit such crimes, is irrelevant. *R. v. Cole*, 1 Phi. Ev. 508. (Said to have been decided by all the judges in Mich. Term, 1810.)

(*b*) The question is, whether A., a brewer, sold good beer to B., a publican. The fact that A. sold good beer to C., D., and E., other publicans, is irrelevant. *Holcombe v. Hewson*, 2 Camp. 391. (Unless it is shown that the beer sold to all is of the same brewing. See illustrations to Art. 3.) *Stephen's Dig. Ev.*, art. 10.

Note by Justice Stephen to Arts. 10, 11, and 12. — "Art. 10 is equivalent to the maxim, '*Res inter alias acta alteri nocere non debet*,' which is explained and commented on in Best, §§ 506-510 (though I should scarcely adopt his explanation of it), and by Broom ('Maxims,' 954-968). The application of the maxim to the law of evidence is obscure, because it does not show how unconnected transactions should be supposed to be relevant to each other. The meaning of the rule must be inferred from the exceptions to it stated in arts. 11 and 12, which show that it means, you are not to draw inferences from one transaction to another which is not specifically connected with it merely because the two resemble

each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference.

"In its literal sense the maxim also fails, because it is not true that a man cannot be affected by transactions to which he is not a party. Illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life, would supply them.

"The exceptions to the rule given in articles 11 and 12 are generalized from the cases referred to in the illustrations. It is important to observe that though the rule is expressed shortly, and is sparingly illustrated, it is of very much greater importance and more frequent application than the exceptions. It is indeed one of the most characteristic and distinctive parts of the English Law of Evidence; for this is the rule which prevents a man charged with a particular offence from having either to submit to imputations which in many cases would be fatal to him, or else to defend every action of his whole life in order to explain his conduct on the particular occasion. A statement of the Law of Evidence which did not give due prominence to the four great exclusive rules of evidence of which this is one would neither represent the existing law fairly nor in my judgment improve it.

"The exceptions to the rule apply more frequently to criminal than to civil proceedings; and in criminal cases the courts are always disinclined to run the risk of prejudicing the prisoner by permitting matters to be proved which tend to show in general that he is a bad man, and so likely to commit a crime. In each of the cases by which article 12 is illustrated, the evidence admitted went to prove the true character of facts which, standing alone, might naturally have been accounted for on the supposition of accident, — a supposition which was rebutted by the repetition of similar occurrences. In the case of *R. v. Gray* (Illustration (2)), there were many other circumstances which would have been sufficient to prove the prisoner's guilt, apart from the previous fires. That part of the evidence, indeed, seemed to have little influence on the jury. Garner's case (Illustration (c), note) was

an extraordinary one, and its result was in every way unsatisfactory."

Similar unconnected Facts not generally admissible.—As to the admissibility of evidence of other crimes, see "Criminal Procedure."

Greenleaf, in his work on Evidence, 14th ed., vol. i., § 52, says that all *collateral facts* should be excluded, "or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them, and moreover the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it;" and in a note, p. 79, further remarks, "A further reason may be, that the evidence, not being to a material point, cannot be the subject of an indictment for perjury." Citing *Odiorne v. Winkley*, 2 Gall. 51-53.

The fact that a person habitually loans money at usurious interest is not relevant to the question whether there was usury in the particular loan on trial. *Jackson v. Smith*, 7 Cow. (N. Y.) 717. And the fact that A. has drawn several notes in a certain form is irrelevant to the question whether the notes in controversy were drawn in that way. *Iron Mountain Bank v. Murdock*, 62 Mo. 70. So also, a ferry company, sued for the loss of animals which fell off the ferry-boat and were drowned, is not allowed to show that such boat had been used for a long time previously and no accident had occurred. *Lewis v. Smith*, 107 Mass. 334. And where an officer is sued for misconduct, it is not allowable for him to show that other officers were accustomed to act in the same way. *Cutter v. Howe*, 122 Mass. 541.

Upon the question whether a certain person has a right to travel on a railroad ticket after the time limited therein for its use, without the payment of fare, the fact that he has at other times purchased similar tickets and used them after the time specified, without being required to pay fare, is irrelevant. *Hill v. Syracuse, etc., R. Co.*, 63 N. Y. 101.

Where the action was for the deterioration of plaintiff's land caused by the escape of noxious substances from the defendant's factory, which were carried by water to the plaintiff's land, it was held that evidence offered by the plaintiff to show the bad condition of similarly situated meadows upon the same stream, and in the vicinity of defendant's works, was properly rejected, on the ground that this would result in the multiplication of issues. *Lincoln v. Taunton Copper Manuf. Co.*, 9 Allen (Mass.), 181.

Where the question between landlord

and tenant was, whether the rent was payable quarterly, or half-yearly, evidence of the mode in which other tenants of the same landlord paid their rent was held inadmissible. *Carter v. Pryke*, Peake's Cas. 95. And where, in covenant, the issue was whether the defendant, who is a tenant of the plaintiff, has committed waste, evidence of bad husbandry, not amounting to waste, should be rejected. *Greenl. Ev.* (14th ed.) § 52; *Harris v. Mantle*, 3 T. R. 307. See also *Balcetti v. Serani*, Peake's Cas. 142; *Furneaux v. Hutchins*, Cowp. 807; *Doe v. Sisson*, 12 East. 62; *Holcombe v. Hewson*, 2 Campb. 291; *Viney v. Brass*, 1 Esp. 292; *Clothier v. Chapman*, 14 East, 331. So where the issue was, whether the tenant had permitted the premises to be out of repair, evidence of *voluntary* waste was held irrelevant. *Edge v. Pemberton*, 12 M. & W. 187.

Upon the question whether the defendant having killed a person at night, knew him to be an officer of the law, the fact that there was a lighted street-lamp near by is relevant as tending to show that A. could see the official uniform. But to prove the amount of light cast by the lamp on this night, evidence showing the amount of light cast by the same lamp on a night four months afterwards is irrelevant (the conditions not being shown to be the same). *Yates v. People*, 32 N. Y. 509.

Evidence of how much hay an ordinary horse will eat in a week is incompetent on the question of how much hay was eaten in eight weeks and a half by a horse which was not in an ordinary condition. *Carlton v. Hescox*, 107 Mass. 410.

Limitations of the Rule.—In Best's *Principles of Evidence* (Cham v. Ed.), 488 n, it is said, "The rule hinted at in the phrase *res inter ALIAS acta* being in its nature *exclusionary*, it may be assumed that the evidence it was designed to exclude is both logically and legally relevant. The grounds of the rule are therefore entirely practical; viz., (1) to prevent multiplicity of collateral issues, confusing the jury and acting as a surprise upon the parties; (2) to provide that a man shall not be convicted of one crime by evidence that he has committed another." *Hubbard v. R. R. Co.*, 39 Me. 506. This being the case, there may be said to exist in the United States, a strong tendency to limit the rule in civil causes. This relaxation appears most commonly in the numerous cases where the necessary proof of liability consists in strengthening a *possible* into a *probable* cause by elimination of all complicating circumstances; in other words, by establishing the desired relation of cause and effect through the inductive process of tracing the same effect through a variety of instances where the cause for which

legal liability is claimed is the only constant force."

Thus, where in an action for the price of a loom-attachment, sold under an agreement that it should work successfully, the evidence was conflicting on the point whether it did so work; and the plaintiff was permitted, against the defendant's objection, after introducing evidence that the defendant's loom and another loom were substantially alike in their mechanical arrangements, though differing somewhat in details, to put in evidence that the attachment had worked successfully on the latter loom; but the evidence as to the similarity of the two looms was conflicting. *Held*, that the evidence objected to was rightly admitted; and that the question of the similarity of the two looms was properly submitted to the jury. *Brierly v. Mills*, 128 Mass. 291.

Injuries on Highways.—And where, in an action for injuries received on a highway, evidence is offered as to state of the highway at a short distance from the place of the accident, before or after the accident, if within such a time as renders it probable, under the circumstances, that no change has taken place, it is admissible. *Todd v. Rowley*, 8 Allen (Mass.), 51; *Bailey v. Trumbull*, 31 Conn. 581; *Walker v. Westfield*, 39 Vt. 256; *Sherman v. Kartright*, 52 Barb. (N. Y.) 67; *Cook v. New Durham*, 20 Am. and Eng. Corp. Cas. 384; *Kent v. Town of Lincoln*, 32 Vt. 591. So in an action to recover damages for injuries received from a fall on a defective sidewalk, the fact that other persons fell upon the same walk, while its condition remained the same as when the plaintiff fell, is relevant to show that it was unsafe for use at the time of his fall. *District of Columbia v. Armes*, 107 U. S. 519; *Quinlan v. Utica*, 74 N. Y. 603; *Chicago v. Powers*, 42 Ill. 169; *Aurora v. Brown*, 12 Bradw. (Ill. App.) 122; *Calkins v. Hartford*, 33 Conn. 57; *Kent v. Lincoln*, 52 Vt. 591. Compare *State v. Railroad Co.*, 52 N. H. 528; *Phillips v. Town of Willow*, 70 Wis. 389; *Bloor v. Town of Delafield*, 69 Wis. 273; *Collins v. Dorchester*, 6 Cush. 396; *Parker v. Publishing Co.*, 69 Me. 173; *Hudson v. Railway*, 59 Iowa, 581.

Upon the question whether a fire was caused by sparks and coals from a locomotive of a railroad company, the fact that passing locomotives of similar construction have on other occasions caused fires at or near the place in question by scattering sparks and coal, is deemed to be relevant; so also is the fact that they have thus repeatedly scattered sparks and coals, though no actual fires were thereby caused, since such a cause may have occasioned fire in one instance and not in others. See "Fires caused by the Operation of Railways."

It being in dispute whether a horse was or was not frightened at a certain pile of lumber, evidence that other horses were frightened by the same pile, under a variety of circumstances, is admissible. *Darling v. Westmoreland*, 52 N. H. 401; *Crocker v. McGregor*, 76 Me. 282; *Gordon v. Boston, etc., R. Co.*, 58 N. H. 396; *House v. Metcalf*, 27 Conn. 631. And in an action by a passenger to recover damages for personal injuries, occasioned by a run off, evidence that the train on which the accident occurred, and of which witness was conductor, had run off the track seven or eight times within a month before the accident, is admissible. *Mobile, etc., R. Co. v. Ashcroft*, 48 Ala. 15.

Upon the question whether a fire, causing the destruction of a certain building by night, was of incendiary origin, the fact that an attempt was made on the same night to set fire to a neighboring building, by the use of similar means, is relevant. *Fawcett v. Nicolls*, 64 N. Y. 377.

The value of any property may generally be proved by the value of similar property under similar conditions, the relevancy of the evidence for such purpose being always a question for the court! *Greenl. Ev.* (14th ed.) 78 n.; *Paine v. Boston, etc., R. Co.*, 168; *Benham v. Dunbar*, 103 Mass. 365; *Isbell v. New York, etc., R. Co.*, 25 Conn. 556; *Chandler v. Jamaica*, 122 Mass. 305; *Carlton v. Hescox*, 107 Mass. 410; *Atchison, etc., R. Co. v. Harper*, 19 Kans. 529; *Cross v. Wilkins*, 43 N. H. 332; *Melvin v. Bullard*, 35 Vt. 268. But it has been held in New York that in determining the value of a certain vessel, evidence to prove the value of other vessels with which she might be compared, is irrelevant. *Blanchard v. Steamboat Co.*, 59 N. Y. 292. And in *Kelliher v. Miller*, 97 Mass. 71, it was *held*, that on the trial of a complaint for flowing land, evidence is inadmissible, upon the question of damages, of what amount the respondent paid less than three years before to a witness, as damages for flowing his land situated on the other side of the brook, opposite the complainant's land, and on about the same level. The court said, "The circumstances in the other case may have been very dissimilar, and the amount of damages paid to the other land-owner may have been greater or less than adequate compensation to him. . . . And in the opinion of the court it does not fall within the analogy of those cases which permit the value of adjacent and similarly situated parcels of land, as indicated by the prices for which they have been sold, to be shown where the question on trial is the value of the estate." See also *Tyler v. Mather*, 9 Gray (Mass.), 183.

b. Acts showing Intention, Knowledge, Good Faith, etc. (Art. 11).—When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner.¹

1. Illustrations to Art. 11.—(a) A. is charged with receiving two pieces of silk from B., knowing them to have been stolen by him from C.

The facts that A. received from B. many other articles stolen by him from C. in the course of several months, and that A. pledged all of them, are deemed to be relevant to the fact that A. knew that the two pieces of silk were stolen by B. from C. *Dunn's Case*, 1 Moo. C. C. 146. See "Receiving Stolen Goods."

(b) A. is charged with uttering, on the 12th December, 1854, a counterfeit crown piece, knowing it to be counterfeit.

The facts that A. uttered another counterfeit crown piece on the 11th December, 1854, and a counterfeit shilling on the 4th January, 1855, are deemed to be relevant to show A.'s knowledge that the crown piece uttered on the 12th was counterfeit. *R. v. Forster*, Dear. 456. See "Counterfeiting."

(c) A. is charged with attempting to obtain money by false pretences, by trying to pledge to B. a worthless ring as a diamond ring.

The facts that two days before, A. tried, on two separate occasions, to obtain money from C. and D. respectively, by a similar assertion as to the same or a similar ring, and that on another occasion on the same day he obtained a sum of money from E. by pledging as a gold chain a chain which was only gilt, are deemed to be relevant as showing his knowledge of the quality of the ring. *R. v. Francis*, L. R. 2 C. C. R. 128. The case of *R. v. Cooper*, L. R. 12 B. D. (C. C. R.) 19, is similar to *R. v. Francis*, and perhaps stronger. See "False Pretences."

(d) A. is charged with obtaining money from B. by falsely pretending that Z. had authorized him to do so.

The fact that on a different occasion A. obtained money from C. by a similar false pretence is deemed to be irrelevant (*R. v. Holt*, Bell C. C., 280; and see *R. v. Francis*, *supra*), as A.'s knowledge that he had no authority from Z. on the second occasion

had no connection with his knowledge that he had no authority from Z. on the first occasion.

(e) A. sues B. for damage done by a dog of B.'s, which B. knew to be ferocious.

The facts that the dog had previously bitten X., Y., and Z., and that they had made complaints to B., are deemed to be relevant. See cases collected in Roscoe's "*Nisi Prius*," 739. See "*Animals. 6. Injuries by Dogs*."

(f) The question is, whether A., the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A. had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person, is deemed to be relevant, as showing that A. knew that the payee was a fictitious person. *Gibson v. Hunter*, 2 H. Bl. 288.

(g) A. sues B. for a malicious libel. Defamatory statements made by B. regarding A. for ten years before those in respect of which the action is brought are deemed to be relevant to show malice. *Barrett v. Long*, 3 H. L. C. 395, 414. See "Libel."

(h) A. is sued by B. for fraudulently representing to B. that C. was solvent, whereby B. being induced to trust C., who was insolvent, suffered loss.

The fact that at the time when A. represented C. to be solvent C. was, to A.'s knowledge, supposed to be solvent by his neighbors, and by persons dealing with him, is deemed to be relevant as showing that A. made the representation in good faith. *Sheen v. Bumpstead*, 2 H. & C. 193. See "Fraud."

(i) A. is accused of stealing property which he had found, and the question is whether he meant to steal it when he took possession of it.

The fact that public notice of the loss of the property had been given in the place where A. was, and in such a manner that A. knew, or might have known, of it, is deemed to be relevant, as showing that A. did not, when he took possession of it, in good faith believe that the real owner of

c. Facts showing System (Art. 12). — When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant.¹

the property could not be found. (This illustration is adopted from Preston's Case, 2 Den. C. C. 353; but the misdirection given in that case is set right. As to the relevancy of the fact, see in particular Lord Campbell's remark on p. 359.) See "Larceny."

(*k*) The question is, whether A. is entitled to damages from B., the seducer of A.'s wife.

The fact that A.'s wife wrote affectionate letters to A. before the adultery was committed, is deemed to be relevant, as showing the terms on which they lived and the damage which A. sustained. *Trelawney v. Coleman*, 1 B. & A. 90. See "Seduction."

(*l*) The question is, whether A.'s death was caused by poison.

Statements made by A. before his illness as to his state of health, and during his illness as to his symptoms, are deemed to be relevant facts. *R. v. Palmer*. See "Res Gestæ."

(*m*) The question is, what was the state of A.'s health at the time when an insurance on her life was effected by B.

Statements made by A. as to the state of her health at or near the time in question are deemed to be relevant facts. *Aveson v. Lord Kinnaird*, 6 Ea. 188. See "Res Gestæ."

(*n*) The question is, whether A., the captain of a ship, knew that a port was blockaded.

The fact that the blockade was notified in the "Gazette" is deemed to be relevant. *Harratt v. Wise*, 9 B. & C. 712; *Stephen's Dig. Ev.*, art. 11.

Other Illustrations. — In *McKenney v. Dingley*, 4 Greenl. (Me.) 172, the action was replevin for a horse claimed by the plaintiff to have been purchased of him by one Reed by false pretences, July 12, 1824, and claimed by the defendant to have been fairly purchased by him of Reed. It was held competent for the plaintiff to prove, as tending to prove a fraudulent intention, that Reed, on the ninth and tenth, and on one or two other days in July, and also on the nineteenth day of August, had made similar false representations to other persons, from whom he had succeeded in obtaining goods to a large amount.

In *Cary v. Hotailing*, 1 Hill (N. Y.), 311, the action was replevin to recover property claimed to have been obtained of the plaintiffs by the defendants by means of false representations as to their solvency and credit; and it was held that where the

question is whether a vendee of goods procured the sale of them through fraud, distinct purchases made by him of others, under similar circumstances, at or about the same time, and when the like motive as the one imputed may reasonably be supposed to have operated, are admissible in evidence against him, with a view to the *quo animo*. In *Hall v. Naylor*, 18 N. Y. 588, there was a similar action, and Comstock, J., said: "On the trial of such an issue, the *quo animo* of the transaction is the fact to be arrived at; and it is, therefore, competent to show that the party accused was engaged in other similar frauds at or about the same time. The transactions must be so connected in point of time, and so similar in their other relations, that the same motive may reasonably be imputed to them all."

In *Allison v. Matthieu*, 3 Johns. (N. Y.) 234, an action for trover for goods fraudulently purchased of the plaintiff Oct. 1, 1804, the plaintiff was permitted to show purchases of goods of two other persons, by similar representations, on the fifth day of November, 1804.

In a prosecution for assault and battery, evidence of assaults and threats by the prisoner against the prosecutor, on the same evening, and prior to the assault for which the prisoner is indicted, is admissible, in behalf of the State, to show with what intent the last assault was made. *Ross v. State*, 62 Ala. 224. Such evidence is competent, although it develops other offences. *Street v. State*, 7 Tex. App. 5.

If it be shown that a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at about the same time, and in relation to a like subject, was actuated by the same spirit. *Butler v. Watkins*, 13 Wall. (U. S.) 456.

But in *State v. Lapage*, 57 N. H. 245, it was held that the prosecution cannot show bad character by proving particular acts, nor by offering evidence of a tendency or disposition in the accused to commit offences of the class for which he is on trial. And see *State v. Hare*, 74 N. Car. 591. See also "Criminal Procedure. XV. Evidence."

1. Illustrations to Art. 12. — (*a*) A. is accused of setting fire to his house in order to obtain money for which it is insured.

The facts that A. had previously lived in two other houses successively, each of which he insured, in each of which a fire occurred, and that after each of those fires

d. Existence of Course of Business, when deemed to be Relevant (Art. 13). — When there is a question whether a particular act was done, the existence of any course of office or business according to which it naturally would have been done is a relevant fact.

When there is a question whether a particular person held a particular public office, the fact that he acted in that office is deemed to be relevant. (See OFFICERS OF MUNICIPALITIES.)

A. received payment from a different insurance office, are deemed to be relevant, as tending to show that the fires were not accidental. *R. v. Gray*, 4 F. & F. 1102.

(b) A. is employed to pay the wages of B.'s laborers, and it is A.'s duty to make entries in a book showing the amounts paid by him. He makes an entry showing that on a particular occasion he paid more than he really did pay.

The question is, whether this false entry was accidental or intentional.

The fact that for a period of two years A. made other similar false entries in the same book, the false entry being in each case in favor of A., is deemed to be relevant. *R. v. Richardson*, 2 F. & F. 343.

(c) The question is, whether the administration of poison to A., by Z., his wife, in September, 1848, was accidental or intentional.

The facts that B., C., and D. (A.'s three sons), had the same poison administered to them in December, 1848, March, 1849, and April, 1849, and that the meals of all four were prepared by Z., are deemed to be relevant, though Z. was indicted separately for murdering A., B., and C., and attempting to murder D. *R. v. Geering*, 18 L. D. M. C. 215; cf. *R. v. Garner*, 3 F. & F. 681.

(d) A. promises to lend money to B. on the security of a policy of insurance which B. agrees to effect in an insurance company of his choosing. B. pays the first premium to the company, but A. refuses to lend the money except upon terms which he intends B. to reject, and which B. rejects accordingly.

The fact that A. and the insurance company have been engaged in similar transactions is deemed to be relevant to the question whether the receipt of the money by the company was fraudulent. *Blake v. Albion Life Assurance Society*, L. R. 4 C. P. D. 94.

Facts showing System or Habit may be proved concerning the admissibility of this class of evidence in criminal cases. See "Criminal Procedure. XV. Evidence."

The fact that a person was in the habit of loaning money without taking notes is relevant in an action to recover a sum so loaned. *Stolp v. Blair*, 68 Ill. 541. And on the question whether the delivery by a father of a slave to his daughter, at the time of her marriage, was a gift, the fact

that he had given a slave to several other of his daughters at their respective marriages is relevant. *Smith v. Montgomery*, 5 Mon. (Ky.) 502. So the fact that the defendant usually procured and paid for the board of the workmen in his employ at other boarding-houses, is relevant on the question of his indebtedness for the board of those boarding with the plaintiff. *Dwight v. Brown*, 9 Conn. 83. The fact that most of the items in an account are shown by the vouchers to be overcharges, is relevant on the question whether the other items are overcharged. *Bush v. Guion*, 6 La. Ann. 798. Complicity in fraud with joint defendants against whom there is direct evidence is provable by showing that all the defendants have been engaged together in similar transactions, and that the act was done under a general agency for the particular defendant, who had previously proposed to participate with the others in a series of frauds of the same character. *Dayton v. Monroe*, 47 Mich. 193.

The vicious habit of a horse for shying may be shown by proving cases of like misbehavior, both before and after the act in question. *Maggi v. Cutts*, 123 Mass. 535; *Chamberlain v. Enfield*, 43 N. H. 356. And in an action against a town for injuries occasioned by an alleged defect in a highway, the evidence was conflicting on the question of the speed at which the plaintiff was driving his horse at the time. *Held*, that the defendant was entitled to put in evidence that the horse, both before and after the accident, had been driven at a certain rate of speed on a race-course as tending to show the capacity of the horse for speed, and as bearing upon the probability of the testimony as to his speed at the time of the accident. *Whitney v. Leominster*, 136 Mass. 25.

But evidence of a habit of a maker of a note to gamble when drunk, is not admissible to show that a promissory note made by him was given for money lost at play. *Thompson v. Bowie*, 4 Wall. (U. S.) 463. And in an action where the defence is usury, evidence that the plaintiff had loaned money at other times, prior to the transaction in question, at usurious rates of interest, is inadmissible. *Ross v. Ackerman*, 46 N. Y. 210.

When the question is whether one person acted as agent for another on a particular occasion, the fact that he so acted on other occasions is deemed to be relevant.¹ (See AGENCY.)

1. To prove what is Negligence. — Although evidence of custom is not admissible to excuse negligence, it is admissible to prove what is negligence in certain cases. *Maxwell v. Eason*, 1 Stewt. (N. J.) 514; *Barber v. Brace*, 3 Conn. 9; *Stimson v. Jackson*, 58 N. H. 138. In *Deering on Negligence*, § 9, it is said, "This rule is particularly invoked in favor of common carriers with respect to the storage and the carriage of freight. One writer boldly says, that, in an action against a carrier for negligence in the method of storing or carrying freight, proof of a custom or usage in that respect conforming with the method adopted by the carrier is inadmissible to repel any charge of negligence or mismanagement in the absence of an express contract as to the mode of carriage; and in such cases where the contract is silent in that respect, a custom or commercial usage, sufficiently ancient and general as to warrant such a presumption, enters into and forms a part of the contract, and both parties are bound by it. *Clarke's Brown on Usages and Customs*, § 107. The distinction is, if the act of stowage is negligent, proof of custom will not excuse it; but proof of such custom is evidence of due care, and the force of such evidence is not to be overcome but by clear proof that the loading was improper and unsafe." *Stephens, etc., Transp. Co. v. Tuckerman*, 33 N. J. L. 543; *Cass v. Boston, etc., R. Co.*, 14 Allen (Mass.), 448; *Holly v. Boston Gas Co.*, 8 Gray (Mass.), 123; *Fuller v. Naugatuck R. Co.*, 21 Conn. 559.

On the trial of the issue whether a drover for hire was liable on the ground of negligence for the loss of cattle from his drove, *held*, that evidence was admissible of the usual practice of drovers under like circumstances, but not of drovers for hire alone, as distinguished from and to the exclusion of owners driving their own cattle. *Maynard v. Buck*, 100 Mass. 40.

Where the issue is negligence in the care of and manner of guarding a railroad turntable, for the purpose of preventing children of tender years having access to it, being injured, it is competent to prove that the fastenings to it were similar in character to those in general use on such turntables. *Kalsti v. Minneapolis, etc., R. Co.*, 32 Minn. 133.

But in *Illinois* it is *held* that in an action by an administratrix to recover for causing the death of her intestate by negligence while engaged in coupling cars, evidence of the usual mode of coupling and uncoupling cars at the same place by others

is inadmissible. What others did, or were in the habit of doing, does not tend to prove the issue as to due care by the deceased. *Chicago, etc., R. Co. v. Clark*, 108 Ill. 113. And in *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, it was *held*, that testimony offered by a railroad company to show that the usual practice of railroad companies in a certain section of the country was not to employ a watchman for bridges, is inadmissible.

See article "Negligence."

Illustrations to Art. 13. — (a) The question is, whether a letter was sent on a given day. The postmark upon it is deemed to be a relevant fact. *R. v. Canning*, 19 S. T. 370.

(b) The question is, whether a particular letter was despatched.

The facts that all letters put in a certain place were, in the common course of business, carried to the post, and that that particular letter was put in that place, are deemed to be relevant. *Hetherington v. Kemp*, 4 Camp. 193; and see *Skelbeck v. Garbett*, 72 B. 846; and *Trotter v. McLean*, L. R. 13 Ch. D. 574.

(c) The question is, whether a particular letter reached A.

The facts that it was posted in due course, properly addressed, and was not returned through the Dead Letter Office, are deemed to be relevant. *Warren v. Warren*, 1 C. M. & R. 250; *Woodcock v. Houldsworth*, 16 M. & W. 124. Many cases on this subject are collected in *Roscoe's Nisi Prius*, pp. 734, 735.

(d) The facts stated in illustration (d) to the last article are deemed to be relevant to the question whether A. was agent to the company. *Blake v. Albion Life Assurance Society*, L. R. 4 C. P. D. 94.

Existence of Course of Office or Business.

— **When Evidence of it is Admissible.** — As to postmarks, letters, etc., see "Letters in Evidence."

The defendant having sued out of the superior court a writ of *audita querela* to annul an execution, applied for a *superseas* of the execution by a petition bearing a certificate of the clerk that it was sworn to before him. At the trial of the defendant for perjury for swearing to this petition, the clerk testified that it was sworn to before him, but whether in his office or in court he did not remember; that there was no order of the court, general or special, to administer the oath, but that it was the general practice in such cases. A rule of the superior court required all motions grounded on facts to

4. *Hearsay Evidence.*—*a. Hearsay and Contents of Documents generally irrelevant* (Art. 14).—(a) The fact that a statement was made by a person not called as a witness, and (b) the fact that a statement is contained or recorded in any book, document, or record whatever, proof of which is not admissible on other grounds, are respectively deemed to be irrelevant to the truth of the matter stated, except (as regards (a)) in the cases contained in the first section of this chapter;¹ (Arts. 15–32) and except (as regards (b)) in the cases contained in the second section of this chapter (Arts. 33–47).² (See HEARSAY EVIDENCE.)

b. Hearsay, when relevant.—(1) *Admissions defined* (Art. 15).—An admission is a statement, oral or written, suggesting any inference as to any fact in issue, or relevant, or deemed to be relevant, to any such fact, made by or on behalf of any party to any

be verified by affidavit. *Held*, that there was sufficient evidence that the defendant was lawfully required by the superior court to swear to the petition, and that he did swear thereto before the court. *Commonwealth v. Kimball*, 108 Mass. 473.

Upon the question whether a railroad company's cars obstructed a highway, evidence of the manner in which the cars were usually operated at that point is admissible. *Hall v. Brown*, 58 N. H. 93.

In a suit brought by the president, directors, and company of the Bank of the United States upon a bond given to the bank to secure the faithful performance of the official duties of one of its cashiers, evidence of the execution of the bond, and its approval by the board of directors (according to the rules and regulations contained in the charter of the bank) is admissible, notwithstanding there was no record of such approval. *Bank of U. S. v. Dandridge*, 12 Wheat. 64.

The G. M. Life Insurance Company loaned certain moneys, for which it received the individual notes of T., defendant's cashier; the checks for the amount loaned were made payable to the order of T., and the entries of the loans in the books of said company were as made to T. *Held*, that, for the purpose of rebutting any presumption arising from the form of the entries in the books of the company, it was competent to show similar entries in said books of a former loan made to defendant. *Pierson v. Atlantic Nat'l. Bank*, 77 N. Y. 304.

1. It is important to observe the distinction between the principles which regulate the admissibility of the statements contained in a document, and those which regulate the manner in which they must be proved. On this subject see the whole of Part. II. (arts. 58–92).

2. *Illustrations to Art. 14.*—(a) A dec-

laration by a deceased attesting witness to a deed, that he had forged it, is deemed to be irrelevant to the question of its validity. *Stobart v. Dryden*, 1 M. & W. 615.

(b) The question is, whether A. was born at a certain time and place. The fact that a public body, for a public purpose, stated that he was born at that time and place, is deemed to be irrelevant, the circumstances not being such as to bring the case within the provisions of article 34. *Sturla v. Freccia*, L. R. 5 App. Cas. 623.

Note by Justice Stephen to Art. 14.—The unsatisfactory character of the definitions usually given of hearsay is well known. See Best, sect. 495; T. E. sects. 507–510. The definition given by Mr. Phillips sufficiently exemplifies it: "When a witness, in the course of stating what has come under the cognizance of his own senses concerning a matter in dispute, states the language of others which he has heard, or produces papers which he identifies as being written by particular individuals, he offers what is called hearsay evidence. This matter may sometimes be the very matter in dispute," etc. (1 Ph. Ev. 143). If this definition is correct, the maxim, "Hearsay is no evidence," can only be saved from the charge of falsehood by exceptions which make nonsense of it. By attaching to it the meaning given in the text, it becomes both intelligible and true. There is no real difference between the fact that a man was heard to say this or that, and any other fact. Words spoken may convey a threat, supply the motive for a crime, constitute a contract, amount to slander, etc.; and if relevant or in issue, on these or other grounds, they must be proved, like other facts, by the oath of some one who heard them. The important point to remember about them is that bare assertion must not, generally speaking, be regarded as relevant to the truth of the matter asserted.

proceeding. Every admission is (subject to the rules hereinafter stated) deemed to be a relevant fact as against the person by or on whose behalf it is made, but not in his favor unless it is, or is deemed to be, relevant for some other reason.¹

(2) *Who may make Admissions on Behalf of Others, and when* (Art. 16). — Admissions may be made on behalf of the real party to any proceeding, by any nominal party to that proceeding; by any person who, though not a party to the proceeding, has a substantial interest in the event; by any one who is privy in law, in blood, or in estate, to any party to the proceeding on behalf of that party.

A statement made by a party to a proceeding may be an admission whenever it is made, unless it is made by a person suing or sued in a representative character only, in which case (it seems) it must be made whilst the person making it sustains that character.

A statement made by a person interested in a proceeding, or by a privy to any party thereto, is not an admission, unless it is made during the continuance of the interest which entitles him to make it.² (See *Admissions*, under title HEARSAY EVIDENCE.)

(3) *Admissions by Agents, and Persons jointly interested with Parties* (Art. 17). — Admissions may be made by agents authorized to make them, either expressly, or by the conduct of their principals; but a statement made by an agent is not an admission merely because if made by the principal himself it would have been one.³

Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to the partnership transactions or joint contracts.⁴

Barristers and solicitors are the agents of their clients for the purpose of making admissions whilst engaged in the actual management of the cause, either in court, or in correspondence

1. See *Admissions* under title "Hearsay Evidence." Concerning admissions in criminal cases, see "Confessions;" for admissions by pleading, see "Estoppel."

Note by Justice Stephen to Art. 15. — This definition is intended to exclude admissions by pleading, admissions which, if so pleaded, amount to estoppels, and admissions made for the purposes of a cause by the parties or their solicitors. These subjects are usually treated of by writers on evidence; but they appear to me to belong to other departments of the law. Appendix, note ix.

2. *Illustrations to Art. 16.* — (a) The assignee of a bond sues the obligor in the name of the obligee.

An admission on the part of the obligee that the money due has been paid, is deemed to be relevant on behalf of the defendant. See *Moriarty v. L. C. & D. Co.*, L. R. 5 Q. B. 320.

(b) An admission by the assignee of the bond in the last illustration would also be deemed to be relevant on behalf of the defendant.

(c) A statement made by a person before he becomes the assignee of a bankrupt is not deemed to be relevant as an admission by him in a proceeding by him as such assignee. *Fenwick v. Thornton*, M. & M. 51 (by Lord Tenterden). In *Smith v. Morgan*, 2 M. & R. 257, Tindal, C. J., decided exactly the reverse.

(d) Statements made by a person as to a bill of which he had been the holder are deemed not to be relevant as against the holder, if they are made after he has negotiated the bill. *Pocock v. Billing*, 2 Bing. 269.

3. See "Agency," vol. i. p. 410.

4. See "Partnership."

relating thereto; but statements made by a barrister or solicitor on other occasions are not admissions merely because they would be admissions if made by the client himself.¹

The fact that two persons have a common interest in the same subject-matter does not entitle them to make admissions respecting it as against each other.²

In cases in which actions founded on a simple contract have been barred by the Statute of Limitations, no joint contractor, or his personal representative, loses the benefit of such statute by reason only of any written acknowledgment or promise made or signed by (or by the agent duly authorized to make such acknowledgment or promise of) any other or others of them (or by reason only of payment of any principal, interest, or other money, by any other or others of them).³

A principal, as such, is not the agent of his surety for the purpose of making admissions as to matters for which the surety gives security.⁴

1. See "Attorney and Client," vol. i.

2. See *Admissions*, under title "Hearsay Evidence."

3. 9 Geo. IV. c. 14, sect. 1. The first set of words in parenthesis was added by 19 and 20 Vict. c. 97, sect. 13; the second set by sect. 14 of the same act. The language is slightly altered. See "Hearsay Evidence."

4. See "Principal and Surety."

Illustrations to Art. 17. — (a) The question is, whether a parcel, for the loss of which a railway company is sued, was stolen by one of their servants. Statements made by the station-master to a police-officer, suggesting that the parcel had been stolen by a porter, are deemed to be relevant, as against the railway, as admissions by an agent. *Kirkstall Brewery v. Furness Railway*, L. R. 9 Q. B. 468.

(b) A. allows his wife to carry on the business of his shop in his absence. A statement by her that he owes money for goods supplied to the shop is deemed to be relevant against him as an admission by an agent. *Clifford v. Burton*, 1 Bing. 199.

(c) A. sends his servant B. to sell a horse. What B. says at the time of the sale, and as part of the contract of sale, is deemed to be a relevant fact as against A.; but what B. says upon the subject at some different time is not deemed to be relevant as against A. (though it might have been deemed to be relevant if said by A. himself). *Helyear v. Hawke*, 5 Esp. 72.

(d) The question is, whether a ship remained at a port for an unreasonable time. Letters from the plaintiff's agent to the plaintiff containing statements which would have been admissions if made by the plaintiff himself are deemed to be irrelevant as against him. *Langhorn v. Allunt*, 4 Tan. 511.

(e) A., B., and C. sue D. as partners upon an alleged contract respecting the shipment of bark. An admission by A. that the bark was his exclusive property, and not the property of the firm, is deemed to be relevant as against B. and C. *Lucas v. De La Cour*, 1 M. & S. 249.

(f) A., B., C., and D. make a joint and several promissory note. Either can make admissions about it as against the rest. *Whitcomb v. Whiting*, 1 S. L. C. 644.

(g) The question is, whether A. accepted a bill of exchange. A notice to produce the bill signed by A.'s solicitor, and describing the bill as having been accepted by A., is deemed to be a relevant fact. *Holt v. Squire*, Ry. & Mo. 282.

(h) The question is, whether a debt due to A., the plaintiff, was due from B., the defendant, or from C. A statement made by A.'s solicitor to B.'s solicitor in common conversation that the debt was due from C., is deemed not to be relevant against A. *Petch v. Lyon*, 9 Q. B. 147.

(i) One co-part owner of a ship cannot as such make admissions against another as to the part of the ship in which they have a common interest, even if he is co-partner with that other as to other parts of the ship. *Jaggers v. Binning*, 1 Star. 64.

(j) A. is surety for B., a clerk. B. being dismissed makes statements as to sums of money which he has received, and not accounted for. These statements are not deemed to be relevant as against A. as admissions. *Smith v. Whippingham*, 6 C. & P. 78. See also *Evans v. Beattie*, 5 Esp. 26; *Bacon v. Chesney*, 1 Star. 192; *Caermarthen, R. C. v. Manchester R. C.*, L. R. 8 C. P. 685.

(4) *Admissions by Strangers* (Art. 18). — Statements by strangers to a proceeding are not relevant as against the parties, except in the cases hereinafter mentioned.¹

In actions against sheriffs for not executing process against debtors, statements of the debtor admitting his debt to be due to the execution creditor are deemed to be relevant as against the sheriff.²

In actions by the trustees of bankrupts, an admission by the bankrupt of the petitioning creditor's debt is deemed to be relevant as against the defendant.³ (See HEARSAY EVIDENCE.)

(5) *Admission by Person referred to by Party* (Art. 19). — When a party to any proceeding expressly refers to any other person for information in reference to a matter in dispute, the statements of that other person may be admissions as against the person who refers to him.⁴

(6) *Admission made without Prejudice* (Art. 20). — No admission is deemed to be relevant in any civil action if it is made either upon an express condition that evidence of it is not to be given,⁵ or under circumstances from which the judge infers that the parties agreed together that evidence of it should not be given,⁶ or if it was made under duress.⁷ (See HEARSAY EVIDENCE.)

(7) *Confessions defined* (Art. 21). — A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only. (See CONFESSIONS, vol. 3, p. 439.)

(8) *Confessions caused by Inducement, Threat, or Promise, when irrelevant in Criminal Proceeding* (Art. 22). — No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat, or promise, proceeding from a person in authority, and having reference to the charge against the accused person, whether addressed to him directly, or brought to his knowledge indirectly.

And if (in the opinion of the judge) such inducement, threat, or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him.

A confession is not involuntary only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by inducement collateral to

1. *Coole v. Braham*, 3 Ex. 183. See *is, whether A. delivered goods to B. B. "Hearsay Evidence."* says, "if C" (the carman) "will say that

2. *Kempland v. Macaulay*, Peake, 95; he delivered the goods, I will pay for them." C.'s answer may as against B. be an admission. *Daniel v. Pitt*, 1 Camp. 366 n.

3. *Jarrett v. Leonard*, 2 M. & S. 265. 5. *Cory v. Bretton*, 4 C. & P. 462. 6. *Paddock v. Forester*, 3 M. & G. 918. 7. *Stockfeth v. Detastet*, per Ellenborough, C. J., 4 Camp. 11. See "Duress,"

4. See "Hearsay Evidence," *Admissions. Illustration to Art. 19.* — The question vol. 5.

the proceeding, or by inducements held out by a person not in authority.

The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority. The master of the prisoner is not as such a person in authority, if the crime of which the person making the confession is accused was not committed against him.

A confession is deemed to be voluntary if, in the opinion of the judge, it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise render it involuntary.

Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved.¹ (See CONFESSIONS, vol. 3, p. 449.)

(9) *Confessions made upon Oath* (Art. 23).—Evidence amounting

1. Judges are now less disposed than they formerly were to hold that the language used amounts to even an inducement. In *R. v. Baldry*, decided in 1852 (2 Den. C. C. 430), the constable told the prisoner that he need not say any thing to criminate himself, but that what he did say would be taken down and used as evidence against him. It was held that this was not an inducement, though there were earlier cases which treated it as such. In *R. v. Jarvis* (L. R. 1 C. C. R. 96) the following was held not to be an inducement: "I think it is right I should tell you that besides being in the presence of my brother and myself" (prisoner's master) "you are in the presence of two officers of the public, and I should advise you that to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue. Take care. We know more than you think we know. So you had better be good boys and tell the truth." *R. v. Reeve*, L. R. 1 C. C. R. 364.

Illustrations to Art. 22.—(a) The question is, whether A. murdered B.

A handbill issued by the Secretary of State, promising a reward and pardon to any accomplice who would confess, is brought to the knowledge of A., who, under the influence of the hope of pardon, makes a confession. This confession is not voluntary. *R. v. Boswell*, C. & Marsh, 584.

(b) A. being charged with the murder of B., the chaplain of the gaol reads the Commendation Service to A., and exhorts him upon religious grounds to confess his sins. A., in consequence, makes a confession. This confession is voluntary. *R. v. Gilham*, 1 Mo. C. C. 186. In this case the exhortation was that the accused man should confess "to God," but it seems

from parts of the case that he was urged also to confess to man "to repair any injury done to the laws of his country." According to the practice at that time, no reasons are given for the judgment. The principle seems to be, that a man is not likely to tell a falsehood in such cases, from religious motives. The case is sometimes cited as an authority for the proposition that a clergyman may be compelled to reveal confessions made to him professionally. It has nothing to do with the subject.

(c) The gaoler promises to allow A., who is accused of a crime, to see his wife, if he will tell where the property is. A. does so. This is a voluntary confession. *R. v. Lloyd*, 6 C. & P. 393.

(d) A. is accused of child-murder. Her mistress holds out an inducement to her to confess, and she makes a confession. This is a voluntary confession, because the mistress is not a person in authority. *R. v. Moore*, 2 Den. C. C. 522.

(e) A. is accused of the murder of B. C., a magistrate, tries to induce A. to confess by promising to try to get him a pardon if he does so. The Secretary of State informs C. that no pardon can be granted, and this is communicated to A. After that A. makes a statement. This is a voluntary confession. *R. v. Clewes*, 4 C. & P. 221.

(f) A., accused of burglary, makes a confession to a policeman under an inducement which prevents it from being voluntary. Part of it is that A. had thrown a lantern into a certain pond. The fact that he said so, and that the lantern was found in the pond in consequence, may be proved. *R. v. Gould*, 9 C. & P. 364. This is not consistent so far as the proof of the words goes with *R. v. Warwickshall*, 1 Leach. 263.

to a confession may be used as such against the person who gives it, although it was given upon oath, and although the proceeding in which it was given had reference to the same subject-matter as the proceeding in which it is to be proved, and although the witness might have refused to answer the questions put to him; but if, after refusing to answer any such question, the witness is improperly compelled to answer it, his answer is not a voluntary confession.¹

(10) *Confession made under Promise of Secrecy (Art. 24).* — If a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it,² or when he was drunk,³ or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.⁴

(11) *Statements by Deceased Persons, when deemed to be Relevant (Art. 25).* — Statements written or verbal of facts in issue, or relevant, or deemed to be relevant, to the issue, are deemed to be relevant if the person who made the statement is dead, in the cases and on the conditions specified in Arts. 26–31, both inclusive. In each of those articles the word “declaration” means such a statement as is herein mentioned, and the word “declarant” means a dead person by whom such a statement was made in his lifetime. (See DECLARATIONS IN EVIDENCE, vol. 5, p. 361.)

(12) *Dying Declarations as to Cause of Death (Art. 26).* — A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant only in trials for the murder or manslaughter of the declarant, and only when the declarant is shown, to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.

Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular.⁵ (See DYING DECLARATIONS.)

(13) *Declarations made in the Course of Business or Professional Duty (by Deceased Person) (Art. 27).* — A declaration is deemed to be relevant when it was made by the declarant in the ordinary

1. *R. v. Garbett*, 1 Den. C. C. 236. See “Confessions,” vol. 3, p. 488 *et seq.*

2. See “Confessions,” vol. 3, p. 481.

3. See “Confessions,” vol. 3, p. 442.

4. See “Confessions,” vol. 3, p. 484.

5. *Illustrations under Art. 26.* — (a) The question is, whether A. has murdered B.

B. makes a statement to the effect that A. murdered him.

B. at the time of making the statement

has no hope of recovery, though his doctor had such hopes, and B. lives ten days after making the statement. The statement is deemed to be relevant. *R. v. Mosley*, 1 Mo. 97.

B., at the time of making the statement (which is written down), says something, which is taken down, thus: “I make the above statement with the fear of death before me, and with no hope of recovery.”

course of business, and in the discharge of professional duty,¹ at or near the time when the matter stated occurred, and of his own knowledge.

Such declarations are deemed to be irrelevant except so far as they relate to the matter which the declarant stated in the ordinary course of his business or duty. (See DECLARATIONS IN EVIDENCE, vol. 5, p. 361.)

(14) *Declarations against Interest (by Deceased Person)* (Art. 28). — A declaration is deemed to be relevant if the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest. The whole of any such declaration, and of any other statement referred to in it, is deemed to be relevant, although matters may be stated which were not against the pecuniary or proprietary interest of the declarant; but statements not referred to in, or necessary to explain, such declarations, are not deemed to be relevant merely because they were made at the same time, or recorded in the same place.

B., on the statement being read over, corrects this to "with no hope at present of my recovery." B. dies thirteen hours afterwards. The statement is deemed to be irrelevant. *R. v. Jenkins*, L. R. 1 C. C. R. 187.

(b) The question is, whether A. administered drugs to a woman with intent to procure abortion. The woman makes a statement which would have been admissible had A. been on his trial for murder. The statement is deemed to be irrelevant. *R. v. Hind*, Bell, 253; following *R. v. Hutchinson*, 2 B. & C. 608, n., quoted in note to *R. v. Mead*.

(c) The question is, whether A. murdered B. A dying declaration by C. that he (C.) murdered B. is deemed to be irrelevant. *Gray's Case*, Ir. Cir. Rep. 76.

(d) The question is, whether A. murdered B.

B. makes a statement before a magistrate on oath, and makes her mark to it, and the magistrate signs it, but not in the presence of A., so that her statement was not a deposition within the statute then in force. B., at the time when the statement was made, was in a dying state, and had no hope of recovery. The statement is deemed to be relevant. *R. v. Woodcock*, 1 East. P. C. 356. In this case, Eyre, C. B., is said to have left to the jury the question, whether the deceased was not in fact under the apprehension of death. 1 Leach, 504. The case was decided in 1789. It is now settled that the question is for the judge.

1. *Doe v. Turford*, 3 B. & Ad. 890.

Illustrations to Art. 27. — (a) The question is, whether A. delivered certain beer to B.

The fact that a deceased drayman of

A.'s, on the evening of the delivery, made an entry to that effect in a book kept for the purpose, in the ordinary course of business, is deemed to be relevant. *Price v. Torrington*, 1 S. L. C. 328, 7th ed.

(b) The question is, What were the contents of a letter not produced after notice?

A copy entered immediately after the letter was written, in a book kept for that purpose, by a deceased clerk, is deemed to be relevant. *Pritt v. Fairclough*, 3 Camp. 305.

(c) The question is, whether A. was arrested at Paddington or in South Molton Street.

A certificate annexed to the writ by a deceased sheriff's officer, and returned by him to the sheriff, is deemed to be relevant so far as it relates to the fact of the arrest; but irrelevant so far as it relates to the place where the arrest took place. *Chambers v. Bernasconi*, 1 C. M. & R. 347. See, too, *Smith v. Blakey*, L. R. 2 Q. B. 326.

(d) The course of business was for A., a workman in a coal-pit, to tell B., the foreman, what coals were sold, and for B. (who could not write) to get C. to make entries in a book accordingly.

The entries (A. and B. being dead) are deemed to be irrelevant, because B., for whom they were made, did not know them to be true.

(e) The question is, What is A.'s age? A statement made by the incumbent in a register of baptisms that he was baptized on a given day is deemed to be relevant. A statement in the same register that he was born on a given day is deemed to be irrelevant, because it was not the incumbent's duty to make it. *R. v. Clapham*, 4 C. & P. 29.

A declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part, and (it seems) though there may be no proof other than the statement itself either of such liability, or of its discharge in whole or in part.

A statement made by a declarant holding a limited interest in any property, and opposed to such interest, is deemed to be relevant only as against those who claim under him, and not as against the reversioner.

An indorsement or memorandum of a payment made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment was made, is not sufficient proof of such payment to take the case out of the operation of the Statute of Limitations; but any such declaration made in any other form by, or by the direction of, the person to whom the payment was made is, when such person is dead, sufficient proof for the purpose aforesaid.

Any indorsement or memorandum to the effect above mentioned made upon any bond or other specialty by a deceased person, is regarded as a declaration against the proprietary interest of the declarant for the purpose above mentioned, if it is shown to have been made at the time when it purports to have been made; but it is uncertain whether the date of such indorsement or memorandum may be presumed to be correct without independent evidence.

Statements of relevant facts opposed to any other than the pecuniary or proprietary interest of the declarant are not deemed to be relevant as such.¹ (See DECLARATIONS IN EVIDENCE, vol. 5, p. 361.)

1. Illustrations to Art. 28. — (a) The question is, whether a person was born on a particular day.

An entry in the book of a deceased man-midwife in these words is deemed to be relevant. *Higham v. Ridgway*, 2 Smith L. C. 318.

“W. Fowden, Junr.’s wife,
Filius circa hor. 3 post merid. natus H.

W. Fowden, Junr.,
Ap. 22, filius natus,
Wife, £1. 6s. 1d.,

Pd. 25 Oct. 1768.”

(b) The question is, whether a certain custom exists in a part of a parish.

The following entries in the parish books, signed by deceased church-wardens, are deemed to be relevant:—

“It is our ancient custom thus to proportion church-lay. The chapelry of Haworth pay one-fifth, etc.”

Followed by—

“Received of Haworth, who this year disputed this our ancient custom, but after we had sued him, paid it accordingly—£8, and £1 for costs.” *Stead v. Heaton*, 4 T. R. 669.

(c) The question is, whether a gate on certain land, the property of which is in dispute, was repaired by A.

An account by a deceased steward, in which he charges A. with the expense of repairing the gate, is deemed to be irrelevant, though it would have been deemed to be relevant if it had appeared that A. admitted the charge. *Doe v. Beviss*, 7 C. B. 456.

(d) The question is, whether A. received rent for certain land.

A deceased steward’s account, charging himself with the receipt of such rent for A., is deemed to be relevant, although the balance of the whole account is in favor of

(15) *Declarations by Testators as to Contents of Wills* (Art. 29). — The declarations of a deceased testator as to his testamentary intentions, and as to the contents of his will, are deemed to be relevant when his will has been lost, and when there is a question as to what were its contents; and when the question is whether an existing will is genuine, or was properly obtained; and when the question is whether any, and which of more existing documents than one, constitute his will.

In all these cases it is immaterial whether the declarations were made before or after the making or loss of the will.¹ (See DECLARATIONS IN EVIDENCE, vol. 5, p. 361.)

(16) *Declarations (by Deceased Persons) as to Public and General Rights* (Art. 30). — Declarations are deemed to be relevant (subject to the third condition mentioned in the next article) when they relate to the existence of any public or general right or custom or matter of public or general interest; but declarations as to particular facts from which the existence of any such public or general right or custom or matter of public or general interest may be inferred, are deemed to be irrelevant.

A right is public if it is common to all Her Majesty's subjects, and declarations as to public rights are relevant, whoever made them.

A right or custom is general if it is common to any considerable number of persons, as the inhabitants of a parish, or the tenants of a manor.

Declarations as to general rights are deemed to be relevant only when they were made by persons who are shown, to the satisfaction of the judge, or who appear from the circumstances of their statement, to have had competent means of knowledge.

Such declarations may be made in any form and manner.² (See DECLARATIONS IN EVIDENCE, vol. 5, p. 361.)

(17) *Declarations as to Pedigree* (Art. 31). — A declaration is

the steward. *Williams v. Graves*, 8 C. & P. 592.

(e) The question is, whether certain repairs were done at A.'s expense. A bill for doing them, receipted by a deceased partner, is deemed to be relevant, there being no other evidence either that the repairs were done or that the money was paid. *R. v. Heyford*, note to *Higham v. Ridgway*, 2 S. L. C. 333, 7th ed. *Contra Doe v. Vowles*, 1 Mo. & Ro. 261. In *Taylor v. Whithams*, L. R. 3 Ch. Div. 605, Jessel, M. R., followed *R. v. Heyford*, and dissented from *Doe v. Vowles*.

(f) The question is, whether A. (deceased) gained a settlement in the parish of B. by renting a tenement.

A statement made by A., whilst in possession of a house, that he had paid rent for it, is deemed to be relevant, because it reduces the interest which would otherwise

be inferred from the fact of A.'s possession. *R. v. Exeter*, L. R. 4 Q. B. 341.

(g) The question is, whether there is a right of common over a certain field.

A statement by A., a deceased tenant for a term of the land in question, that he had no such right, is deemed to be relevant as against his successors in the term, but not as against the owner of the field. *Papendick v. Bridgewater*, 5 E. & B. 166.

(h) The question is, whether A. was lawfully married to B.

A statement by a deceased clergyman, that he performed the marriage under circumstances which would have rendered him liable to a criminal prosecution, is not deemed to be relevant as a statement against interest. *Sussex Peerage Case*, 11 C. & F. 108.

1. *Sugden v. St. Leonards*, L. R. 1 P. D. (C. A.) 154.

deemed to be relevant (subject to the conditions hereinafter mentioned) if it relates to the existence of any relationship between persons, whether living or dead, or to the birth, marriage, or death of any person by which such relationship was constituted, or to the time or place at which any such fact occurred, or to any fact immediately connected with its occurrence.

Such declarations may express either the personal knowledge of the declarant, or information given to him by other persons qualified to be declarants, but not information collected by him from persons not qualified to be declarants. They may be made in any form, and in any document, or upon any thing in which statements as to relationship are commonly made.

The conditions above referred to are as follows : —

(1) Such declarations are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not to cases in which it is only relevant to the issue.

(2) They must be made by a declarant shown to be legitimately related by blood to the person to whom they relate, or by the husband or wife of such a person.

(3) They must be made before the question in relation to which they are to be proved has arisen ; but they do not cease to be deemed to be relevant because they were made for the purpose of preventing the question from arising.

This condition applies also to statements as to public and general rights or customs and matters of public and general interest.¹ (See DECLARATIONS IN EVIDENCE, vol. 5, p. 361.)

1. Illustrations under Art. 30. — (a) The question is, whether a road is public.

A statement by A. (deceased) that it is public is deemed to be relevant. *Crease v. Barrett*, per Parke, B., 1 C. M. & R. 269.

A statement by A. (deceased) that he planted a willow (still standing) to show where the boundary of the road had been when he was a boy is deemed to be irrelevant. *R. v. Bliss*, 7 A. & E. 550.

(b) The following are instances of the manner in which declarations as to matters of public and general interest may be made. They may be made in —

Maps prepared by, or by the direction of, persons interested in the matter. Implied in *Hammond v. Bradstreet*, 10 Ex. 390, and *Pike v. Fulcher*, 1 E. & E. 111. In each of these cases the map was rejected as not properly qualified.

Copies of court rolls. *Crease v. Barrett*, 1 C. M. & R. 928.

Deeds and leases between private persons. *Plaxton v. Dare*, 10 B. & C. 17.

Verdicts, judgments, decrees, and orders of courts, and similar bodies, if final. *Duke of Newcastle v. Braxtowe*, 4 B. & Ad. 273; *Pim v. Curell*, 6 M. & W. 234, 266.

2. Illustrations to Art. 31. — (a) The question is, which of three sons (*Fortunatus*, *Stephanus*, and *Achaicus*) born at a birth is the eldest.

The fact that the father said that *Achaicus* was the youngest, and he took their names from *St. Paul's Epistles* (see 1 Cor. xvi. 17), and the fact that a relation present at the birth said that she tied a string round the second child's arm to distinguish it, are relevant. *Vin. Abr. tit. "Evidence," T. b. 91.*

(b) The question is, whether one of the *cestuis que vie* in a lease for lives is living.

The fact that he was believed in his family to be dead is deemed to be irrelevant, as the question is not one of pedigree. *Whittuck v. Walters*, 4 C. & P. 375.

(c) The following are instances of the ways in which statements as to pedigree may be made : By family conduct or correspondence ; in books used as family registers ; in deeds and wills ; in inscriptions on tombstones, or portraits ; in pedigrees, so far as they state the relationship of living persons known to the compiler. In 1 Ph. Ev. 203-215, and T. E. sects. 583-587, these and many other forms of statement of the same sort are mentioned.

(18) *Evidence given in Former Proceeding, when Relevant* (Art. 32). — Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead,¹ or is mad,² or so ill that he will probably never be able to travel,³ or is kept out of the way by the adverse party,⁴ or in civil, but not, it seems, in criminal, cases, is out of the jurisdiction of the court,⁵ or, perhaps, in civil, but not in criminal, cases, when he cannot be found.

Provided in all cases, —

(1) That the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness.⁶

(2) That the questions in issue were substantially the same in the first as in the second proceeding.⁶

Provided also, —

(3) That the proceeding, if civil, was between the same parties or their representatives in interest.⁶

(4) That, in criminal cases, the same person is accused upon the same facts.⁷

If evidence is reduced to the form of a deposition, the provisions of Art. 90 apply to the proof of the fact that it was given.

The conditions under which depositions may be used as evidence are stated in Arts. 140-142. (See HEARSAY EVIDENCE.)

5. *Statements in Books, Documents, and Records, when Relevant.* — *a. Recitals of Public Facts in Statutes and Proclamations* (Art. 33). — When any act of state or any fact of a public nature is in issue, or is, or is deemed to be, relevant to the issue, any statement of it made in a recital contained in any public Act of Parliament, or in any royal proclamation or speech of the Sovereign in opening Parliament, or in any address to the Crown of either House of Parliament, is deemed to be a relevant fact.⁸ (See BOOKS AS EVIDENCE, vol. 2, p. 367 j.)

b. Relevancy of Entry in Public Record made in Performance of Duty (Art. 34). — An entry in any record, official book, or register kept in any of Her Majesty's dominions, or at sea, or in any foreign country, stating, for the purpose of being referred to by the public, a fact in issue, or relevant, or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such record, book, or register is kept, is itself deemed to be a relevant fact.⁹ (See BOOKS AS EVIDENCE, vol. 2, p. 367 j.)

1. *Mayor of Doncaster v. Day*, 3 Tau. 262.

2. *R. v. Eriswell*, 3 T. R. 720.

3. *R. v. Hogg*, 6 C. & P. 176.

4. *R. v. Scaife*, 17 Q. B. 238, 243.

5. *Fry v. Wood*, 1 Atk. 44; *R. v. Scaife*, 17 Q. B. 243.

6. *Doe v. Tatham*, 1 A. & E. 319; *Doe v. Derby*, 1 A. & E. 783, 785, 789.

7. *Beeston's Case*, Dears. 405.

8. *R. v. Francklyn*, 17 S. T. 636; *R. v. Sutton*, 4 M. & S. 532.

9. *Sturla v. Freccia*, L. R. 5 App. Ca. 623; see especially p. 633, 634 and 643, 644.

c. Relevancy of Statements in Works of History, Maps, Charts, and Plans (Art. 35). — Statements as to matters of general public history made in accredited historical books are deemed to be relevant when the occurrence of any such matter is in issue, or is, or is deemed to be, relevant to the issue; but statements in such works as to private rights or customs are deemed to be irrelevant.¹

[*Submitted*] Statements of facts in issue or relevant, or deemed to be relevant, to the issue made in published maps or charts generally offered for public sale as to matters of public notoriety, such as the relative position of towns and countries, and such as are usually represented or stated in such maps or charts, are themselves deemed to be relevant facts;² but such statements are irrelevant if they relate to matters of private concern, or matters not likely to be accurately stated in such documents.³ (See *BOOKS AS EVIDENCE*, vol. 2, p. 367 j.)

d. Entries in Bankers' Books (Arts. 36, 37, 38). — These articles state the rules of evidence peculiar to English statutes concerning entries in bankers' books.

e. Judgment (Art. 39). — The word "judgment" in Arts. 40–47 means any final judgment, order, or decree of any court.

The provisions of Arts. 40–45, both inclusive, are all subject to the provisions of Art. 46. (See *JUDGMENTS*.)

f. All Judgments Conclusive Proof of their Legal Effect (Art. 40). — All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence of the state of things so effected is a fact in issue, or is, or is deemed to be, relevant to the issue.⁴

T. E. (from Greenleaf) sects. 1429, 1432. See also *Queen's Proctor v. Fry*, L. R. 4 P. D. 230.

1. See *Cases in 2 Ph. Ev.*, 155, 156.

2. In *R. v. Orton*, maps of Australia were given in evidence to show the situation of various places at which the defendant said he had lived.

3. e.g., a line in the tithe commutation map purporting to denote the boundaries of A.'s property is irrelevant in a question between A. and B. as to the position of the boundaries. *Wilberforce v. Hearfield*, L. R. 5 Ch. D. 709; and see *Hammond v. —*, 10 Ex. 390.

4. *Illustrations to Art. 40.* — (a) The question is, whether A. has been damaged by the negligence of his servant B. in injuring C.'s horse.

A judgment in an action, in which C. recovered damages against A., is conclusive proof as against B., that C. did recover damages against A. in that action. *Green v. New River Co.*, 4 T. R. 590. See Art. 44, *Illustration (a)*.

(b) The question is, whether A., a ship-owner, is entitled to recover as for a loss by capture against B., an underwriter.

A judgment of a competent French prize-court condemning the ship and cargo as prize, is conclusive proof that the ship and cargo were lost to A. by capture. Involved in *Geyer v. Aguilar*, 7 T. R. 681.

(c) The question is, whether A. can recover damages from B. for a malicious prosecution.

The judgment of a court by which A. was acquitted is conclusive proof that A. was acquitted by that court. *Leggatt v. Tolliver*, 14 Ex. 301; and see *Caddy v. Barlow*, 1 Man. & Ry. 277.

(d) A. as executor to B., sues C. for a debt due from C. to B.

The grant of probate to A. is conclusive proof as against C. that A. is B.'s executor. *Allen v. Dundas*, 37 R. 125–130. In this case the will to which probate had been obtained was forged.

(e) A. is deprived of his living by the sentence of an ecclesiastical court.

The sentence is conclusive proof of the fact of deprivation in all cases. Judgment of Lord Holt in *Phillips v. Bury*, 2 T. R. 346, 351.

(f) A. and B. are divorced *à vinculo matrimonii* by a sentence of the divorce court.

The existence of the judgment effecting it may be proved in the manner prescribed in Part II. (Arts. 58–90). (See JUDGMENTS.)

g. Judgment Conclusive as between Parties and Privies of Facts forming Ground of Judgment (Art. 41). — Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based, unless evidence was admitted in the action in which the judgment was delivered, which is excluded in the action in which that judgment is intended to be proved.¹ (See JUDGMENTS.)

h. Statements in Judgments Irrelevant as between Strangers except in Admiralty Cases (Art. 42). — Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between a party or privy and a stranger, except² in the case of judgments of courts of admiralty condemning a ship as prize. In such cases the judgment is conclusive proof as against all persons of the fact on which the condemnation proceeded, where such fact is plainly stated upon the face of the sentence.³ (See JUDGMENTS.)

The sentence is conclusive proof of the divorce in all cases. Assumed in *Needham v. Bremner*, L. R. 1 C. P. 582.

1. *R. v. Hutchins*, L. R. 52 B. D. 353, supplies a recent illustration of this principle.

Illustrations to Art. 41. — (a) The question is, whether C., a pauper, is settled in parish A. or parish B.

D. is the mother and E. the father of C. D., E.; and several of their children were removed from A. to B. before the question as to C.'s settlement arose, by an order unappealed against, which order described D. as the wife of E.

The statement in the order that D. was the wife of E. is conclusive as between A. and B. *R. v. Hartington Middle Quarter*, 4 E. & B. 780; and see *Flitters v. Allfrey*, L. R. 10 C. P. 29; and contrast *Dover v. Child*, L. R. 1 Ex. D. 172.

(b) A. and B. each claim administration to the goods of C., deceased.

Administration is granted to B., the judgment declaring, that, as far as appears by the evidence, B. has proved himself next of kin.

Afterwards there is a suit between A. and B. for the distribution of the effects of C. The declaration in the first suit is in the second suit conclusive proof as against A. that B. is nearer of kin to C. than A. *Barrs v. Jackson*, 1 Phill. 582, 587, 588.

(c) A company sues A. for unpaid premium and calls. A special case being stated in the court of common pleas, A. obtains judgment on the ground that he never was a shareholder.

The company being wound up in the

court of chancery, A. applies for the repayment of the sum he had paid for premium and calls. The decision that he never was a shareholder is conclusive as between him and the company that he never was a shareholder, and he is therefore entitled to recover the sums he paid. *Bank of Hindustan, etc., Allison's Case*, L. R. 9 Ch. App. 24.

(d) A obtains a decree of judicial separation from her husband B., on the ground of cruelty and desertion, proved by her own evidence.

Afterwards B. sues A. for dissolution of marriage on the ground of adultery, in which suit neither B. nor A. can give evidence. A. charges B. with cruelty and desertion. The decree in the first suit is deemed to be irrelevant in the second. *Stoate v. Stoate*, 2 Swa. & Tr. 223.

2. This exception is treated by Lord Eldon as an objectionable anomaly in *Lothian v. Henderson*, 3 B. & P. 545. See, too, *Castrique v. Imrie*, L. R. 4 E. & T. App. 434, 435.

3. **Illustrations to Art. 42.** — (a) The question between A. and B. is, whether certain lands in Kent had been disgevilled. A special verdict on a feigned issue between C. and D. (strangers to A. and B.) finding that in the 2d Edw. VI. a disgevelling act was passed in words set out in the verdict is deemed to be irrelevant. *Doe v. Brydges*, 6 M. & G. 282.

(b) The question is, whether A. committed bigamy by marrying B. during the lifetime of her former husband C.

A decree in a suit of jactitation of marriage, forbidding C. to claim to be the

i. Effect of Judgment not pleaded as an Estoppel (Art. 43). — If a judgment is not pleaded by way of estoppel, it is, as between parties and privies, deemed to be a relevant fact whenever any matter which was or might have been decided in the action in which it was given is in issue, or is or is deemed to be relevant to the issue, in any subsequent proceeding.

Such a judgment is conclusive proof of the facts which it decides, or might have decided if the party who gives evidence of it had no opportunity of pleading it as an estoppel.¹ (See JUDGMENTS.)

j. Judgments generally deemed to be Irrelevant as between Strangers (Art. 44). — Judgments are not deemed to be relevant as rendering probable facts which may be inferred from their existence, but which they neither state nor decide, as between strangers; as between parties and privies in suits where the issue is different, even though they relate to the same occurrence or subject-matter, or in favor of strangers against parties or privies.

But a judgment is deemed to be relevant as between strangers, (1) if it is an admission; or (2) if it relates to a matter of public or general interest, so as to be a statement under Art. 30.² (See JUDGMENTS.)

husband of A., on the ground that he was not her husband, is deemed to be irrelevant. *Duchess of Kingston's Case*, 2 S. L. C. 760.

(c) The question is, whether A., a ship-owner, has broken a warranty to B., an underwriter, that the cargo of the ship, whose freight was insured by A., was neutral property.

The sentence of a French prize-court condemning ship and cargo, on the ground that the cargo was enemy's property, is conclusive proof in favor of B. that the cargo was enemy's property (though on the facts the court thought it was not). *Geyer v. Aguilar*, 7 T. R. 681.

1. *Illustrations to Art. 43.* — (a) A. sues B. for deepening the channel of a stream, whereby the flow of water to A.'s mill was diminished.

A verdict recovered by B. in a previous action for substantially the same cause, and which might have been pleaded as an estoppel, is deemed to be relevant, but not conclusive in B.'s favor. *Vooght v. Winch*, 2 B. & A. 622; and see *Feversham v. Emerson*, 11 Ex. 391.

(b) A. sues B. for breaking and entering A.'s land, and building thereon a wall and a cornice. B. pleads that the land was his, and obtains a verdict in his favor on that plea.

Afterwards B.'s devisee sues A.'s wife (who on the trial admitted that she claimed through A.) for pulling down the wall and cornice. As the first judgment could not

be pleaded as an estoppel (the wife's right not appearing on the pleadings), it is conclusive in B.'s favor that the land was his. *Whitaker v. Jackson*, 2 H. & C. 926. This had previously been doubted. See 2 Ph. Ev. 24, n. 4.

2. *Illustrations to Art. 44.* — (a) The question is, whether A. has sustained loss by the negligence of B., his servant, who has injured C.'s horse.

A judgment recovered by C. against A. for the injury, though conclusive as against B., as to the fact that C. recovered a sum of money from A., is deemed to be irrelevant to the question whether this was caused by B.'s negligence. *Green v. New River Company*, 4 T. R. 589.

(b) The question whether a bill of exchange is forged arises in an action on the bill. The fact that A. was convicted of forging the bill is deemed to be irrelevant. Per *Blackburn, J.*, in *Castrique v. Imrie*, L. R. 4 E. & I. App. 434.

(c) A collision takes place between two ships, A. and B., each of which is damaged by the other.

The owner of A. sues the owner of B., and recovers damages on the ground that the collision was the fault of B.'s captain. This judgment is not conclusive in an action by the owner of B. against the owner of A., for the damage done to B. *The Calypso*, 1 Swab. Ad. 28. (*Semble*, it is deemed to be irrelevant, on the general principle in *Duchess of Kingston's Case*, 2 S. L. C. 813.)

k. Judgments Conclusive in Favor of Judge (Art. 45). — When any action is brought against any person for any thing done by him in a judicial capacity, the judgment delivered, and the proceedings antecedent thereto, are conclusive proof of the facts therein stated, whether they are or are not necessary to give the defendant jurisdiction, if, assuming them to be true, they show that he had jurisdiction.¹ (See JUDGMENTS.)

l. Fraud, Collusion, or Want of Jurisdiction, may be proved (Art. 46). — Whenever any judgment is offered as evidence under any of the articles hereinbefore contained, the party against whom it is so offered may prove that the court which gave it had no jurisdiction, or that it has been reversed, or, if he is a stranger to it, that it was obtained by any fraud or collusion, to which neither he nor any person to whom he is privy was a party.² (See JUDGMENTS.)

m. Foreign Judgments (Art. 47). — The provisions of Arts. 40–46 apply to such of the judgments of courts of foreign countries as can by law be enforced in this country, and so far as they can be so enforced.³ (See JUDGMENTS.)

6. Opinions, when Relevant and when not. — a. Opinion generally Irrelevant (Art. 48). — The fact that any person is of opinion that a fact in issue, or relevant, or deemed to be relevant, to the issue, does or does not exist, is deemed to be irrelevant to the existence of such fact, except in the cases specified in this chapter.⁴ (See EXPERT AND OPINION EVIDENCE.)

b. Opinions of Experts on Points of Science or Art (Art. 49). — When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts.

(*d*) A. is prosecuted and convicted as a principal felon.

B. is afterwards prosecuted as an accessory to the felony committed by A.

The judgment against A. is deemed to be irrelevant as against B., though A.'s guilt must be proved as against B. *Semble* from *R. v. Turner*, 1 Mood. C. C. 347.

(*e*) A. sues B., a carrier, for goods delivered by A. to B.

A judgment recovered by B. against a person to whom he had delivered the goods, is deemed to be relevant as an admission by B. that he had them. *Buller*, N. P. 242, b.

(*f*) A. sues B. for trespass on land.

A judgment, convicting A. for a nuisance by obstructing a highway on the place said to have been trespassed on, is (at least) deemed to be relevant to the question whether the place was a public highway (and is possibly conclusive). *Petrie v. Nuttall*, 11 Ex. 569.

1. *Illustrations to Art. 45.* — A. sues B. (a justice of the peace) for taking from him a vessel and five hundred pounds of

gunpowder thereon. B. produces a conviction before himself of A. for having gunpowder in a boat on the Thames (against 2 Geo. III. c. 28).

The conviction is conclusive proof for B., that the thing called a boat was a boat. *Brittain v. Kinnaird*, 1 B. & B. 432.

2. Cases on this article collected in T. E. sects. 1524, 1525, sect. 1530. See, too, 2 Ph. Ev. 35, and *Ochsenbien v. Papelier*, L. R. 8 Ch. 695.

3. The cases on this subject are collected in the note on the *Duchess of Kingston's Case*, 2 S. L. C. 813–845. A list of the cases will be found in *R. N. P.* 221–223. The last leading cases on the subject are *Godard v. Gray*, L. R. 6 Q. B. 139, and *Castrique v. Imrie*, L. R. 4 E. & I. App. 414.

4. The question is, whether A., a deceased testator, was sane or not when he made his will. His friends' opinions as to his sanity, as expressed by the letters which they addressed to him in his lifetime, are deemed to be irrelevant. *Wright v. Doe d. Tatham*, 7 A. & E. 313.

Such persons are hereinafter called experts.

The words "science or art" include all subjects on which a course of special study or experience is necessary to the formation of an opinion,¹ and, amongst others, the examination of handwriting.

When there is a question as to a foreign law, the opinions of experts who in their profession are acquainted with such law are the only admissible evidence thereof, though such experts may produce to the court books which they declare to be works of authority upon the foreign law in question, which books the court, having received all necessary explanations from the expert, may construe for itself.²

It is the duty of the judge to decide, subject to the opinion of the court above, whether the skill of any person, in the matter on which evidence of his opinion is offered, is sufficient to entitle him to be considered as an expert.³

The opinion of an expert as to the existence of the facts on which his opinion is to be given is irrelevant, unless he perceived them himself.⁴ (See EXPERT AND OPINION EVIDENCE.)

c. Facts bearing upon Opinions of Experts (Art. 50).—Facts not otherwise relevant are deemed to be relevant if they support or are inconsistent with the opinions of experts, when such opinions are deemed to be relevant.⁵ (See EXPERT AND OPINION EVIDENCE.)

1. 1 S. L. C. 555, 7th ed. (note to Carter v. Boehm), 28 Vict. sect. 18.

2. Baron de Bode's Case, 8 Q. B. 250-267; Di Sora v. Philipps, 10 H. L. 624; Castrique v. Imrie, L. R. 4 E. & I. App. 434; see, too, Picton's Case, 30 S. T. 510, 511.

3. Bristow v. Sequeville, 6 Ex. 275; Rowley v. L. & N. W. Railway, L. R. 8 Ex. 221. In the Goods of Bonelli, L. R. 1 P. D. 69.

4. 1 Ph. 507; T. E. sect. 1278.

Illustrations to Art. 49.—(a) The question is, whether the death of A. was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A. is supposed to have died, are deemed to be relevant. *R. v. Palmer (passim)*. See my "Gen. View of Crim. Law," 357.

(b) The question is, whether A., at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A. commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of

knowing that what they do is either wrong or contrary to law, are deemed to be relevant. *R. v. Dove (passim)*; Gen. View Crim. Law, 391.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person, or by different persons, are deemed to be relevant. 28 Vict. c. 18, sect. 8.

(d) The opinions of experts on the questions, whether in illustration (a), A.'s death was in fact attended by certain symptoms; whether in illustration (b), the symptoms from which they infer that A. was of unsound mind existed; whether in illustration (c) either or both of the documents were written by A., are deemed to be irrelevant.

5. Illustrations to Art. 50.—(a) The question is, whether A. was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is deemed to be relevant. *R. v. Palmer*, printed trial, p. 124, etc. In this case (tried in 1856) evidence was given of the symptoms at-

d. Opinion as to Handwriting, when deemed to be Relevant (Art. 51). — When there is a question as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the supposed writer that it was or was not written or signed by him, is deemed to be a relevant fact.

A person is deemed to be acquainted with the handwriting of another person when he has at any time seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself, or under his authority, and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.¹ (See HANDWRITING.)

e. Comparison of Handwritings (Art. 52). — Comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine, is permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. This paragraph applies to all courts of judicature, criminal or civil, and to all persons having by law, or by consent of parties, authority to hear, receive, and examine evidence.² (See HANDWRITING.)

f. Opinion as to Existence of Marriage, when Relevant (Art. 53). — When there is a question whether two persons are or are not married, the facts that they cohabited and were treated by others as man and wife are deemed to be relevant facts, and to raise a presumption that they were lawfully married, and that any act necessary to the validity of any form of marriage which may have passed between them was done; but such facts are not sufficient to prove a marriage in a prosecution for bigamy, or in proceedings for a divorce, or in a petition for damages against an adulterer.³ (See EXPERT AND OPINION EVIDENCE.)

tending the deaths of Agnes Senet, poisoned by strychnine in 1845, Mrs. Serjeantson Smith, similarly poisoned in 1848, and Mrs. Dove, murdered by the same poison subsequently to the death of Cook, for whose murder Palmer was tried.

(b) The question is, whether an obstruction to a harbor is caused by a certain bank. An expert gives his opinion that it is not.

The fact that other harbors similarly situated in other respects, but where there were no such banks (*Foulks v. Chadd*, 3 Doug. 157), began to be obstructed at about the same time, is deemed to be relevant.

1. *Illustrations to Art. 51.* — The question is, whether a given letter is in the handwriting of A., a merchant in Calcutta.

B. is a merchant in London, who has written letters addressed to A., and received

in answer letters purporting to be written by him. C. is B.'s clerk, whose duty it was to examine and file B.'s correspondence. D. is B.'s broker, to whom B. habitually submitted the letter purporting to be written by A. for the purpose of advising with him thereon.

The opinions of B., C., and D., on the question whether the letter is in the handwriting of A., are relevant, though neither B., C., nor D. ever saw A. write. *Doe v. Suckermore*, 5 A. & E. 705 (*Coleridge, J.*); 730 (*Patteson, J.*); 739, 740 (*Denman, C. J.*).

The opinion of C., who saw A. write once twenty years ago, is also relevant. *R. v. Horne Tooke*, 25 S. T. 71, 72.

2. 17 & 18 Vict. c. 125, sect. 27; 28 Vict. c. 18, sect. 8.

3. *Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, 1 Doug. 170; and see *Cather-*

g. Grounds of Opinion, when deemed to be Relevant (Art. 54). — Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant.¹ (See EXPERT AND OPINION EVIDENCE.)

7. Character, when deemed to be Relevant, and when not. —
a. Character generally Irrelevant (Art. 55). — The fact that a person is of a particular character is deemed to be irrelevant to any inquiry respecting his conduct, except in the cases mentioned in this chapter. (See CHARACTER IN EVIDENCE, vol. 3, p. 110.)

b. Evidence of Character in Criminal Cases (Art. 56). — In criminal proceedings, the fact that the person accused has a good character is deemed to be relevant; but the fact that he has a bad character is deemed to be irrelevant, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.

In this article the word "character" means reputation as distinguished from disposition, and evidence may be given only of general reputation and not of particular acts by which reputation or disposition is shown.² (See CHARACTER IN EVIDENCE.)

c. Character as affecting Damages (Art. 57). — In civil cases the fact that the character of any party to the action is such as to affect the amount of damages which he ought to receive, is generally deemed to be irrelevant.³

II. On Proof. — 1. *Facts proved otherwise than by Evidence.* —

a. Of what Facts the Court takes Judicial Notice (Art. 58). — It is the duty of all judges to take judicial notice of the following facts: —

(1) All unwritten laws, rules, and principles having the force of law administered by any court sitting under the authority of her Majesty and her successors in England or Ireland, whatever may be the nature of the jurisdiction thereof.⁴

wood v. Caslon, 13 M. & W. 261. Compare R. v. Mainwaring, Dear. & B. 132. See, too, De Thoren v. A. G. L. R. 1 App. Cas. 686; Piers v. Piers, 2 H. & C. 331. Some of the references in the report of De Thoren v. A. G. are incorrect. This article was not expressed strongly enough in the former editions.

1. Illustration to Art. 54. — An expert may give an account of experiments performed by him for the purpose of forming his opinion.

2. R. v. Rowton, 1 L. & C. 520; R. v. Turberfield, 1 L. & C. 495, is a case in which the character of a prisoner became incidentally relevant to a certain limited extent.

3. In 1 Ph. Ev. 504, etc., and T. E. sect. 333, all the cases are referred to. The most important are — v. Moor, 1 M. & S. 284, which treats the evidence as admissible, though perhaps it does not absolutely af-

firm the proposition that it is so; and Jones v. Stevens, 11 Price, 235, see especially pp. 266, 268, which decides that it is not. The question is now rendered comparatively unimportant, as the object for which such evidence used to be tendered can always be obtained by cross-examining the plaintiff to his credit.

Moral Character of Party injured has Nothing to do with Question of Damages.

— In an action against a railroad company, the defendants requested an instruction that the jury should consider the character of the plaintiff in fixing the damages. Held, that moral character has nothing to do with the measure of damages. A man of the worst character may be entitled to as much damages for an injury as a man of the highest character. Indianapolis, etc., R. Co. v. Bush, 101 Ind. 582. See "Damages," vol. 5.

4. Ph. Ev. 460, 461; T. E. sect. 4, and see

(2) All public Acts of Parliament,¹ and all Acts of Parliament whatever, passed since Feb. 4, 1851, unless the contrary is expressly provided in any such act.²

(3) The general course of proceeding and privileges of Parliament and of each House thereof, and the date and place of their sittings, but not transactions in their journals.³

(4) All general customs which have been held to have the force of law in any division of the High Court of Justice, or by any of the superior courts of law or equity, and all customs which have been duly certified to and recorded in any such court.⁴

(5) The course of proceeding and all rules of practice in force in the Supreme Court of Justice. Courts of a limited or inferior jurisdiction take judicial notice of their own course of procedure and rules of practice, but not of those of other courts of the same kind; nor does the Supreme Court of Justice take judicial notice of the course of procedure and rules of practice of such courts.⁵

(6) The accession and [*semble*] the sign manual of her Majesty and her successors.⁶

(7) The existence and title of every state and sovereign recognized by her Majesty and her successors.⁷

(8) The accession to office, names, titles, functions, and, when attached to any decree, order, certificate, or other judicial or official documents, the signatures of all the judges of the Supreme Court of Justice.⁸

(9) The Great Seal, the Privy Seal, the seals of the Superior Courts of Justice,⁹ and all seals which any court is authorized to use under any Act of Parliament,¹⁰ certain other seals mentioned in Acts of Parliament,¹⁰ the seal of the corporation of London,¹¹ and the seal of any notary public in the Queen's domains.¹²

(10) The extent of the territories under the dominion of her Majesty and her successors; the territorial and political divisions of England and Ireland, but not their geographical position or the situation of particular places; the commencement, continuance,

36 & 37 Vict. c. 66 (Judicature Act of 1873), sect. 25.

1. Ph. Ev. 460, 461; T. E. sect. 4, and see 36 and 37 Vict. c. 66 (Judicature Act of 1873), sect. 25.

2. 13 & 14 Vict. c. 21, sects. 7, 8, and see (for date) caption of sessions of 14 & 15 Vict.

3. Ph. Ev. 460; T. E. sect. 5.

4. The old rule was, that each court took notice of customs held by or certified to it to have the force of law. It is submitted that the effect of the Judicature Act, which fuses all the courts together, must be to produce the results stated in the text. As to the old law, see *Piper v. Chappell*, 14 M. & W. 649, 650. *Ex parte Powell*, *In re Matthews*, L. R. 1 Ch. D. 505-507, contains

some remarks by Lord Justice Mellish as to proving customs till they come by degrees to be judicially noticed.

5. 1 Ph. Ev. 462, 463; T. E. sect. 19.

6. 1 Ph. Ev. 458; T. E. sects. 16, 12.

7. 1 Ph. Ev. 460; T. E. sect. 3.

8. 1 Ph. 462; T. E. 19; and as to latter part, 8 & 9 Vict. c. 113, sect. 2, as modified by 36 & 37 Vict. c. 66, sect. 76 (Judicature Act of 1873).

9. The Judicature Acts confer no seal on the Supreme or High Court, or its divisions.

10. *Doe v. Edwards*, 9 A. & E. 555. See list in T. E. sect. 6.

11. 1 Ph. Ev. 464; T. E. sect. 6.

12. *Cole v. Sherwood*, 11 Ex. 482. As to foreign notaries, see "*Earl's Trust*," 4 K. & J. 300.

and termination of war between her Majesty and any other sovereign; and all other public matters directly concerning the general government of her Majesty's dominions.¹

(11) The ordinary course of nature, natural and artificial divisions of time, the meaning of English words.²

(12) All other matters which they are directed by any statute to notice.³ (See JUDICIAL NOTICE.)

b. As to Proof of Such Facts (Art. 59). — No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence; but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof, unless and until the party calling upon him to take such notice produces any such document or book of reference.⁴ (See JUDICIAL NOTICE.)

c. Evidence need not be given of Facts admitted (Art. 60). — No fact need be proved in any proceeding which the parties thereto, or their agents, agree to admit at the hearing, or which they have admitted before the hearing and with reference thereto, or by their pleadings.⁵ Provided that in a trial for felony the prisoner can make no admissions so as to dispense with proof, though a confession may be proved as against him subject to the rules stated in Arts. 21–24.⁶

2. Of Oral Evidence. — a. Proof of Facts by Oral Evidence (Art. 61). — All facts may be proved by oral evidence subject to the provisions as to the proof of documents contained in Chaps. IX., X., XI., and XII. (Arts. 63–92).

b. Oral Evidence must be Direct (Art. 62). — Oral evidence must in all cases whatever be direct; that is to say, —

If it refers to a fact alleged to have been seen, it must be the evidence of a witness who says he saw it.

If it refers to a fact alleged to have been heard, it must be the evidence of a witness who says he heard it.

If it refers to a fact alleged to have been perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner.

If it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.⁷

1. 1 Ph. Ev. 466, 460, 458; and see T. E. sects. 15, 16.

2. 1 Ph. Ev. 465, 466; T. E. sect. 14.

3. *e.g.*, the Articles of War. See sect. 1 of the Mutiny Act.

4. T. E. sect. 20; *e.g.*, a judge will refer in case of need to an almanac, or to a printed copy of the statutes, or write to the Foreign Office, to know whether a state has been recognized.

5. See Schedule to Judicature Act of 1875, Order xxxii. See "Hearsay Evidence," *Admissions*.

6. 1 Ph. Ev. 391, n. 6. In *R. v. Thornhill*, 8 C. & P., Lord Abinger acted upon this rule in a trial for perjury. See "Confessions," vol. 3, p. 410.

7. Note by Justice Stephen to Art. 62. — Owing to the ambiguity of the word "evidence," which is sometimes used to signify

3. *Of Documentary Evidence. — Primary and Secondary, and Attested Documents. — a. Proof of Contents of Documents (Art. 63).* — The contents of documents may be proved either by primary or by secondary evidence. (See WRITTEN INSTRUMENTS.)

b. Primary Evidence (Art. 64). — Primary evidence means the document itself produced for the inspection of the court, accompanied by the production of an attesting witness in cases in which an attesting witness must be called under the provisions of Arts. 66 and 67; or an admission of its contents proved to have been made by a person whose admissions are relevant under Arts. 15–20.¹

Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.²

Where a number of documents are all made by printing, lithography, or photography, or any other process of such a nature as in itself to secure uniformity in the copies, each is primary evidence of the contents of the rest;³ but where they are all copies of a common original, no one of them is primary evidence of the contents of the original.⁴ (See WRITTEN INSTRUMENTS.)

c. Proof of Documents by Primary Evidence (Art. 65). — The contents of documents must, except in the cases mentioned in Art. 71, be proved by primary evidence; and in the cases mentioned in Art. 66 by calling an attesting witness. (See WRITTEN INSTRUMENTS.)

d. Proof of Execution of Document required by Law to be attested (Art. 66). — If a document is required by law to be

the effect of a fact when proved, and sometimes to signify the testimony by which a fact is proved, the expression “hearsay is no evidence” has many meanings. Its common and most important meaning is the one given in Art. 14, which might be otherwise expressed by saying that the connection between events, and reports that they have happened, is generally so remote that it is expedient to regard the existence of the reports as irrelevant to the occurrence of the events, except in excepted cases. Art. 62 expresses the same thing from a different point of view, and is subject to no exceptions whatever. It asserts that whatever may be the relation of a fact to be proved to the fact in issue, it must, if proved by oral evidence, be proved by direct evidence. For instance, if it were to be proved under Art. 31 that A., who died fifty years ago, said that he had heard from his father B., who died a hundred years ago, that A.’s grandfather C. had told B. that D., C.’s elder brother, died without issue, A.’s statement must be proved by

some one who, with his own ears, heard him make it. If (as in the case of verbal slander) the speaking of the words was the very point in issue, they must be proved in precisely the same way. Cases in which evidence is given of character and general opinion may perhaps seem to be exceptions to this rule, but they are not so. When a man swears that another has a good character, he means that he has heard many people, though he does not particularly recollect what people, speak well of him, though he does not recollect all that they said. See “Expert and Opinion Evidence;” “Inspection;” “View.”

1. *Slaterrie v. Pooley*, 6 M. & W. 664.

2. *Roe d. West v. Davis*, 7 Ea. 362.

3. *R. v. Watson*, 2 Star. 129. This case was decided long before the invention of photography, but the judgments delivered by the court (*Ellenborough, C. J.*, and *Abbott, Bayley*, and *Holroyd, JJ.*) established the principle stated in the text.

4. *Moden v. Murray*, 3 Camp. 224.

attested, it may not be used as evidence (except in the cases mentioned or referred to in the next article) if there be an attesting witness alive, sane, and subject to the process of the court, until one attesting witness at least has been called for the purpose of proving its execution.

If it be shown that no such attesting witness is alive, or can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

The rule extends to cases in which the document has been burnt,¹ or cancelled;² the subscribing witness is blind;³ the person by whom the document was executed is prepared to testify to his own execution of it;⁴ the person seeking to prove the document is prepared to prove an admission of its execution by the person who executed it, even if he is a party to the cause, unless such admission be made for the purpose of, or has reference to, the cause.⁵ (See WRITTEN INSTRUMENTS.)

e. Cases in which Attesting Witnesses need not be called (Art. 67).

— In the following cases, and in the case mentioned in Art. 88, but in no others, a person seeking to prove the execution of a document required by law to be attested is not bound to call for that purpose either the party who executed the deed or any attesting witness, or to prove the handwriting of any such party or attesting witness:—

(1) When he is entitled to give secondary evidence of the contents of the document under Art. 71.⁶

(2) When his opponent produces it when called upon, and

1. *Gillies v. Smither*, 2 Star. R. 528.

2. *Breton v. Cope*, Pea. R. 43.

3. *Cronk v. Frith*, 9 C. & P. 197.

4. *R. v. Harringworth*, 4 M. & S. 353.

5. *Call v. Dunning*, 4 Ea. 53. See, too, *Whyman v. Garth*, 8 Ex. 803; *Randall v. Lynch*, 2 Camp. 357.

Note by Justice Stephen to Arts. 66 and 67.—This is probably the most ancient, and is, as far as it extends, the most inflexible of all the rules of evidence. The following characteristic observations by *Lord Ellenborough* occur in *R. v. Harringworth*, 4 M. & S. 353:—

“The rule, therefore, is universal that you must first call the subscribing witness; and it is not to be varied in each particular case by trying whether in its application it may not be productive of some inconvenience, for then there would be no such thing as a general rule. *A lawyer who is well stored with these rules would be no better than any other man that is without them*, if by mere force of speculative reasoning it might be shown that the application of such and such a rule would be productive of such and such an inconvenience, and there-

fore ought not to prevail; but if any general rule ought to prevail, this is certainly one that is as fixed, formal, and universal as any that can be stated in a court of justice.”

In *Whyman v. Garth*, 8 Ex. 807, *Pollock, C. B.*, said, “The parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his [the attesting witness] being called to depose to the circumstances attending its execution.”

In very ancient times, when the jury were witnesses as to matter of fact, the attesting witnesses to deeds (if a deed came in question) would seem to have been summoned with, and to have acted as a sort of assessors to, the jury. See as to this, *Bracton*, fo. 38 a; *Fortescue de Laudibus*, ch. xxxii., with *Selden's* note; and cases collected from the Year-books in *Brooke's Abridgment*, tit. “Testmoignes.”

For the present rule, and the exceptions to it, see 1 Ph. Ev. 242-261; T. E. sects. 1637-1642; R. N. P. 147-150; Best, sects. 220, etc.

6. *Cooke v. Tanswell*, 8 Tau. 450; *Poole v. Warren*, 8 A. & E. 588.

claims an interest under it in reference to the subject-matter of the suit.¹

(3) When the person against whom the document is sought to be proved is a public officer, bound by law to procure its due execution, and who has dealt with it as a document duly executed.² (See WRITTEN INSTRUMENTS.)

f. Proof when Attesting Witness denies the Execution (Art. 68). — If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.³ (See WRITTEN INSTRUMENTS.)

g. Proof of Document not required by Law to be attested (Art. 69). — An attested document not required by law to be attested may, in all cases whatever, civil or criminal, be proved as if it was unattested.⁴

h. Secondary Evidence (Art. 70). — Secondary evidence means, —

(1) Examined copies, exemplifications, office copies, and certified copies.⁵

(2) Other copies made from the original, and proved to be correct.

(3) Counterparts of documents as against the parties who did not execute them.⁶

(4) Oral accounts of the contents of a document given by some person who has himself seen it. (See WRITTEN INSTRUMENTS.)

i. Cases in which Secondary Evidence relating to Documents may be given (Art. 71). — Secondary evidence may be given of the contents of a document in the following cases : —

(1) When the original is shown, or appears, to be in the possession or power of the adverse party, and when, after the notice mentioned in Art. 72, he does not produce it.⁷

(2) When the original is shown, or appears to be, in the possession or power of a stranger not legally bound to produce it, and who refuses to produce it after being served with a *subpœna duces tecum*, or after having been sworn as a witness and asked for the document, and having admitted that it is in court.⁸

1. *Pearce v. Hooper*, 3 Tau. 60; *Rear-den v. Minter*, 5 M. & G. 204. As to the sort of interest necessary to bring a case within this exception, see *Collins v. Bayntum*, 1 Q. B. 118.

2. *Plumer v. Brisco*, 11 Q. B. 46. *Bailey v. Bidwell*, 13 M. & W. 73, would perhaps justify a slight enlargement of the exception, but the circumstances of the case were very peculiar. Mr. Taylor (sects. 1650, 1651) considers it doubtful whether the rule extends to instruments executed by corporations, or to deeds enrolled under the provisions of any Act of Parliament, but his authorities hardly seem to support his view; at all events, as to deeds by corporations.

3. "Where an attesting witness has denied all knowledge of the matter, the case stands as if there were no attesting witness." *Talbot v. Hodson*, 7 Tau. 251, 254.

4. 17 & 18 Vict. c. 125, sect. 26; 28 & 29 Vict. c. 18, sects. 1-7.

5. See chapter x. (Arts. 73-84).

6. *Munn v. Godbold*, 3 Bing. 292.

7. *R. v. Watson*, 2 T. R. 201. *Entick v. Carrington*, 19 S. T. 1073, is cited by Mr. Phillips as an authority for this proposition. I do not think it supports it, but it shows the necessity for the rule, as at common law no power existed to compel the production of documents.

8. *Mills v. Oddy*, 6 C. & P. 732; *Marston v. Downes*, 1 A. & E. 31.

(3) When the original has been destroyed or lost, and proper search has been made for it.¹

(4) When the original is of such a nature as not to be easily movable,² or is in a country from which it is not permitted to be removed.³

(5) When the original is a public document.⁴

(6) When the document is an entry in a banker's book, proof of which is admissible under Art. 36.

(7) When the original is a document for the proof of which special provision is made by any Act of Parliament, or any law in force for the time being;⁴ or—

(8) When the originals consist of numerous documents which cannot be conveniently examined in court, and the fact to be proved is the general result of the whole collection, provided that that result is capable of being ascertained by calculation.⁵

Subject to the provisions hereinafter contained, any secondary evidence of a document is admissible.⁶

In case (*h*) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided by the judge, unless, in deciding such a question, the judge would in effect decide the matter in issue. (See WRITTEN INSTRUMENTS.)

j. Rules as to Notice to produce (Art. 72).—Secondary evidence of the contents of the documents referred to in art. 71 (*a*) may not be given unless the party proposing to give such secondary evidence has, if the original is in the possession or under the control of the adverse party, given him such notice to produce it as the court regards as reasonably sufficient to enable it to be procured,⁷ or has, if the original is in the possession of a stranger to the action, served him with a *subpœna duces tecum* requiring its production;⁸ if a stranger so served does not produce the document, and has no lawful justification for refusing or omitting to do so, his omission does not entitle the party who served him with the *subpœna* to give secondary evidence of the contents of the document.⁹

1. 1 Ph. Ev. sect. 452; 2 Ph. Ev. 281; T. E. (from Greenleaf) sect. 399. The loss may be proved by an admission of the party or his attorney. *R. v. Haworth*, 4 C. & P. 254.

2. *Mortimer v. McCallan*, 6 M. & W. 67, 68 (this was the case of a libel written on a wall); *Bruce v. Nicolopulo*, 11 Ex. 133 (the case of a placard posted on a wall).

3. *Alivon v. Furnival*, 1 C. M. & R. 277, 291, 292.

4. See chapter x. (Arts. 73–84).

5. *Roberts v. Doxen, Peake*, 116; *Meyer v. Sefton*, 2 Star. 276. The books, etc., should in such a case be ready to be produced if required. *Johnson v. Kershaw*, 1 DeG. & S. 264.

6. If a counterpart is known to exist, it is the safest course to produce or account for it. *Munn v. Godbold*, 3 Bing. 297; *R. v. Castleton*, 7 T. R. 236.

7. *Dwyer v. Collins*, 7 Ex. 648.

8. *Newton v. Chaplin*, 10 C. B. 56–69.

9. *R. v. Llanfaethly*, 2 E. & B. 940.

Such notice is not required in order to render secondary evidence admissible in any of the following cases :—

- (1) When the document to be proved is itself a notice.
- (2) When the action is founded upon the assumption that the document is in the possession or power of the adverse party, and requires its production.¹
- (3) When it appears or is proved that the adverse party has obtained possession of the original from a person *subpœnaed* to produce it.²

(4) When the adverse party or his agent has the original in court.³ (See WRITTEN INSTRUMENTS.)

4. *Proof of Public Documents* (Arts. 73–84).—These articles relate almost entirely to the admission and proof of public documents under English statutes. For a consideration of the subject applicable to this country, see WRITTEN INSTRUMENTS.

5. *Presumptions as to Documents*.—*a. Presumptions as to Date of a Document* (Art. 85).—When any document bearing a date has been proved, it is presumed to have been made on the day on which it bears date; and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed, but independent proof of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practised, and would, if practised, injure any person, or defeat the objects of any law.⁴ (See DATE, vol. 5.)

b. Presumption as to Stamp of a Document (Art. 86).—When any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped,⁵ unless it be shown to have remained unstamped for some time after its execution.⁶

c. Presumption as to Sealing and Delivery of Deeds (Art. 87).—When any document purporting to be and stamped as a deed appears or is proved to be or to have been signed and duly

1. *How v. Hall*, 14 Ea. 247. In an action on a bond, no notice to produce the bond is required. See other illustrations in 2 Ph. Ev. 373; T. E. s. 422.

2. *Leeds v. Cook*, 4 Esp. 256.

3. Formerly doubted. See 2 Ph. Ev. 278, but so held in *Dwyer v. Collins*, 7-Ex. 639.

4. Ph. Ev. 482, 483; T. E. sect. 137; Best, sect. 403.

Illustrations to Art. 85.—(a) An instrument admitting a debt, and dated before the act of bankruptcy, is produced by a bankrupt's assignees, to prove the petitioning creditor's debt. Further evidence of the date of the transaction is required in order to guard against collusion between the assignees and the bankrupt, to the prejudice of creditors whose claims date from

the interval between the act of bankruptcy and the adjudication. *Anderson v. Weston*, 6 Bing. (N. Car.) 302; *Sinclair v. Baggolay*, 4 M. & W. 318.

(b) In a petition for damages on the ground of adultery, letters are produced between the husband and wife, dated before the alleged adultery, and showing that they were then on affectionate terms. Further evidence of the date is required to prevent collusion to the prejudice of the person petitioned against. *Houlston v. Smith*, 2 C. & P. 24.

5. *Closmadenc v. Carrel*, 18 C. B. 44. In this case the growth of the rule is traced, and other cases are referred to, in the judgment of *Creswell, J.*

6. *Marine Investment Co. v. Haviside*, L. R. 5 E. & I. app. 624.

attested, it is presumed to have been sealed and delivered, although no impression of a seal appears thereon.¹ (See DEEDS.)

d. Presumption as to Documents Thirty Years Old (Art. 88).—Where any document purporting or proved to be thirty years old is produced from any custody which the judge in the particular case considers proper, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested;² and the attestation or execution need not be proved, even if the attesting witness is alive and in court.

Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.³ (See ANCIENT DOCUMENTS, vol. 1.)

e. Presumption as to Alterations (Art. 89).—No person producing any document which upon its face appears to have been altered in a material part can claim under it the enforcement of any right created by it, unless the alteration was made before the completion of the document, or with the consent of the party to be charged under it, or his representative in interest.

This rule extends to cases in which the alteration was made by a stranger, whilst the document was in the custody of the person producing it, but without his knowledge or leave.⁴

Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed.⁵

Alterations and interlineations appearing on the face of a will are, in the absence of all evidence relating to them, presumed to have been made after the execution of the will.⁶

There is no presumption as to the time when alterations and interlineations, appearing on the face of writings not under seal, were made,⁷ except that it is presumed that they were so made that the making would not constitute an offence.⁸

An alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever.

An alteration which in no way affects the rights of the parties

1. *Hall v. Bainbridge*, 12 Q. B. 699-710; *Alden's v. Cornwell*, L. R. 3 Q. B. 573. This qualifies one of the resolutions in *Re Sandilands*, L. R. 6 C. P. 411.

2. 2 Ph. Ev. 248 *et seq.*

3. 2 Ph. Ev. 245-8; *Starkie*, 521-526; *Pigot's case*, 11 Rep. 47; *Davidson v. Cooper*, 11 M. & W. 778; 13 M. & W. 343; *Doe v. Catomare*, 16 Q. B. 745.

5. *Doe v. Catomare*, 16 Q. B. 745.

6. *Simmons v. Rudall*, 1 Sim. (N.S.) 136.

7. *Knight v. Clements*, 8 A. & E. 215.

8. *R. v. Gordon*, *Dears*. 592.

or the legal effect of the instrument is immaterial.¹ (See ALTERATION OF INSTRUMENTS, vol. 1.)

6. *Of the Exclusion of Oral by Documentary Evidence, and of the Modification and Interpretation of Documentary by Oral Evidence.* — *a. Evidence of the Terms of Contracts, Grants, and other Dispositions of Property reduced to a Documentary Form* (Art. 90). — When any judgment of any court, or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.² Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence.

Provided that any of the following matters may be proved : —

(1) Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated,³ want or failure of consideration, or mistake in fact or law, or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto.⁴

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.⁵

(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant, or disposition of property.⁶

(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, provided that such agreement is not invalid under the Statute of Frauds, or otherwise.⁷

(5) Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description, unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.⁸

Oral evidence of a transaction is not excluded by the fact that

1. This appears to be the result of many cases referred to in T. E. sects. 1619, 1620. See the judgments in *Davidson v. Cooper*, and *Aldens v. Cornwell*, referred to above.

2. Illustrations (a) and (b).

3. *Reffell v. Reffell*, L. R. 1 P. & D. 139.

4. Illustration (c).

5. Illustrations (d) and (e).

6. Illustrations (f) and (g).

7. Illustration (h).

8. *Wigglesworth v. Dallison*, and note thereto, S. L. C. 598-628.

a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, or other disposition of property.¹

Oral evidence of the existence of a legal relation is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established, or is carried on.²

The fact that a person holds a public office need not be proved by the production of his written or sealed appointment thereto, if he is shown to have acted on it.³ (See WRITTEN INSTRUMENTS.)

b. What Evidence may be given for the Interpretation of Documents (Art. 91).—(1) Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts.

(2) In order to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning

1. Illustration (2).

2. Illustration (j).

3. See authorities collected in 1 Ph. Ev. 449, 450; T. E. sect. 139.

Illustrations to Art. 90—(a) A policy of insurance is effected on goods "in ships from Surinam to London." The goods are shipped in a particular ship, which is lost.

The fact that that particular ship was orally excepted from the policy cannot be proved. *Weston v. Eames*, 1 Tau. 115.

(b) An estate called Gotton Farm is conveyed by a deed which describes it as consisting of the particulars described in the first division of a schedule and delineated in a plan on the margin of the schedule.

Evidence cannot be given to show that a close not mentioned in the schedule or delineated in the plan was always treated as part of Gotton Farm, and was intended to be conveyed by the deed. *Barton v. Dawes*, 10 C. B. 261-265.

(c) A institutes a suit against B. for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake.

A. may prove that such a mistake was made as would entitle him to have the contract reformed. *Story's Equity Jurisprudence*, chap. 5, sects. 153-162.

(d) A. lets land to B., and they agree that a lease shall be given by A. to B.

Before the lease is given, B. tells A. that he will not sign it unless A. promises to destroy the rabbits. A. does promise. The lease is afterwards granted, and reserves sporting-rights to A., but does not mention the destruction of the rabbits. B. may prove A.'s verbal agreement as to the rabbits. *Morgan v. Griffiths*, L. R. 6 Ex. 70. And see *Angell v. Duke*, L. R. 10 Q. B. 174.

(e) A. and B. agree verbally that B. shall take up an acceptance of A.'s, and that thereupon A. and B. shall make a written agreement for the sale of certain furniture by A. to B. B. does not take up the acceptance. A. may prove the verbal agreement that he should do so. *Lindley v. Lacey*, 17 C. B. (N. S.) 578.

(f) A. and B. enter into a written agreement for the sale of an interest in a patent, and at the same time agree verbally that the agreement shall not come into force unless C. approves of it. C. does not approve. The party interested may show this. *Pym v. Campbell*, 6 E. & B. 370.

(g) A., a farmer, agrees in writing to transfer to B., another farmer, a farm which A. holds of C. It is verbally agreed that the agreement is to be conditional on C.'s consent. B. sues A. for not transferring the farm. A. may prove the condition as to C.'s consent and the fact that he does not consent. *Wallis v. Littell*, 11 C. B. (N. S.) 369.

(h) A. agrees in writing to sell B. fourteen lots of freehold land and make a good title to each of them. Afterwards B. consents to take one lot though the title is bad. Apart from the Statute of Frauds this agreement might be proved. *Goss & Lord Nugent*, 5 B. & Ad. 58, 65.

(i) A. sells B. a horse, and verbally warrants him quiet in harness. A. also gives B. a paper in these words: "Bought of A. a horse for 7*l.* 2*s.* 6*d.*"

B. may prove the verbal warranty. *Allen v. Pink*, 4 M. & W. 140.

(j) The question is, whether A. gained a settlement by occupying and paying rent for a tenement. The facts of occupation and payment of rent may be proved by oral evidence, although the contract is in writing. *R. v. Hull*, 7 B. & C. 611.

of illegible, or not commonly intelligible, characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations, and of common words which, from the context, appear to have been used in a peculiar sense; but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.¹

(3) If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.²

(4) In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer,³ or which identifies any person or thing mentioned in it.⁴ Such facts are hereinafter called the circumstances of the case.⁵

(5) If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in which case they may be interpreted according to their less proper meaning.⁶

(6) If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.⁷

(7) If the document applies in part, but not with accuracy, to the circumstances of the case, the court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and as to his habitual use of language or names for particular persons or things.⁸

(8) If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.⁹

(9) If the document is of such a nature that the court will presume that it was executed with any other than its apparent

1. Illustration (*d*).

2. Illustrations (*e*) and (*f*).

3. See all the illustrations.

4. Illustration (*g*).

5. As to proving facts showing the knowledge of the writer, and for an instance of a document which is not admis-

sible for that purpose, see *Adie v. Clark*, L. R. 3 Ch. Div. 134, 142.

6. Illustration (*h*).

7. Illustration (*i*).

8. Illustrations (*k*), (*l*), (*m*).

9. Illustrations (*n*), (*o*).

intention, evidence may be given to show that it was in fact executed with its apparent intention.¹ (See WRITTEN INSTRUMENTS.)

1. Illustration (p).

Illustrations to Art. 91. — (a) A lease contains a covenant as to "ten thousand" rabbits. Oral evidence to show that a thousand meant, in relation to rabbits, 1,200, is admissible. *Smith v. Wilson*, 3 B. & Ad. 728.

(b) A sells to B. "1,170 bales of gambier." Oral evidence is admissible to show that a "bale" of gambier is a package compressed and weighing two hundred weight. *Garrison v. Perrin*, 2 C. B. (N. S.) 681.

(c) A., a sculptor, leaves to B. "all the marble in the yard, the tools in the shop, bankers, mod tools for carving." Evidence to show whether "mod" meant models, moulds, or modelling-tools, and to show what bankers are, may be given.

(d) Evidence may not be given to show that the word "boats," in a policy of insurance, means "boats not slung on the outside of the ship, on the quarter." *Blackett v. Royal Exchange Co.*, 2 C. & J. 244.

(e) A. leaves an estate to K., L., M., etc., by a will dated before 1838. Eight years afterward A. declares that by these letters he meant particular persons. Evidence of this declaration is not admissible. Proof that A. was in the habit of calling a particular person M. would have been admissible. *Clayton v. Lord Nugent*, 13 M. & W. 200. See 205, 206.

(f) A. leaves a legacy to —. Evidence to show how the blank was intended to be filled is not admissible. *Baylis v. A. G.*, 2 Atk. 239.

(g) Property was conveyed in trust in 1704 for the support of "Godly preachers of Christ's holy Gospel." Evidence may be given to show what class of ministers were at the time known by that name. *Shore v. Wilson*, 9 C. & F. 365, 565, 566.

(h) A. leaves property to his "children." If he has both legitimate and illegitimate children, the whole of the property will go to the legitimate children. If he has only illegitimate children, the property may go to them, if he cannot have intended to give it to unborn legitimate children. *Wig. Ext. Ev.*, pp. 18 and 19, and note of cases.

(i) A testator leaves all his estates in the county of Limerick and city of Limerick to A. He had no estates in the county of Limerick, but he had estates in the county of Clare, of which the will did not dispose. Evidence cannot be given to show that the words "of Clare" had been erased from the draught by mistake, and so omitted from the will as executed. *Miller v. Travers*, 8 Bing. 244.

(j) A. leaves a legacy to "Mrs. and Miss Bowden." No such persons were living at the time the legacy was made, but Mrs. Washburne, whose maiden name had been Bowden, was living, and had a daughter, and the testatrix used to call them Bowden. Evidence of these facts was admitted. *Lee v. Pain*, 4 Hare, 251-253.

(k) A. devises land to John Hiscocks, the eldest son of John Hiscocks. John Hiscocks had two sons, Simon, his eldest, and John, his second son, who, however, was the eldest son by a second marriage. The circumstances of the family, but not the testator's declarations of intention, may be proved in order to show which of the two was intended. *Doe v. Hiscocks*, M. & W. 363.

(l) A. devises property to Elizabeth, the natural daughter of B. B. has a natural son John, and a legitimate daughter Elizabeth. The court may infer from the circumstances under which the natural child was born, and from the testator's relationship to the putative father, that he meant to provide for John. *Ryall v. Hannam*, 10 Beav. 536.

(m) A. leaves a legacy to his niece, Elizabeth Stringer. At the date of the will he had no such niece, but he had a great-great-niece named Elizabeth Jane Stringer. The court may infer from these circumstances that Elizabeth Jane Stringer was intended; but they may not refer to instructions given by the testator to his solicitor, showing that the legacy was meant for a niece, Elizabeth Stringer, who had died before the date of the will, and that it was put into the will by a mistake on the part of the solicitor. *Stringer v. Gardiner*, 27 Beav. 35; 4 De G. & J. 468.

(n) A. devises one house to George Gord, the son of George Gord, another to George Gord the son of John Gord, and a third to George Gord the son of Gord. Evidence both of circumstances and of the testator's statements of intention may be given to show which of the two George Gord he meant. *Doe v. Needs*, 2 M. & W. 129.

(o) A. leaves two legacies of the same amount to B., assigning the same motive for each legacy, one being given in his will, the other in a codicil. The court presumes that they are not meant to be cumulative; but the legatee may show, either by proof of surrounding circumstances, or of declarations by the testator, that they were. *Per Leach, V. C.*, in *Hurst v. Leach*, 5 Madd. 351, 360, 361. The rule in this case was vindicated, and a number of other cases, both before and after it,

c. Cases to which Arts. 90 and 91 do not apply (Art. 92). — Arts. 90 and 91 apply only to parties to documents, and their representatives in interest, and only to cases in which some civil right or civil liability dependent upon the terms of a document is in question. Any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove; and any party to any document, or any representative in interest of any such party, may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document.¹ (See WRITTEN INSTRUMENTS.)

III. Production and Effect of Evidence. — **I. Burden of Proof.** — *a. He who affirms must prove (Art. 93).* — Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist.² (See BURDEN OF PROOF, vol. 2, p. 649.)

b. Presumption of Innocence (Art. 94). — If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt.

The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.³ (See CRIMINAL PROCEDURE, vol. 4, p. 844.)

c. On whom the General Burden of Proof lies (Art. 95). — The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at first, by his proving facts which

were elaborately considered by Lord St. Leonards, when chancellor of Ireland, in *Hall v. Hill*, 1 Dru. & War. 94, 111-133.

1. Illustrations to Art. 92. — (*a*) The question is, whether A., a pauper, is settled in the parish of Cheadle. A deed of conveyance to which A. was a party is produced, purporting to convey land to A. for a valuable consideration. The parish appealing against the order was allowed to call A. as a witness to prove that no consideration passed. *R. v. Cheadle*, 3 B. & Ad. 833.

(*b*) The question is, whether A. obtained money from B. under false pretences. The money was obtained as a premium for executing a deed of partnership, which deed stated a consideration other than the one which constituted the false pretence. B. may give evidence of the false pretence, although he executed the deed mis-stating the consideration for the premium. *R. v. Adamson*, 2 Moody, 286.

2. 1 Ph. Ev. 552; T. E. sect. 337.

3. Illustrations to Art. 94. — (*a*) A. sues B. on a policy of fire-insurance. B. pleads that A. burned down the house insured. B. must prove his plea as fully as if A. were being prosecuted for arson. *Thurtell v. Beaumont*, 1 Bing. 339.

(*b*) A. sues B. for damage done to A.'s ship by inflammable matter loaded thereon by B. without notice to A.'s captain. A. must prove the absence of notice. *Williams v. East India Co.*, 3 Ea. 102, 198, 199.

(*c*) The question in 1819 is, whether A. is settled in the parish of a man to whom she was married in 1813. It is proved that in 1812 she was married to another person, who enlisted soon afterwards, went abroad on service, and had not been heard of afterwards. The burden of proving that the first husband was alive at the time of the second marriage is on the person who asserts it. *R. v. Twynning*, 2 B. & A. 386.

raise a presumption in his favor.¹ (See BURDEN OF PROOF, vol. 2, p. 649.)

d. Burden of Proof as to Particular Fact (Art. 96). — The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the burden of proving that fact shall lie on any particular person;² but the burden may, in the course of a case, be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively. (See BURDEN OF PROOF, vol. 2, p. 649.)

e. Burden of proving Fact to be proved to make Evidence Admissible (Art. 97). — The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact, is on the person who wishes to give such evidence.³ (See BURDEN OF PROOF.)

1. 1 Ph. Ev. 552; T. E. sects. 338, 339.

Illustrations to Art. 95. — (a) It appears upon the pleadings that A. is indorsee of a bill of exchange. The presumption is, that the indorsement was for value, and the party interested in denying this must prove it. *Mills v. Barber*, 1 M. & W. 425.

(b) A., a married woman, is accused of theft, and pleads not guilty.

The burden of proof is on the prosecution. She is shown to have been in possession of the stolen goods soon after the theft. The burden of proof is shifted to A. She shows that she stole them in the presence of her husband. The burden of proving that she was not coerced by him is shifted on to the prosecutor. 1 Rus. Cri. 33; and 2, 337.

(c) A. is indicted for bigamy. On proof by the prosecution of the first marriage, A. proves that at the time he was a minor. This throws on the prosecution the burden of proving the consent of A.'s parents. *R. v. Butler*, 1 R. & R. 61.

(d) A deed of gift is shown to have been made by a client to his solicitor. The burden of proving that the transaction was in good faith is on the solicitor. 1 Story Eq. Juris. sect. 310, note 1. Quoting *Hunter v. Atkins*, 3 M. & K. 113.

(e) It is shown that a hedge stands on A.'s land. The burden of proving that the ditch adjacent to it is not A.'s also, is on the person who denies that the ditch belongs to A. *Grey v. West*, Selw. N. P. 1297.

(f) A. proves that he received the rent of land. The presumption is that he is the owner in fee simple, and the burden of proof is on the person who denies it. *Doe v. Coulthred*, 7 A. & E. 235.

(g) A. finds a jewel mounted in a socket, and gives it to B. to look at. B. keeps it,

and refuses to produce it on notice, but returns the socket. The burden of proving that it is not as valuable a stone of the kind as would go into the socket is on B. *Armoury v. Delamirie*, 1 S. L. C. 357.

(h) A. sues B. on a policy of insurance, and shows that the vessel insured went to sea, and that after a reasonable time no tidings of her have been received, but that her loss had been rumored. The burden of proving that she has not foundered is on B. *Koster v. Reed*, 6 B. & C. 19.

2. For instances of such provisions, see T. E. sects. 345, 346.

Illustrations under Art. 96. — (a) A. prosecutes B. for theft, and wishes the court to believe that B. admitted the theft to A. A. must prove the admission.

B. wishes the court to believe that, at the time in question, he was elsewhere. He must prove it.

(b) A., a ship-owner, sues B., an underwriter, on a policy of insurance on a ship. B. alleges that A. knew of, and concealed from B., material facts. B. must give enough evidence to throw upon A. the burden of disproving his knowledge; but slight evidence will suffice for this purpose. *Elkin v. Jansen*, 13 M. & W. 655. See especially the judgment of Alderson, B., 663-666.

(c) In actions for penalties under the old game-laws, though the plaintiff had to aver that the defendant was not duly qualified, and was obliged to give general evidence that he was not, the burden of proving any definite qualification was on the defendant. 1 Ph. Ev. 550, and cases there quoted. The illustration is founded more particularly on *R. v. Jarvis*, in a note to *R. v. Stone*, 1 Ea. 639, where Lord Mansfield's language appears to imply what is stated above.

3. **Illustrations under Art. 97.** — (a) A.

2. *Presumptions and Estoppels.* — *a. Presumption of Legitimacy (Art. 98).* — The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband; or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred.

Neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other, nor are any declarations by them upon that subject deemed to be relevant facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not; provided that in applications for affiliation orders when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten.¹ (See *BASTARDY*, vol. 2, p. 129.)

b. Presumption of Death from Seven Years' Absence (Art. 99). — A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it.²

There is no presumption as to the age at which a person died who is shown to have been alive at a given time, or as to the order in which two or more persons died who are shown to have died in the same accident, shipwreck, or battle. (See *DEATH*, vol. 5.)

wishes to prove a dying declaration by B. A. must prove B.'s death, and the fact that he had given up all hope of life when he made the statement.

(*b*) A. wishes to prove, by secondary evidence, the contents of a lost document.

A. must prove that the document has been lost.

1. *R. v. Luffe*, 8 Ea. 207; *Cope v. Cope*, 1 Mo. & Ro. 272-274; *Legge v. Edmonds*, 25 L. J. Eq. 125, see p. 135; *R. v. Mansfield*, 1 Q. B. 444; *Morris v. Davies*, 3 C. & P. 215. I am not aware of any decision as to the paternity of a child born, say six months after the death of one husband, and three months after the mother's marriage

to another. Amongst common soldiers in India, such a question might easily arise. The rule in European regiments is, that a widow not remarried within the year (it used to be six months) must leave the regiment; the result was, and is, that widowhoods are usually very short.

2. *McMahon v. McElroy*, 2 Ir. Rep. Eq. 1; *Hopewell v. De Pinna*, 2 Camp. 113; *Nepean v. Doe*, 2 S. L. C. 562, 681; *Nepean v. Knight*, 2 M. & W. 894, 912; *R. v. Lumley*, L. R., 1 C. C. R. 196; and see the caution of Lord Denman in *R. v. Harborne*, 2 A. & E. 544. All the cases are collected and considered in *in re Phené's Trust*, L. R. 5 Ch. App. 139.

*c. Presumption of Lost Grant*¹ (Art. 100). — When it has been shown that any person has for a long period of time exercised any proprietary right which might have had a lawful origin by grant or license from the Crown, or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested, if it had not had a lawful origin, there is a presumption that such right had a lawful origin, and that it was created by a proper instrument, which has been lost. (See GRANTS.)

d. Presumption of Regularity and of Deeds to complete Title (Art. 101). — When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.²

1. The subject of the doctrine of lost grants is much considered in *Angus v. Dalton*, L. R. 3 Q. B. D. 84; 6 App. Cas. 740.

Illustrations under Art. 100. — (a) The question is whether B. is entitled to recover from A. the possession of lands which A.'s father and mother successively occupied from 1754 to 1792 or 1793, and which B. had occupied (without title) from 1793 to 1809. The lands formed originally an encroachment on the Forest of Dean.

The undisturbed occupation for thirty-nine years raises a presumption of a grant from the Crown to A.'s father. *Goodtitle v. Baldwin*, 11 Ea. 488. The presumption was rebutted in this case by an express provision of 20 Ch. II. c. 3, avoiding grants of the Forest of Dean. See also *Doe d. Devine v. Wilson*, 10 Moo. P. C. 502.

(b) A fishing mill-dam was erected more than a hundred and ten years before 1861 in the river Derwent in Cumberland (not being navigable at that place), and was used for more than sixty years before 1861 in the manner in which it was used in 1861. This raises a presumption that all the upper proprietors whose rights were injuriously affected by the dam had granted a right to erect it. *Leconfield v. Lonsdale*, L. R. 5 C. P. 657.

(c) A. builds a windmill near B.'s land in 1829, and enjoys a free current of air to it over B.'s land as of right, and without interruption till 1860. This enjoyment raises no presumption of a grant by B. of a right to such a current of air, as it would not be natural for B. to interrupt it. *Webb v. Bird*, 13 C. B. N. S. 841.

(d) No length of enjoyment (by means of a deep well) of water percolating through underground undefined passages, raises a presumption of a grant from the owners of the ground under which the water so percolates, of a right to the water. *Chasemore v. Richards*, 7 H. L. C. 339.

2. **Presumption as to Judicial Records.** — Wharton on Evidence, 3d ed. § 1302, states

the rule thus: "The true view is, not that the law presumes that a judicial record is right, but that, if on its face it is complete and regular, the law throws upon the party objecting to it the burden of proving any latent imperfections by which it may be affected." *Citing R. v. Lynne Regis*, 1 Dougl. 159; *Chaunce v. Rigby*, 3 M. & W. 68; *James v. Howard*, 3 G. & Dav. 264; *Parsons v. Lloyd*, 3 Wils. 341; *Taylor v. Ford*, 22 W. R. 47; 29 L. J. N. S. 392; *Van Omeron v. Dowick*, 2 Camp. 44; *Phillips v. Evans*, 1 Cr. & M. 461; *Gasset v. Howard*, 10 Q. B. 453; *Bank U. S. v. Dandridge*, 12 Wheat. (U. S.) 69; *Florentine v. Barton*, 2 Wall. (U. S.) 210; *Cofield v. McClelland*, 16 Wall. (U. S.) 331; *McNitt v. Turner*, 16 Wall. (U. S.) 352; *Garnharts v. U. S.*, 16 Wall. (U. S.) 162; *Pittsburg Railroad v. Ramsey*, 22 Wall. (U. S.) 322; *Ready v. Scott*, 23 Wall. (U. S.) 352; *Sprague v. Litherberry*, 4 McLean (U. S.), 442; *Segee v. Thomas*, 3 Blatch. (U. S.) 11; *Kibbe v. Dunn*, 5 Biss. (U. S.) 233; *Austin v. Austin*, 50 Me. 74; *Plummer v. Ossipee*, 59 N. H. 55; *Stearns v. Stearns*, 32 Vt. 678; *Cowen v. Balkom*, 3 Pick. (Mass.) 281; *Apthorp v. North*, 14 Mass. 167; *Sanford v. Sanford*, 28 Conn. 6; *Schermerhorn v. Talman*, 14 N. Y. 93; *Rowe v. Parsons*, 13 N. Y. Supreme Ct. 338; *Mandeville v. Reynolds*, 68 N. Y. 528; *Cromelein v. Brink*, 29 Penn. St. 522; *Williamson v. Fox*, 38 Pa. St. 214; *Smith v. Williamson*, 11 N. J. L. 313; *State v. Lewis*, 22 N. J. L. 564; *Den v. Gaston*, 25 N. J. L. 615; *Hudson v. Messick*, 1 Houst. Del. 275; *Brown v. Connelly*, 5 Blackf. 390; *Brackenridge v. Dawson*, 7 Ind. 383; *Morgan v. State*, 12 Ind. 448; *Kelly v. Garner*, 13 Ind. 399; *Owen v. State*, 25 Ind. 371; *Markel v. Evans*, 47 Ind. 326; *Kenney v. Phillippy*, 91 Ind. 511; *Burke v. Pinnell*, 93 Ind. 540; *Outlaw v. Davis*, 27 Ill. 467; *Tibbs v. Allen*, 27 Ill. 119; *Moore v. Neil*, 39 Ill. 256; *Rosenthal v. Remick*, 44 Ill. 202; *Stamposki v. Hooper*, 86 Ill. 321; *McNorton v.*

When a person in possession of any property is shown to be entitled to the beneficial ownership thereof, there is a presumption that every instrument has been executed which it was the legal duty of his trustees to execute in order to perfect his title.¹

e. Estoppel by Conduct (Art. 102).—When one person by any thing which he does or says, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing.

When any person under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act. (See ESTOPPEL, vol. 6.)

Ackers, 24 Iowa, 369; Preston v. Wright, 60 Iowa, 351; Merritt v. Baldwin, 6 Wis. 439; Bunker v. Rand, 19 Wis. 253; Thorp v. Commonwealth, 3 Metc. (Ky.) 411; Vincent v. Eames, 1 Metc. (Ky.) 247; Letcher v. Kennedy, 3 J. J. Marsh. 701; Sidwell v. Worthington, 8 Dana, 74; Brown v. Gill, 49 Ga. 549; Tyler v. Chevalier, 56 Ga. 168; McGrews v. McGrews, 1 St. & Part. 30; Stubbs v. Leavitt, 30 Ala. 138; Gray v. Cruise, 36 Ala. 559; State v. Fansh. 23 Miss. 483; Grinstead v. Foute, 26 Miss. 476; Reynolds v. Nelson, 41 Miss. 83; State v. Williamson, 57 Mo. 192; Wadsworth's Succes., 1 La. An. 966; Gibson v. Foster, 2 La. Ann. 509; Brooks v. Walker, 3 La. Ann. 150; Towne v. Bossier, 19 La. Ann. 162; People v. Garcia, 25 Cal. 531; Butcher v. Bank, 2 Kans. 70; Sumner v. Cook, 12 Kans. 162; Dodge v. Coffin, 15 Kans. 277; Ward v. Baker, 16 Kans. 31; State v. Gibson, 21 Ark. 140; Callison v. Autry, 4 Tex. 371; Frost v. Holmes, 8 Tex. 29.

Presumption as to Regularity and Validity of Official Acts.—See "Officers of Municipalities."

1. Doe d. Hammond v. Cooke, 6 Bing. 174-179.

Presumption of Conveyance from Trustee to Cestui Que Trust.—Sometimes where an estate has been vested by deed or will in trustees for a *cestui que trust*, whether it is a fee or some lesser estate, the law will presume that the trustees have surrendered, conveyed, or assigned the estate, whatever

it was, to the *cestui que trust*. 1 Perry on Trusts (3d ed.), § 349; England v. Slade, 4 T. R. 682; Wilson v. Allen, 1 J. & W. 611; Noel v. Bewley, 3 Sim. 103; Cooke v. Sulton, 2 S. & S. 154; Hillary v. Waller, 12 Ves. 239; Lade v. Halford, Bull. N. P. 110; Doe v. Hilder, 2 B. & A. 782; Emery v. Grocock, 6 Madd. 54; Townshend v. Champ-ernown, 1 G. & J. 583; Goodtitle v. Jones, 7 T. R. 47; Doe v. Sybourn, 7 T. R. 2; Moore v. Jackson, 4 Wend. (N. Y.) 59; Dutch Church v. Mott, 7 Paige (N. Y.), 77; Jackson v. Moore, 13 Johns. (N. Y.) 513; 1 Green. Cruise, Dig. 412; Matthews v. Ward, 10 Gill & J. 443; Jackson v. Pierce, 2 Johns. (N. Y.) 226; Sinclair v. Jackson, 8 Cow. (N. Y.) 543.

"It seems now to be well settled, that three circumstances must concur in order to raise the presumption of a conveyance or surrender by the trustee to the *cestui que trust*: (1) It must have been the duty of the trustee to make the conveyance; (2) there must be some sufficient reason to support the presumption; (3) the presumption must be in support of a just title, and not to defeat it." 1 Perry on Trusts (3d ed.) § 350. See "Trusts."

Illustrations under Art. 102.—(a) A., the owner of machinery in B.'s possession, which is taken in execution by C., abstains from claiming it for some months, and converses with C.'s attorney without referring to his claim, and by these means impresses C. with the belief that the machinery is B.'s. C. sells the machinery. A. is

f. Estoppel of Tenant and Licensee (Art. 103).—No tenant, and no person claiming through any tenant, of any land or hereditament of which he has been let into possession, or for which he has paid rent, is, till he has given up possession, permitted to deny that the landlord had, at the time when the tenant was let into possession or paid the rent, a title to such land or hereditament;¹ and no person who came upon any land by the license of the person in possession thereof is, whilst he remains on it, permitted to deny that such person had a title to such possession at the time when such license was given.² (See ESTOPPEL, LANDLORD AND TENANT.)

g. Estoppel of Acceptor of Bill of Exchange (Art. 104).—No acceptor of a bill of exchange is permitted to deny the signature of the drawer or his capacity to draw, or, if the bill is payable to the order of the drawer, his capacity to indorse the bill, though he may deny the fact of the indorsement;³ nor if the bill be drawn by procuration, the authority of the agent, by whom it purports to be drawn, to draw in the name of the principal, though he may deny his authority to indorse it. If the bill is accepted in blank, the acceptor may not deny the fact that the drawer indorsed it.⁴ (See ESTOPPEL, and BILLS AND NOTES.)

h. Estoppel of Bailee, Agent, and Licensee (Art. 105).—No bailee, agent, or licensee is permitted to deny that the bailor, principal, or licensor, by whom any goods were intrusted to any of them respectively was entitled to those goods at the time when they were so intrusted.

estopped from denying that it is B.'s. *Pickard v. Sears*, 6 A. & E. 469, 474.

(b) A., a retiring partner of B., gives no notice to the customers of the firm that he is no longer B.'s partner. In an action by a customer, he cannot deny that he is B.'s partner. (Per Parke, B.) *Freeman v. Cooke*, 2 Ex. 661.

(c) A. sues B. for a wrongful imprisonment. The imprisonment was wrongful, if B. had a certain original warrant; rightful, if he had only a copy. B. had in fact a copy. He led A. to believe that he had the original, though not with the intention that A. should act otherwise than he actually did; nor did A. so act. B. may show that he had only a copy, and not the original. *Howard v. Hudson*, 2 E. & B. 1.

(d) A. sells eighty quarters of barley to B., but does not specifically appropriate to B. any quarters. B. sells sixty of the eighty quarters to C. C. informs A., who assents to the transfer. C., being satisfied with this, says nothing further to B. as to delivery. B. becomes bankrupt. A. cannot, in an action by C. to recover the barley, deny that he holds for C. on the ground that, for want of specific appropriation, no property passed to B. *Knights v. Wiffen*, L. R. 5 Q. B. 660.

(e) A. signs blank checks, and gives them to his wife to fill up as she wants money. A.'s wife fills up a check for £50. 2s. so carelessly that room is left for the insertion of figures before the "50" and for the insertion of words before the "fifty." She then gives it to a clerk of A.'s to get it cashed. He writes "3" before the "50," and "three hundred and" before "fifty." A.'s banker pays the check so altered in good faith. A. cannot recover against the banker. *Young v. Grote*, 4 Bing. 253.

(f) A. carelessly leaves his door unlocked, whereby his goods are stolen. He is not estopped from denying the title of an innocent purchaser from the thief. Per *Blackburn*, J., in *Swan v. N. B. Australasian Co.*, 2 H. & C. 181. See *Baxendale v. Bennett*, 3 Q. B. D. 525. The earlier cases on the subject are much discussed in *Jorden v. Money*, 5 H. & C. 209-216, 234, 235.

1. *Doe v. Barton*, 11 A. & E. 307; *Doe v. Smyth*, 4 M. & S. 347; *Doe v. Pegg*, 1 T. R. 760 (note).

2. *Doe v. Baytop*, 3 A. & E. 188.

3. *Garland v. Jacomb*, L. R. 8 Ex. 216.

4. *Sanderson v. Coleman*, 4 M. & G. 209.

Provided that any such bailee, agent, or licensee may show that he was compelled to deliver up any such goods to some person who had a right to them as against his bailor, principal, or licensor, or that his bailor, principal, or licensor wrongfully and without notice to the bailee, agent, or licensee, obtained the goods from a third person, who has claimed them from such bailee, agent, or licensee.¹

Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive proof of that shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading had actual notice at the time of receiving the same that the goods had not been in fact laden on board, provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder holds.² (See ESTOPPEL, BAILMENT, BILL OF LADING, AGENCY, and LICENSE.)

3. *Of the Competency of Witnesses.*³ — *a. Who may testify* (Art. 106). — All persons are competent to testify in all cases except as hereinafter accepted.

*b. What Witnesses are Incompetent*⁴ (Art. 107). — A witness is incompetent if, in the opinion of the judge, he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth.

A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible; but such writing must be written, and such signs made, in open court. Evidence so given is deemed to be oral evidence. (See WITNESSES.)

c. Competency in Criminal Cases (Art. 108). — In criminal cases

1. *Dixon v. Hammond*, 2 B. & A. 313; *Crossley v. Dixon*, 10 H. L. C. 293; *Gosling v. Birnie*, 7 Bing. 339; *Hardman v. Wilcock*, 9 Bing. 382; *Biddle v. Bond*, 34 L. J. Q. B. 137 [6 B. & S. 225]; *Wilson v. Anderton*, 1 B. & Ad. 450. As to carriers, see *Sheridan v. New Quay*, 4 C. B. (N. S.) 618.

2. 18 & 19 Vict. c. iii. sect. 3.

3. *Note by Justice Stephen.* — The law as to the competency of witnesses was formerly the most, or nearly the most, important and extensive branch of the Law of Evidence. Indeed, rules as to the incompetency of witnesses, as to the proof of documents, and as to the proof of some particular is-

suues, are nearly the only rules of evidence treated of in the older authorities. Great part of Bentham's "Rationale of Judicial Evidence" is directed to an exposure of the fundamentally erroneous nature of the theory upon which these rules were founded; and his attack upon them has met with a success so nearly complete that it has itself become obsolete. The history of the subject is to be found in Mr. Best's work, book i. part i. ch. ii. sects. 132-188. See, too, T. E. 1210-1257, and R. N. P. 177-181. As to the old law, see 1 Ph. Ev. 1, 104.

4. A witness under sentence of death was said to be incompetent in *R. v. Webb*, 11 Cox, 133, *sed quare*.

the accused person and his or her wife or husband, and every person and the wife or husband of every person jointly indicted with him, is incompetent to testify.¹

Provided that in any criminal proceeding against a husband or wife for any bodily injury or violence inflicted upon his or her wife or husband, such wife or husband is competent and compellable to testify.² (See HUSBAND AND WIFE OR WITNESSES.)

d. Competency in Proceedings relating to Adultery (Art. 109). — In proceedings instituted in consequence of adultery, the parties and their husbands and wives are competent witnesses, provided that no witness in any [? such] proceeding, whether a party to the suit or not, is liable to be asked, or bound to answer, any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery.³ (See ADULTERY, vol. I, p. 214, and DIVORCE.)

e. Communications during Marriage (Art. 110). — No husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage.⁴ (See PRIVILEGED COMMUNICATIONS.)

f. Judges and Advocates privileged as to Certain Questions (Art. 111). — It is doubtful whether a judge is compellable to testify as to any thing which came to his knowledge in court as such judge.⁵

It seems that a barrister cannot be compelled to testify as to what he said in court in his character of a barrister.⁶ (See PRIVILEGED COMMUNICATIONS.)

g. Evidence as to Affairs of State (Art. 112). — No one can be compelled to give evidence relating to any affairs of state, or as to official communications between public officers upon public affairs, except with the permission of the officer at the head of the department concerned,⁷ or to give evidence of what took place in either House of Parliament, without the leave of the House, though he may state that a particular person acted as speaker.⁸ (See PRIVILEGED COMMUNICATIONS.)

h. Information as to Commission of Offences (Art. 113). — In cases in which the government is immediately concerned, no witness can be compelled to answer any question the answer to which would tend to discover the names of persons by or to whom information was given as to the commission of offences.

In ordinary criminal prosecutions it is for the judge to decide

1. *R. v. Payne*, L. R. 1 C. C. R. 349, and *R. v. Thompson*, id. 377.

2. *Reeve v. Wood*, 5 B. & S. 364. Treason has been also supposed to form an exemption. See T. E. sect. 1273.

3. 32 & 33 Vict. c. 68, sect. 3. The word "such" seems to have been omitted accidentally.

4. 16 & 17 Vict. c. 83, sect. 3. It is doubt-

ful whether this would apply to a widower or divorced person, questioned after the dissolution of the marriage as to what had been communicated to him whilst it lasted.

5. *R. v. Gizard*, 8 C. & P. 595.

6. *Curry v. Walter*, 1 Esp. 456.

7. *Beatson v. Skene*, 5 H. & N. 838.

8. *Chubb v. Solomons*, 3 Car. & Kir. 77; *Plunkett v. Cobbett*, 5 Esp. 136.

whether the permission of any such question would or would not, under the circumstances of the particular case, be injurious to the administration of justice.¹ (See WITNESSES.)

i. Competency of Jurors (Art. 114).—A petty juror may not,² and it is doubtful whether a grand juror may,³ give evidence as to what passed between the jurymen in the discharge of their duties. It is also doubtful whether a grand juror may give evidence as to what any witness said when examined before the grand jury. (See WITNESSES.)

j. Professional Communications (Art. 115).—No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client during, in the course, and for the purpose of such employment. It is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser.

This article does not extend to—

(1) Any such communication as aforesaid made in furtherance of any criminal purpose.⁴

(2) Any fact observed by any legal adviser, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not.

(3) Any fact with which such legal adviser became acquainted otherwise than in his character as such. The expression "legal adviser" includes barristers and solicitors,⁵ their clerks,⁶ and interpreters between them and their clients. It does not include officers of a corporation through whom the corporation has elected to make statements.⁷ (See PRIVILEGED COMMUNICATIONS.)

1. *R. v. Hardy*, 24 S. T. 811; *A. G. v. Bryant*, 15 M. & W. 169; *R. v. Richardson*, 3 F. & F. 693.

2. *Vaise v. Delaval*, 1 T. R. 11; *Burgess v. Langley*, 5 M. & G. 722.

3. 1 Ph. Ev. 140; T. E. sect. 863.

4. *Follett v. Jefferyes*, 1 Sim. n. s. 17; *Charlton v. Coombes*, 32 L. J. Ch. 284. These cases put the rule on the principle, that the furtherance of a criminal purpose can never be part of a legal adviser's business. As soon as a legal adviser takes part in preparing for a crime, he ceases to act as a lawyer and becomes a criminal,—a conspirator or accessory as the case may be.

5. *Wilson v. Rastall*, 4 T. R. 753; as to interpreters, *ib.* 756.

6. *Taylor v. Foster*, 2 C. & P. 195; *Foot v. Hayne*, 1 C. & P. 545. Quære, whether licensed conveyancers are within the rule? *Parke, B.*, in *Turquand v. Knight*, 7 M. & W. 100, thought not. Special pleaders would seem to be on the same footing.

7. *Mayor of Swansea v. Quirk*, L. R., 5 C. P. D. 106.

Illustrations to Art. 115.—(a) A., being charged with embezzlement, retains B., a barrister, to defend him. In the course of the proceedings, B. observes that an entry has been made in A.'s account-book, charging A. with the sum said to have been embezzled, which entry was not in the book at the commencement of B.'s employment.

This being a fact observed by B. in the course of his employment, showing that a

k. Confidential Communications with Legal Advisers (Art. 116).

— No one can be compelled to disclose to the court any communication between himself and his legal adviser, which his legal adviser could not disclose without his permission, although it may have been made before any dispute arose as to the matter referred to.¹

l. Clergymen and Medical Men (Art. 117). — Medical men² and (probably) clergymen may be compelled to disclose communications made to them in professional confidence. (See PRIVILEGED COMMUNICATIONS.)

fraud has been committed since the commencement of the proceedings, is not protected from disclosure in a subsequent action by A. against the prosecutor in the original case for malicious prosecution. *Brown v. Foster*, 1 H. & N. 736.

(b) A. retains B. an attorney to prosecute C. (whose property he had fraudulently acquired) for murder, and says, "It is not proper for me to appear in the prosecution for fear of its hurting me in the cause coming on between myself and him; but I do not care if I give £10,000 to get him hanged, for then I shall be easy in my title and estate." This communication is not privileged. *Duchess of Kingston's Case*, 20 S. T. 572, 573.

1. *Minet v. Morgan*, L. R. 8 Ch. App. 361, reviewing all the cases, and adopting the explanation given in *Pearse v. Pearse*, 1 De G. & S. 18-31, of *Radcliffe v. Fursman*, 2 Br. P. C. 514.

2. *Duchess of Kingston's Case*, 20 S. T. 572, 573.

Note by Justice Stephen to Art. 117. — The question whether clergymen, and particularly whether Roman Catholic priests, can be compelled to disclose confessions made to them professionally, has never been solemnly decided in England, though it is stated by the text-writers that they can. (1 Greenl. Ev. § 247.) See 1 Ph. Ev. 109; T. E. sects. 837, 838; R. N. P. 190; Starkie, 40. The question is discussed at some length in Best, sects. 583, 584; and a pamphlet was written to maintain the existence of the privilege by Mr. Baddeley in 1865. Mr. Best shows clearly that none of the decided cases are directly in point, except *Butler v. Moore* (MacNally, 253, 254), and possibly *R. v. Sparkes*, which was cited by Garrow in arguing *Du Barré v. Livette* before Lord Kenyon (1 Pea. 108). The report of his argument is in these words: "The prisoner being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted; and that confession was permitted to be given in evidence on the trial [before Buller, J.], and he was convicted and executed." The report is of no value, resting

as it does on Peake's note of Garrow's statement of a case in which he was probably not personally concerned; and it does not appear how the objection was taken, or whether the matter was ever argued. Lord Kenyon, however, is said to have observed: "I should have paused before I admitted the evidence there admitted."

Mr. Baddeley's argument is in a few words, that the privilege must have been recognized when the Roman Catholic religion was established by law, and that it has never been taken away.

I think that the modern Law of Evidence is not so old as the Reformation, but has grown up by the practice of the courts, and by decisions in the course of the last two centuries. It came into existence at a time when exceptions in favor of auricular confessions to Roman Catholic priests were not likely to be made. The general rule is that every person must testify to what he knows. An exception to the general rule has been established in regard to legal advisers; but there is nothing to show that it extends to clergymen, and it is usually so stated as not to include them. This is the ground on which the Irish Master of the Rolls (Sir Michael Smith) decided the case of *Butler v. Moore* in 1802 (MacNally, Ev. 253, 254). It was a demurrer to a rule to administer interrogatories to a Roman Catholic priest as to matter which he said he knew, if at all, professionally only. The Judge said, "It was the undoubted legal constitutional right of every subject of the realm who has a cause depending, to call upon a fellow-subject to testify what he may know of the matters in issue; and every man is bound to make the discovery, unless specially exempted and protected by law. It was candidly admitted that no special exemption could be shown in the present instance, and analogous cases and principles alone were relied upon." The analogy, however, was not considered sufficiently strong.

Several judges have, for obvious reasons, expressed the strongest disinclination to compel such a disclosure. Thus, Best, C. J., said, "I, for one, will never compel a

m. Production of Title-Deeds of Witness not a Party (Art. 118).—No witness who is not a party to a suit can be compelled to produce his title-deeds to any property,¹ or any document the production of which might tend to criminate him, or expose him to any penalty or forfeiture;² but a witness is not entitled to refuse to produce a document in his possession only because its production may expose him to a civil action,³ or because he has a lien upon it.⁴

No bank is compellable to produce the books of such bank, except in the case provided for in Art. 37.⁵ (See WITNESSES.)

n. Production of Documents which another Person, having Possession, could refuse to produce (Art. 119).—No solicitor,⁶ trustee, or mortgagee can be compelled to produce (except for the purpose of identification) documents in his possession as such, which his client, *cestui que trust*, or mortgagor would be entitled to refuse to produce if they were in his possession; nor can any one who is entitled to refuse to produce a document be compelled to give oral evidence of its contents.⁷ (See WITNESSES.)

o. Witness not to be compelled to criminate Himself (Art. 120).—No one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the witness⁸ (or the wife or husband of the witness)⁹ to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for; but no one is excused from answering any question, only because the answer may establish, or tend to establish, that he owes a debt, or is otherwise liable to any civil suit, either at the instance of the Crown, or of any other person.¹⁰ (See WITNESSES.)

clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence" (*obiter*, in *Broad v. Pitt*, 3 C. & P. 518). Alderson, B., thought (rather it would seem as a matter of good feeling than as a matter of positive law) that such evidence should not be given. *R. v. Griffin*, 6 Cox, Cr. Ca. 219.

1. *Pickering v. Noyes*, 1 B. & C. 263; *Adams v. Lloyd*, 3 H. & N. 351.

2. *Whitaker v. Izod*, 2 Tau. 115.

3. *Doe v. Date*, 3 Q. B. 609, 618.

4. *Hope v. Liddell*, 7 DeG. M. & G. 331; *Hunter v. Leathley*, 10 B. & C. 858; *Brassington v. Brassington*, 1 Sim. & Stu. 455. It has been doubted whether production may not be refused on the ground of a lien as against the party requiring the production. This is suggested in *Brassington v. Brassington*, and was acted upon by Lord Denman in *Kemp v. King*, 2 Mo. & Ro. 437; but it seems to be opposed to *Hunter v. Leathley*, in which a broker who had a lien on a policy for premiums advanced was compelled to produce it in an action against the underwriter by the assured who

had created the lien. See *Ley v. Barlow* (Judgt. of Parke, B.), 1 Ex. 801.

5. 42 and 43 Vict. c. 11.

6. *Volant v. Soyer*, 13 C. B. 231; *Phelps v. Prew*, 3 E. & B. 431.

7. *Davies v. Waters*, 9 M. & W. 608; *Few v. Guppy*, 13 Beav. 454.

8. *R. v. Boyes*, 1 B. & S. 330.

9. As to husbands and wives, see 1 Hale, P. C. 301; *R. v. Cliviger*, 2 T. R. 263; *Cartwright v. Green*, 8 Ve. 405; *R. v. Bathwick*, 2 B. & Ad. 639; *R. v. All Saints, Worcester*, 6 M. & S. 194. These cases show that even under the old law, which made the parties and their husbands and wives incompetent witnesses, a wife was not incompetent to prove matter which might tend to criminate her husband. *R. v. Cliviger* assumes that she was, and was to that extent overruled. As to the later law, see *R. v. Halliday*, Bell, 257. The cases, however, do not decide that if the wife claimed the privilege of not answering she would be compelled to do so, and to some extent they suggest that she would not.

10. 46 Geo. III, c. 37. See *R. v. Scott*,

p. Corroboration, when required (Art. 121).—When the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so.¹ (See *ACCESSORY Evidence*, vol. 1, p. 74.)

q. Number of Witnesses (Art. 122).—In trials for high treason, or misprision of treason, no one can be indicted, tried, or attainted (unless he pleads guilty), except upon the oath of two lawful witnesses, either both of them to the same overt act, or one of them to one, and another of them to another, overt act of the same treason. If two or more distinct treasons of divers heads or kinds are alleged in one indictment, one witness produced to prove one of the said treasons, and another witness produced to prove another of the said treasons, are not to be deemed to be two witnesses to the same treason within the meaning of this article.²

If, upon a trial for perjury, the only evidence against the defendant is the oath of one witness contradicting the oath on which perjury is assigned, and if no circumstances are proved which corroborate such witness, the defendant is entitled to be acquitted.³ (See *WITNESSES*.)

4. *Of taking Oral Evidence, and of the Examination of Witnesses.*

—*a. Evidence to be upon Oath, except in Certain Cases (Art. 123).*—All oral evidence given in any proceeding must be given upon oath; but if any person called as a witness refuses or is unwilling to be sworn from alleged conscientious motives, the judge before whom the evidence is to be taken may, upon being satisfied of the sincerity of such objection, permit such person, instead of being sworn, to make his or her solemn affirmation and declaration in the following words:—

“I, A. B., do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare,” etc.⁴

⁵ If any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, objects to take an oath, or is objected to as incompetent to take such an oath, such person must, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration:—

“I solemnly promise and declare that the evidence given by me

25 L. J. M. C. 128, 7 C. C. C. 164, and subsequent cases as to bankrupts, and *Ex parte Scholfield*, L. R. 6 Ch. D. 230.

1. 1 Ph. Ev. 93-101; T. E. sects. 887, 891;

3 Russ. Cri. 600-611.

2. 7 & 8 Will. III., c. 3, sects. 2, 4.

3. 3 Russ. on Crimes, 77-86.

4. 17 & 18 Vict. c. 125, sect. 20 (civil

cases); 24 & 25 Vict. c. 66 (criminal cases).

5. 32 & 33 Vict. c. 68, sect. 4; 33 & 34 Vict. c. 49. I omit special provisions as to Quakers, Moravians, and Separatists, as the enactments mentioned above include all cases. The statutes are referred to in T. E. sect. 1254; R. N. P. 175, 176.

to the court shall be the truth, the whole truth, and nothing but the truth."

If any person having made either of the said declarations wilfully and corruptly gives false evidence, he is liable to be punished as for perjury. (See OATH and WITNESSES.)

b. Form of Oaths; by whom they may be administered (Art. 124). — Oaths are binding which are administered in such form and with such ceremonies as the person sworn declares to be binding.¹

Every person now or hereafter having power by law or by consent of parties to hear, receive, and examine evidence, is empowered to administer an oath to all such witnesses as are lawfully called before him.² (See OATH.)

c. How Oral Evidence may be taken (Art. 125). — Oral evidence may be taken (according to the law relating to civil and criminal procedure) in open court upon a final or preliminary hearing, or out of court for future use in court: —

(1) Upon affidavit.

(2) Under a commission.

(3) Before any officer of the court, or any other person or persons appointed for that purpose by the court, or a judge.

Oral evidence taken in open court must be taken according to the rules contained in this chapter relating to the examination of witnesses.

³ Oral evidence taken under a commission must be taken in the manner prescribed by the terms of the commission.

⁴ Oral evidence taken under (c) must be taken in the same manner as if it were taken in open court; but the examiner has no right to decide on the validity of objections taken to particular questions, but must record the questions, the fact that they were objected to, and the answers given.

Oral evidence given on affidavit must be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief and the grounds thereof may be admitted. The costs of every affidavit unnecessarily setting forth matters of hearsay or argumentative matter, or copies of or extracts from documents, must be paid by the party filing them.

⁵ When a deposition, or the return to a commission, or an affidavit, or evidence taken before an examiner, is used in any court as evidence of the matter stated therein, the party against whom it is read may object to the reading of any thing therein contained on any ground on which he might have objected to its being stated by a witness examined in open court, provided that

1. 1 & 2 Vict. c. 105. For the old law, see *Omichund v. Barker*, 1 S. L. C. 455.

2. 14 & 15 Vict. c. 99, sect. 16.

3. T. E. 491.

4. T. E. sect. 1283.

5. T. E. 491. *Hutchinson v. Bernard*, 2 Mo. & Ro. 1.

no one is entitled to object to the reading of any answer to any question asked by his own representative on the execution of a commission to take evidence. (See DEPOSITIONS and WITNESSES.)

d. Examination in Chief, Cross-Examination, and Re-Examination (Art. 126). — Witnesses examined in open court must be first examined in chief, then cross-examined, and then re-examined.

Whenever any witness has been examined in chief, or has been intentionally sworn, or has made a promise and declaration as hereinbefore mentioned for the purpose of giving evidence, the opposite party has a right to cross-examine him; but the opposite party is not entitled to cross-examine merely because a witness has been called to produce a document on a *subpoena duces tecum*, or in order to be identified. After the cross-examination is concluded, the party who called the witness has a right to re-examine him.

The court may in all cases permit a witness to be recalled either for further examination in chief, or for further cross-examination; and if it does so, the parties have the right of further cross-examination and further re-examination respectively.

If a witness dies, or becomes incapable of being further examined in any state of his examination, the evidence given before he became incapable is good.¹

If in the course of a trial a witness who was supposed to be competent appears to be incompetent, his evidence may be withdrawn from the jury, and the case may be left to their decision independently of it.² (See WITNESSES.)

e. To what Matters Cross-Examination and Re-Examination must be directed (Art. 127). — The examination and cross-examination must relate to facts in issue, or relevant or deemed to be relevant thereto; but the cross-examination need not be confined to the facts to which the witness testified on his examination in chief.

The re-examination must be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter. (See WITNESSES.)

f. Leading Questions (Art. 128). — Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in an examination in chief, or a re-examination, except with the permission of the court, but such questions may be asked in cross-examination. (See WITNESSES.)

1. *R. v. Doolin*, 1 Jebb. C. C. 123. though there can be no cross-examination. The judges compared the case to that of

a dying declaration, which is admitted 2. *R. v. Whitehead*, L. R. 1 C. C. R. 33.

g. Questions Lawful in Cross-Examinations (Art. 129). — When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend, —

- (1) To test his accuracy, veracity, or credibility; or
- (2) To shake his credit, by injuring his character.

Witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the answer was disgraceful to the witness; but it is submitted that the court has the right to exercise a discretion in such cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not, in the opinion of the court, affect the credibility of the witness as to the matter to which he is required to testify.

In the case provided for in Art. 120 a witness cannot be compelled to answer such a question.¹ (See WITNESSES.)

h. Exclusion of Evidence to contradict Answers to Questions testing Veracity (Art. 130). — When a witness under cross-examination has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence can be given to contradict him,² except in the following cases: —

(1) If a witness is asked whether he has been previously convicted of any felony or misdemeanor, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof.³

(2) If a witness is asked any question tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted.⁴ (See WITNESSES.)

i. Statements Inconsistent with Present Testimony may be proved (Art. 131). — Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the action and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion; and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it. The same course may be taken with a witness upon his examination in chief, if the judge is of opinion that he is “adverse” (i.e., hostile) to the party by whom he was called, and permits the question. (See WITNESSES.)

1. Illustration under Art. 129. — (a) The question is, whether A. committed perjury in swearing that he was R. T. B. deposes that he made tattoo marks on the arm of R. T., which at the time of the trial were not, and never had been, on the arm of A. B. may be asked and compelled to answer the question whether, many years after the alleged tattooing, and many years before the occasion on which he was ex-

amined, he committed adultery with the wife of one of his friends. *R. v. Orton.* See summing up of Cockburn, C. J., vol. ii. p. 719.

2. *A. G. v. Hitchcock*, 1 Ex. 91, 99-105. See, too, *Palmer v. Trower*, 8 Ex. 247.

3. 28 & 29 Vict. c. 18, sect. 6.

4. *A. G. v. Hitchcock*, 1 Ex. 91, pp. 100, 105.

j. Cross-Examination as to Previous Statements in Writing (Art. 132).—A witness under cross-examination [or a witness whom the judge under the provisions of Art. 131 has permitted to be examined by the party who called him as to previous statements inconsistent with his present testimony] may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him [or being proved in the first instance]; but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him. The judge may, at any time during the trial, require the document to be produced for his inspection, and may thereupon make such use of it for the purposes of the trial as he thinks fit.¹ (See WITNESSES.)

k. Impeaching Credit of Witness (Art. 133).—The credit of any witness may be impeached by the adverse party by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not upon their examination in chief give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted.²

No such evidence may be given by the party by whom any witness is called;³ but when such evidence is given by the adverse party, the party who called the witness may give evidence in reply to show that the witness is worthy of credit.⁴ (See WITNESSES.)

l. Offences against Women (Art. 134).—When a man is prosecuted for rape or an attempt to ravish, it may be shown that the woman against whom the offence was committed was of a generally immoral character, although she is not cross-examined on the subject.⁵ The woman may in such case be asked whether she had had connection with other men, but her answer cannot be contradicted.⁶ She may also be asked whether she has had connection on other occasions with the prisoner; and if she denies it she (probably) may be contradicted.⁷ (See RAPE.)

m. What Matters may be proved in Reference to Declarations Relevant under Arts. 25–32 (Art. 135).—Whenever any declaration or statement made by a deceased person relevant or deemed to be relevant under Arts. 25–32, both inclusive, or any deposition is proved, all matters may be proved in order to contradict it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had

1. 17 & 18 Vict. c. 125, sect. 24; and 28 Vict. c. 18, sect. 5. I think the words between brackets represent the meaning of the sections, but in terms they apply only to witnesses under cross-examination. "Witnesses may be cross-examined," etc.

2. 2 Ph. Ev. 503, 504; T. E. sects. 1324, 1325.

3. 17 & 18 Vict. c. 125, sect. 2, and 28 Vict. c. 18, sect. 3.

4. 2 Ph. Ev. 504.

5. *R. v. Clarke*, 2 Star, 241.

6. *R. v. Holmes*, L. R. 1 C. C. R. 334.

7. *R. v. Martin*, 6 C. & P. 562, and remarks in *R. v. Holmes*, p. 337, per Kelly, C. B.

been called as a witness, and had denied, upon cross-examination, the truth of the matter suggested.¹ (See WITNESSES.)

n. Refreshing Memory (Art. 136). — A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.² An expert may refresh his memory by reference to professional treatises.³ See WITNESSES.)

o. Right of Adverse Party as to Writing used to refresh Memory (Art. 137). — Any writing referred to under Art. 136 must be produced and shown to the adverse party if he requires it; and such party may, if he pleases, cross-examine the witness thereupon.⁴ (See WITNESSES.)

p. Giving, as Evidence, Document called for and produced on Notice (Art. 138). — When a party calls for a document which he has given the other party notice to produce, and such document is produced to, and inspected by, the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so, and if it is, or is deemed to be, relevant.⁵ (See TRIAL.)

q. Using, as Evidence, a Document, Production of which was refused on Notice (Art. 139). — When a party refuses to produce a document which he has had notice to produce, he may not afterwards use the document as evidence without the consent of the other party.⁶ (See TRIAL.)

5. Of Depositions. — Arts. 140, 141, 142, relate to special English statutory provisions concerning the taking of depositions. The subject is treated in a separate article in this work. (See DEPOSITIONS, vol. 5.)

6. Of Improper Admission and Rejection of Evidence (Art. 143). — A new trial will not be granted in any civil action on the ground of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.⁷

If in a criminal case evidence is improperly rejected or admitted, there is no remedy, unless the prisoner is convicted, and unless

1. *R. v. Drummond*, 1 Lea. 338; *R. v. Pike*, 3 C. & P. 598. In these cases dying declarations were excluded, because the persons by whom they were made would have been incompetent as witnesses, but the principle would obviously apply to all the cases in question.

2. 2 Ph. Ev. 480, etc.; T. E. sects. 1264-1270; R. N. P. 194, 195.

3. *Sussex Peerage Case*, 11 C. & F. 114-117.

4. See Cases in R. N. P. 195.

5. *Wharam v. Routledge*, 1 Esp. 235;

Calvert v. Flower, 7 C. & P. 386.

6. *Doe v. Hodgson*, 12 A. & E. 135; but see remarks in 2 Ph. Ev. 270.

7. 1 Judicature Act, 1875, Order xxxix.

EVIDENT—EWE—EXAMINATION, ETC.,—EXAMINE.

the judge, in his discretion, states a case for the Court for Crown Cases Reserved; but if that court is of opinion that any evidence was improperly admitted or rejected, it must set aside the conviction. (See *NEW TRIAL*.)

EVIDENT.—Clear to the mind; obvious; plain; apparent; manifest; notorious; palpable.¹

EWE.—See *SHEEP*.

EXAMINATION IN CRIMINAL LAW.—See *PRELIMINARY EXAMINATION*.

EXAMINE.—See *EXAMINATION*.²

1. *Ex parte Foster*, 5 Tex. App. 647; s. c., 32 Am. Rep. 577, quoting Webster's Dict., a case arising on the construction of the words "proof is evident," as a requisite to admission to bail. The court says, speaking of this definition, "This is very satisfactory, is doubtless accurate and correct, and, as we shall endeavor to show hereafter, not inconsistent with our view of the constitutional expression, 'proof is evident,' even when subjected to philological construction. Perhaps we cannot succeed better in making ourselves understood than by declaring the general rules which will control and govern us in refusing bail, under the constitutional prohibition, than by attempting to announce a definite abstract meaning for the constitutional expression which is not easily defined. The Supreme Court of Pennsylvania have laid down a rule upon this subject, which we think worthy of approval. In *The Com. v. Keeper of Prison*, 2 Ashm. (Pa.) 227, it is said to be 'a safe rule, where a malicious homicide is charged, to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by a jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail; and, in instances where the evidence of the Commonwealth is of less efficacy, to admit to bail.' . . . The same idea is tersely and happily expressed by *Brickell, C. J.*, in *Ex parte McAnally*, 53 Ala. 495. He says, 'If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offence has been committed; that the accused is the guilty agent, and that he would probably be punished capitally if the law is administered,—bail is not a matter of right.' . . . We know of no better exposition of our views with regard to the proper construction of the constitutional expression, 'proof is evident,' than the two rules quoted; and, when subjected to strictest criticism, we cannot see that they are in any wise inconsistent with the definition quoted from Mr. Webster."

See also *Ex parte Beacom*, 12 Tex. App. 318; *McCoy v. The State*, 25 Tex. 33.

Where two successive juries have failed to agree in their verdict on an indictment, that fact is a circumstance strongly going to show, that, as to the prisoner's guilt, the proof was not "evident." *In re Alexander*, 59 Mo. 598.

Proof is not "evident" when the evidence is entirely circumstantial, "unless it excludes, to a moral certainty, every other reasonable hypothesis, but that of the guilt of the accused." *Ex parte Acree*, 63 Ala. 234.

The mere fact that a mistrial of a capital case had resulted by disagreement of the jury does not entitle the accused to the privilege of bail, on the theory that such a mistrial shows that the proof is not "evident." *Webb v. The State*, 4 Tex. App. 167.

See also *BAIL*.

2. A stockholder, under a power to examine the books of transfer, and those containing the names of the stockholders, has the right not only to inspect the books, but to take memoranda or copies of the names. *Brouwer v. Cottreal*, 10 Barb. (N. Y.) 216. "It was supposed that the etymological meaning of the words 'exhibit' and 'examine' limited their meaning to the construction contended for by the defendant. If the derivation be from *examen*, a swarm of bees, it may be supposed to imply the industry and perseverance of the bee, and would then authorize a search as thorough as the most earnest could desire; and not only a search, but that the best part of that which is searched should also be carried off to be converted to a good and useful purpose."

The power to supervisors of a county to *examine, settle, and allow* all accounts chargeable against a county, involves also the power to *reject*. *People v. Supervisors of Dutchess*, 9 Wend. (N. Y.) 508.

Power to *examine, hear, and punish*, is a judicial power. *Groenvelt v. Burwell*, 1 Salk. 200.

EXCEED.¹**EXCEPT.**²

EXCEPTION. (See BILL OF EXCEPTIONS.)—An exception is defined to be a clause in a deed whereby the feoffor, donor, lessor, etc., doth except somewhat out of that which he had granted before by his deed.³ A *reservation* differs from an *exception* in this, that the latter is ever part of the thing granted, and of a thing *in esse* at the time; but the former is of a thing newly created or reserved out of a thing demised that was not *in esse* before.⁴ However, the two words are often used indiscriminately.⁵

The difference between an *exception* and a *proviso* in a statute is, that the first exempts absolutely from the operation of the enactment, whereas the latter only defeats the operation of the enactment conditionally.⁶

1. A constitutional provision exempting from sale on execution every homestead "not exceeding eighty acres," is a limitation upon the power of the Legislature to reduce the exemption below that quantity, but not upon the power to increase it. *David's Admr. v. David*, 56 Ala. 49. See *In re Harrington*, 2 El. & Bl. 669. Where a city was authorized "to appropriate money for suitable buildings or rooms, and for the foundation of a library, a sum not exceeding one dollar for each of its ratable polls," it was *held* that the words, "not exceeding," restricted only the latter provision. *Dearborn v. Inhab. of Brookline*, 97 Mass. 466.

A debt which originally exceeded five pounds, but had been reduced below that amount by payments from time to time before action brought, *held*, to be "a demand originally exceeding five pounds." *Elsley v. Kirby*, 9 M. & W. 536. Otherwise, where an account containing items amounting to upwards of five pounds was reduced by payments so that at no one time so much as five pounds was due. *Pope v. Banyard*, 3 M. & W. 424.

2. In a covenant to plough the demised premises "except the rabbit-warren," etc., "except" was *held* tantamount to "but not," and covenant to lie for ploughing the rabbit-warren. *Duke of St. Albans v. Ellis*, 16 East, 352.

In a covenant to the effect that a certain gate was to be kept up "except by the consent of the parties," "except" was *held* to have properly the sense of "until," and the intent of the parties to be that the gate should be upheld until by agreement it should be taken down, and then that it was to remain down forever. *Fowle v. Bigelow*, 10 Mass. 379.

Where land was conveyed with all the buildings standing *except the brick factory*, it was *held* that the grantor's title to the

land on which the factory stood, and the water privilege appurtenant thereto, did not pass by the deed. *Allen v. Scott*, 21 Pick. (Mass.) 25; s. c., 32 Am. Dec. 238.

3. *Darling v. Crowell*, 6 N. H. 423.

"In *1 Shep. Touch*, 77 . . . it is said every exception must be part of the thing granted, capable of being severed from it, and not an inseparable incident; and 'such that he that doth except may have, and doth properly belong to him.'" *Goodrich v. Eastern R. Co.*, 37 N. H. 167. And see *Case v. Haight*, 3 Wend. (N. Y.) 635.

4. *Bryan v. Bradley*, 16 Conn. 482; *Bowman v. Wathen*, 2 McLean (U. S.), 391; *Winthrop v. Fairbanks*, 41 Me. 311; *State v. Wilson*, 42 Me. 21; *Adams v. Morse*, 51 Me. 498; *Cocheco Co. v. Whittier*, 10 N. H. 310; *Cunningham v. Knight*, 1 Barb. (N. Y.) 407; *Gould v. Glass*, 19 Barb. (N. Y.) 192; *Earl of Cardigan v. Armitage*, 2 B. & C. 197, 206; *Co. Litt.* 47 a.

5. *Winthrop v. Fairbanks*, 41 Me. 307. "The distinction between an exception and a reservation is so obscure in many cases that it has not been observed; but that which in terms is a reservation in a deed is often construed to be a good exception, in order that the object designed to be secured may not be lost." See also *Barnes v. Burt*, 38 Conn. 541; *Stockwell v. Couillard*, 129 Mass. 231, where it is said, "Whether a particular provision is an exception or a reservation does not depend upon the use of the word 'reserving' or 'excepting,' but upon the nature and effect of the provision itself."

6. *Waffle v. Goble*, 53 Barb. (N. Y.) 522, quoting *Bouv. L. Dict.*

In *Simpson v. Ready*, 12 M. & W. 736, 740, *Alderson, B.*, says, "There is a manifest distinction between a proviso and an exception. If an exception occurs in the description of the offence in the statute, the exception must be negated, or the

In Equity Practice.—A formal written statement of objections to a pleading, or master's report.¹

EXCESSIVE.—In order to constitute "excessive" bail, it must be *per se* unreasonably great, and clearly disproportionate to the offence involved, or the peculiar circumstances appearing must show it to be so in the particular case.²

Whether a fine is "excessive" or not must depend materially upon the circumstances and the nature of the act for which it is imposed.³ As to the meaning of "excessively burdened," see note 4; of "excessive weight," see note 5.

party will not be brought within the description. But if the exception comes by way of proviso, and does not alter the offence, but merely states what persons are to take advantage of it, then the offence must be specially pleaded, or may be given in evidence under the general issue, according to circumstances."

1. Burr. Law Dict.

2. *Ex parte* Ryan, 44 Cal. 558, where bail in the sum of fifteen thousand dollars on a charge of assault with attempt to commit murder was *held* not excessive.

One hundred and twelve thousand dollars was *held* not excessive bail for ten distinct felonies—such being the amount alleged to have been received by the prisoner, by reason of the commission of such felonies. *Ex parte* Duncan, 53 Cal. 410.

3. *Blydenburgh v. Miles*, 39 Conn. 484. "We should be very reluctant to say that the Legislature had exceeded its powers in imposing excessive penalties, and ought not to do so except in a very clear case."

The provision in the 8th article of the amendments to the Constitution, that "excessive fines" shall not be imposed, applies to national, not to State, legislation; the court observing, however, that, if this were otherwise, a fine of fifty dollars and imprisonment at hard labor in the house of correction for three months—the punishment imposed by a State for violating a statute forbidding the keeping and sale of intoxicating liquors—cannot be regarded as excessive, cruel, or unusual. *Pervear v. Com.*, 5 Wall. (U. S.) 475.

In *People v. Haug*, 37 N. W. Rep. 28 (Mich.), it is said, "Any fine or penalty is excessive if it seriously impairs the capacity of gaining a business livelihood."

4. In *Town of Weybridge v. Towns of Addison et al.*, 57 Vt. 569, in construing an Act regulating the apportionment of expenses in repairing a highway and bridge among the towns to be benefited, the court says, "When is a town excessively burdened, and what shall be considered in determining it? The term 'excessively burdened' is a relative one, covering a

consideration of the complainant town's burdens in connection with the burdens of the other towns benefited by such highway. A town is not excessively burdened by being required to build and maintain a highway within its limits, within the spirit and intent of the statute, unless its municipal burdens and taxation for necessary purposes would be increased thereby beyond its due measure and proportion, in comparison with the municipal burdens and taxation for necessary purposes of such other towns as are deemed to be especially benefited by such highway. . . . In determining, then, whether the complainant town is or would be excessively burdened by being required to build and maintain a highway or bridge within its limits, and whether other towns deemed to be especially benefited thereby ought to bear any portion of the expense of the same, the ability of the towns so deemed to be benefited thereby to bear any portion of such expense, as well as the ability of the complainant town, must be considered together with the benefits derived therefrom."

A town is not entitled to State assistance under this clause, where the commissioners fail to find and report that the town, independent of its indebtedness voluntarily incurred in aid of a railroad, would be "excessively burdened" by being required to build the bridge. *Sheldon v. State*, 59 Vt. 36, where the court says, "It is indeed somewhat difficult to see why any indebtedness, except when incurred to meet an unusual and extraordinary emergency, should be taken into account on this point, because the burdens imposed by statute upon towns for the ordinary and necessary purposes are common, and many, probably most, towns pay as they go. Why should others that do not, but borrow money, and run in debt, have that indebtedness considered, on the question of excessive burden?"

5. In construing a statute allowing special damages to be recovered by one who has undertaken to repair a highway from any one by whose order "excessive weight" has passed along the same, or "extraordinary traffic" has been conducted thereon,

EXCHANGE.—The word “exchange,” when used in reference to real estate, has at common law a definite and well-settled meaning. An exchange is a mutual grant of equal interests, the one in consideration of the other. The word “exchange” is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution. The estates exchanged must be equal in quantity, not of *value*, for that is immaterial, but of *interest*, as fee-simple for fee-simple, a lease for twenty years for a lease for twenty years.¹ As applied to personal property, a sale or exchange is a transmutation of property from one man to another in consideration of some price or recompense in value. If it be a commutation of goods for goods, it is more properly an exchange.² The difference between a sale and exchange is this: the former is a transferring of goods for money; the latter, for goods by way of bargain. In either case the same rules of law are prescribed for regulating the transaction.³

having regard to the average expense of repairing highways in the neighborhood, it was held that “excessive weight” and “extraordinary traffic” mean excessive and extraordinary with reference to the road itself and the ordinary user of the road, and not with reference to the weight which by the statute may lawfully be imposed upon it. *Lord Aveland v. Lucas*, 5 C. P. D. 211; affirmed, 49 L. J. R. Q. B. 643. And see *Wallington v. Hoskins*, 6 Q. B. D. 206; *Reg. v. Ellis*, 8 Q. B. D. 466.

1. *Long v. Fuller*, 21 Wis. 123, quoting 2 Bl. Com. 323. The court also says, “Jacob, in his Law Dictionary, says, ‘Exchange of lands is a mutual grant of equal interests in lands or tenements, the one in exchange for the other.’ He also says, ‘There is a tacit condition of re-entry in this deed, on the lands given in exchange, in case of eviction, and on the warranty to vouch and recover over in value; for if either of the parties is evicted, even of a part, the exchange is defeated.’” It was held in this case that a power of attorney to “exchange and convey” a certain lot for other real estate did not authorize the attorney to purchase land to be paid for in part by an assignment of the principal’s interest in said lot (under a contract of sale), and the remainder and greater part in money.

Blackstone’s definition is likewise quoted in *Wilcox v. Randall*, 7 Barb. (N. Y.) 633.

Where A. and B. entered into a parol agreement to exchange farms, in pursuance of which A. conveyed his farm to B. by a deed in the common form, and B. conveyed his farm to A. in the same manner, it was held that this was not an *exchange*, properly so called, and that A.’s widow was entitled to be endowed in both farms. *Cass*

v. Thompson, 1 N. H. 65; s. c., 8 Am. Dec. 36.

A power to “sell and exchange” lands includes the power to make partition of them. *Phelps v. Harris*, 101 U. S. 370, and authorities cited therein.

2. *Buffum v. Merry*, 3 Mass. (U. S.) 481, quoting 2 Bl. Com. 446; *Mitchell v. Gile*, 12 N. H. 395.

3. *Elwell v. Chamberlin*, 31 N. Y. 624, quoting Chit. on Cont. 374. The court says, “In Domat’s Civil Law, exchange is defined to be ‘a covenant by which the contractors give to one another one thing for another, whatever it be, except money; for in that case it would be a sale.’”

In *Hazard v. Hamlin*, 5 Watts (Pa.), it is said, “An exchange has all the qualities of a sale, to which payment or delivery is essential, and which, without it, is but an executory agreement to sell that binds not the property.”

“The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property.” *Com. v. Clark*, 14 Gray (Mass.), 372.

An averment of a contract of sale was held not to be supported by proof of an *exchange*. *Vail v. Strong*, 10 Vt. 457.

“An exchange of one piece of property

EXCISE LAWS.—See INTOXICATING LIQUORS; LICENSES.

EXCLUDE.—To shut out; to except.¹

EXCLUSIVE.—Shutting out; debarring from participation;²

for another cannot be regarded as a payment. In all cases of payment, there must be a debt to be paid. In the exchange of property, no debt is created: one thing is given for another. It was not competent, therefore, for the appellees to say that, by their defence of payment, the appellants meant that they had exchanged a patent right for the mules. Under the answer of payment, they could not have proved such an exchange." *Atchinson v. Lee*, 75 Ind. 134.

An indictment which charges the defendant with falsely "selling, exchanging, and delivering" as true a forged draft, etc., is good under a statute prohibiting the "passing, uttering, and publishing" of forged paper." *State v. Watson*, 65 Mo. 115. "We do not mean to say that the words 'pass,' 'utter,' and 'publish,' and the words 'sell,' 'exchange,' and 'deliver,' may be used interchangeably, but that, where the latter words are used in connection with acts charged which clearly constitute the offence imputed by the former words, the indictment is sufficient."

A contract by which the title and possession of a slave are transferred for a valuable consideration measured in money terms is a sale, whether the consideration be paid in money, or in something agreed upon as its equivalent; but a contract by which the owner of two slaves transfers them to another, in consideration of two other slaves and one hundred dollars in money, the price or value not being measured in money terms, is an exchange. *Gunter v. Leckey*, 30 Ala. 591.

Exchangeable Value.—In *Little Rock Junction Ry. v. Woodruff*, 5 S. W. Rep. 793 (Ark.), it is said, "A frequent source of confusion in cases of condemnation is, that property sometimes seems to have a value other than, and different from, its market value. Bouvier, in his definition of 'value,' says, 'This term has two different meanings. It sometimes expresses the utility of an object, and sometimes the power of purchasing other goods with it. The first may be called the value in use; the latter, value in exchange.' Webster recognizes a difference between 'intrinsic' and 'exchangeable' value. Webster's Dict. 'Value.'"

1. A clause in a policy of marine insurance "excluding during the term all ports and places in Mexico and Texas, also the West Indies, from July 15 to October 15, 1839," was interpreted to mean "excepting during the term all ports and places in

Mexico," etc. It is not an exclusion of voyages, a condition that the vessel shall not be employed in voyages to and from those places, but is only a suspension of risks during such time as the vessel should be at the excepted ports. *Palmer v. Warren Ins. Co.*, 1 Story (C. C.), 360.

2. "The word 'exclusive' is derived from 'ex,' out, and 'cludere,' to shut. An Act does not grant an exclusive privilege or franchise unless it shuts out or excludes others from enjoying a similar privilege or franchise."

"A special privilege or franchise is not necessarily 'exclusive.' The right of a patentee of an invention is 'exclusive.' So would be an Act of the Legislature which should attempt to confer upon a private corporation or individual the exclusive right to manufacture or vend any article of trade, and prohibit all other persons from competing in such business. . . . But the grant of a particular power to a private corporation is not 'exclusive' simply because the same power is not possessed by other corporations, so long as there is nothing to prevent the granting of such power to any other corporation." An Act authorizing the lessees of certain ferries to acquire the right to use a pier and adjoining land is not in violation of a constitutional prohibition against the passage of any private or local bill "granting . . . any exclusive privilege, immunity, or franchise whatever." *In re Union Ferry Co.*, 98 N. Y. 139.

"Sole and exclusive fishery" having been used in a declaration instead of "several fishery," the expressions were regarded as equivalent, and the declaration not defective, at least after verdict. *Holford v. Bailey*, 13 Q. B. 427, reversing s. c., 8 Q. B. 1000.

That a municipality has, by its charter, the exclusive right to fix the rates of all licenses to retailers of spirituous liquors, and to prohibit their sale, is not a defence to an indictment under a State law for selling without a license. *Sloan v. State*, 8 Blackf. (Ind.) 361.

"Exclusive of costs" in a statute defining the jurisdiction of a court by a fixed amount, has reference to costs in the court referred to, and not those which have been incurred in another court, and have become a part of the debt. *Van Tyne v. Bunce*, 1 Edw. (N. Y.) 584.

Land not in use at all is not "used exclusively" for the benefit of an institution of learning to which it belongs within the

EXCUSABLE HOMICIDE — EXCUSE — EXECUTE, ETC.

besides; over and above; not taking into account; not computing.¹

EXCUSABLE HOMICIDE. — See **HOMICIDE**.

EXCUSE.²

EXECUTE. (See **DEEDS**; **EXECUTION**; **WILLS**.) — To carry into effect.³ Of writings, to make or sign and deliver.⁴

EXECUTIONS. (See also **JUDICIAL SALES**, **REDEMPTION**, **SHERIFFS**, **OFFICES AND OFFICERS**, **SUPPLEMENTARY PROCEEDINGS**, and particular writs under their proper names.)

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meaning of a statute exempting from taxation lands so used. *Theological Seminary v. People*, 101 Ill. 578.

1. *Walker v. Gibbs*, 1 Yeates (Pa.), 255.

A bequest to my daughter E., "exclusive of what I advanced to her and her husband," releases the husband from liability on his bond to the testator. *Coall v. Smith*, 4 Pa. St. 376.

A conveyance to B. of a described portion of lot 12, "and enough off of the west end of No. 13 to make," with certain land already owned by B., "fifty acres exclusive of water," carries land at the south-westerly corner of lot No. 13, covered with water; and when, by reason of the removal of an old dam, the water receded, the land thus uncovered belonged to B. This land was not excluded from the conveyance, but from the computation, in ascertaining the fifty acres. *Bartlett v. Corliss*, 63 Me. 287.

2. Under an act that "whosoever without lawful authority or excuse" shall make, mend, etc., any die impressed with the resemblance of either side of any current coin, shall be guilty of felony, an indictment is sufficient which uses the word "excuse" alone, as that word includes "authority." *The Queen v. Harvey*, L. R. 1 C. C. R. 284.

3. Where a testator bequeathed his estate to one for life, and, after her death, "to be equally divided among her now surviving children, or any of them that may be alive at her decease, or the heirs

of any that may be dead at the time of executing this my last will," the time of executing was held to be the time when this provision of the will was carried into effect. *Scott v. Guernsey*, 60 Barb. 163; *Lambert v. Harvey*, 100 Ill. 338.

The phrase, "a person executing the functions of a public officer," in a bribery act, includes a member of a common council or other municipal officer. *People v. Jaehne*, 103 N. Y. 182.

4. "Execution means 'finishing, completing an act;' and as delivery is a substantial, not a mere technical, requisite, the execution of a deed means that it has been delivered as well as signed and sealed." *Gaskell v. King*, 12 Ired. (N. Car.) 221; *State v. Young*, 23 Minn. 551; *Tiernan v. Fenimore*, 17 Ohio, 545. So the terms "executed unto," used of a promissory note, import both making and delivery. *Bogley v. McMickle*, 9 Cal. 430. And see *Little v. Dodge*, 32 Ark. 453; *Ricketts v. Harvey*, 78 Ind. 152.

But signing and sealing were held to constitute an execution without delivery in *Stuart v. Dutton*, 39 Ill. 91; and, under a statutory provision dispensing with the proof of the signature or execution of written instruments unless they were denied under oath, *signature* and *signed* were said to be synonymous with *execution* and *executed*. *Nielson v. Schuckman*, 53 Wis. 638. This is the popular sense of the word. *Tiernan v. Fenimore*, 17 Ohio, 545.

I. Definition and Kinds. — An execution is a judicial writ issuing out of the court containing the record or other judicial proceeding on which it is grounded, principally used for the purpose of enforcing or carrying into effect a judgment or decree of the court.¹

Many different kinds of writs of execution are mentioned in the old common-law treatises, but those now in most general and common use are *fiery facias*, and *capias ad satisfaciendum*.²

The writ of *fiery facias* is a common-law writ of execution directed to the sheriff, commanding him that of the lands and goods and chattels of the judgment debtor in his bailiwick, he cause to be made an amount specified. In the United States, this writ is usually directed, in the first instance, against the goods and chattels, and, failing these, against the lands of the person named.³

Capias ad satisfaciendum is also a common-law writ directed to the sheriff, commanding him to take the party named therein, and him safely keep, so that he may have his body in court on a day specified therein, to satisfy the judgment of the adverse party.⁴

II. Issuance and Delivery. — 1. *Authority to issue.* — As a general rule, no one can sue out an execution, but the plaintiff or his agent or attorney.⁵ A general standing order of court directing the clerk to issue execution at the instance of any person entitled thereto, including himself, is sufficient, without any special order, under a statute authorizing clerks to issue execution on order of court.⁶ And an assignee may sue out an execution in the name of the plaintiff without making himself a party by *scire facias*.⁷ The

But while execution includes making and delivery, "it cannot involve other matters without enlarging its meaning beyond reason." A rule dispensing with proof, as above, does not preclude inquiry into the date of delivery or the circumstances of signing. *Freeman v. Ellison*, 37 Mich. 459.

1. 1 Abbott's Law Dict. 461, tit. "Execution;" 1 Bouv. Law Dict. 495; Herman on Executions (1st ed. 1878), 1, §§ 1, 2, 4. *Executio est finis et fructus legis*. It is "the life of the law, the effect, fruit, and life of every suit." 5 Coke, 89, 91; Co. Litt. 289. It is the means whereby a party obtains the benefit of his judgment.

2. Herman on Executions (edition of 1878), 2, § 2; Burrill's Law Dict. tit. "Executions." For the various kinds at common law, see Bac. Abr. tit. "Executions;" 3 Black. Com. *412, *et seq.*; 2 Tidd's Pr. *993; and 3 Bouv. Inst. 565, § 3374, *et seq.*
3. 1 Abb. Law Dict. 496, tit. "Fieri Facias;" Co. Litt. 290 b; 3 Bouv. Inst. 572, § 3388.

4. 1 Abb. Law Dict. tit. "Capias ad Respondendum." For common-law form, see 3 Black. Com. (Cooley's ed.) 464, Appendix No. III.; Reg. Jud. 31.

When Used. — The use of this writ has been greatly limited by statutory enact-

ment in recent times; and where imprisonment for debt has been abolished, it is seldom, if ever, used except where a party is, by fraud, attempting to evade the payment of his debts. See Herman on Executions (ed. 1878), 20, § 24.

5. *Lewis v. Phillips*, 17 Ind. 108; s. c., 79 Am. Dec. 457; *Brush v. Lee*, 36 N. Y. 49; *Snell v. Allen*, 1 Swan (Tenn.), 208; *Freeman on Executions* (1876), § 21.

Thus, the clerk of a court is not authorized to issue execution upon a judgment without the direction of the party recovering it, his agent or attorney. *Sowles v. Harvey*, 20 Ind. 217; *Wills v. Chandler*, 2 Fed. Rep. 273; *Watt v. Alvord*, 25 Ind. 533.

But it is held that the issuance of an execution by a clerk without authority will be good if ratified by the creditor. *Clarkson v. White*, 4 J. J. Marsh. (Ky.) 529; s. c., 20 Am. Dec. 229.

And issuance without authority of plaintiff is a mere irregularity. *Johnson v. Murray*, 112 Ind. 154.

6. *Elliott v. Ellery*, 11 Ohio, 306.

7. *Corriell v. Doolittle*, 2 Greene (Iowa), 385. And see *State v. Pilsbury*, 35 La. Ann. 408; *Fiske v. Lamoureaux*, 48 Mo. 523. Compare *Reid, Exr., v. Ross*, 15 Ind. 265.

attorney of the judgment creditor is in general presumed to have authority to cause execution to be issued, and to receive the money in payment thereon.¹ It has been held that where the right of an attorney to a lien is a mere equitable right, he cannot control the execution, or have it issued for his own benefit;² but it is at least doubtful if this can be the law where the lien is expressly given by statute, as in many of the States. Although the award of an execution is a judicial act,³ its issue is purely ministerial, and may be delegated.⁴

2. *When and where issued.*—In a majority of the States, an execution may be issued immediately upon the rendition, entry, or docketing of a judgment.⁵ It follows as a matter of course from the judgment, and need not be specially awarded by the court.⁶

At common law an execution was required to be issued, unless the judgment was revived within a year and a day after the entry of the judgment;⁷ but this period has been extended by statute in many of the States.⁸

1. *Langdon v. Potter*, 13 Mass. 320; *Gray v. Wass*, 1 Greenl. 257; *Brackett v. Norton*, 4 Conn. 517; *Pennington's Exrs. v. Yell*, 11 Ark. 212; s. c., 52 Am. Dec. 262.

And it has been held by the Supreme Court of Michigan that a party may be liable in trespass for property taken and sold under an execution, wrongfully issued at the instance of his attorney without his direction. *Foster v. Wiley*, 27 Mich. 244; s. c., 15 Am. Rep. 185. Compare *Welsh v. Cochran*, 63 N. Y. 181; *Averill v. Williams*, 4 Denio (N. Y.), 295; s. c., 47 Am. Dec. 252.

2. *Barker v. St. Quintin*, 12 M. & W. 441. Compare *Andrews v. Morse*, 12 Conn. 444; s. c., 31 Am. Dec. 752. A surety or replevin bail has no right to direct and control the execution, — *Cherry v. Singleton*, 66 Ga. 206, — at least until he pays the judgment. *Palmer v. Galbreath*, 74 Ind. 84.

3. *Johnson v. Ball*, 1 Verg. (Tenn.) 290; s. c., 24 Am. Dec. 451; *Freeman on Executions* (1876), § 23.

4. *McMahan v. Colclough*, 2 Ala. 70; *Kyle v. Evans*, 3 Ala. 481; s. c., 37 Am. Dec. 705. But the issuance of a *scire facias* is a judicial act, and must be awarded by the court. *Frierson v. Harris's Heirs*, 5 Coldw. (Tenn.) 146; s. c., 94 Am. Dec. 220.

5. *Herman on Executions* (1878), 57, § 70. In Illinois an execution issued before the entry of judgment on the record, was held absolutely void. *Cummins v. Holmes*, 109 Ill. 15. Until taxation of costs an execution does not become "legally issuable" within the meaning of Comp. L. § 5462, which forbids a levy on the property of the surety on the appeal bond

unless the execution is issued within thirty days from the time when it shall be "legally issuable." *Weiss v. Chambers*, 50 Mich. 158.

Where the order granting a new trial was appealed from and superseded, it will not authorize the issuance of an execution on the judgment. *Loomis v. McKenzie*, 57 Iowa, 77.

Final execution can issue only after final judgment. *Marvin v. Herrick*, 5 Wend. (N. Y.) 109; *Parker v. Frambes*, 2 N. J. L. 115.

6. "The court usually, when judgment is rendered, say nothing about the execution, nor is it necessary that they should, for it follows of course. It is the right of a party recovering a final judgment to have execution upon that judgment." *Little v. Cook*, 1 Aiken (Vt.), 363; s. c., 15 Am. Dec. 698; *Howard v. Burlington*, 35 Vt. 491.

7. 3 Black. Com. 421; 8 Bac. Abr. 600; *Elliott v. Mayfield*, 3 Ala. 223.

8. *Herman on Executions* (1878), 58, § 70. In the absence of a statute, one year is a reasonable time where personalty has been attached. *Speelman v. Chaffee*, 5 Colo. 247. An execution may be issued after the lapse of ten years from the date of docketing the judgment, where the judgment has been kept alive by the issuance of executions within each successive period of three years after its rendition; and a levy and sale of *personal* property under it are valid. (The ruling does not apply to sales of land under execution.) *Williams v. Mullis*, 87 N. Car. 159.

Where a judgment was rendered in a justice's court in December, 1868, less than five years prior to the taking effect of the Code of 1873, and execution was issued

In Louisiana, the right to an execution lasts as long as there is any thing due.¹

An execution prematurely issued on a valid and existing judgment, though erroneous, is not void, and cannot be collaterally attacked by another execution debtor in a suit against the sheriff for the proceeds.² Although issued before the day allowed by law, if not acted upon until after that time, it may be amended, and parties acting thereunder will not be liable as trespassers.³ But where there is no actual judgment on which it may rest, it is absolutely void.⁴ And an execution cannot ordinarily be issued as of course on a claim filed against decedent's estate.⁵

thereon in 1877, *held* that the execution was properly issued and was valid; for, although section 3911 of the Revision, which was in force when the judgment was rendered, provided that in such cases execution should not issue after five years from the entry of the judgment, yet, as the five years had not elapsed when section 3569 of the Code took effect, that section became the law applicable to the case, and extended the time for the issuance of the execution to ten years after the date of the judgment. *Woods v. Haviland*, 59 Ia. 479.

Execution on Justice's Judgment, issued after Lapse of Six Months.—An execution issued by a justice of the peace, more than six months after rendition of the judgment (Code, §§ 3658-9), though irregular, and liable to be quashed on motion, is not void. *Sandlin v. Anderson*, 76 Ala. 403.

Under the Pub. Sts. c. 164, § 8, and c. 171, § 16, a plaintiff who has obtained judgment against an absent defendant on a default, and who has not given the bond mentioned in c. 164, § 8, is not entitled to an execution after the expiration of a year from the rendering of the judgment. *Pease v. Morris*, 132 Mass. 72.

Section 3025 of the Code, providing that only one execution shall be in existence at the same time, is mandatory; and the fact that the first execution was *ordered* returned, but was not, did not make a second execution, issued before the first one was returned, legal, and a sale thereunder valid. *Merritt v. Grover*, 61 Iowa, 99.

Where a case is removed from a State court to a circuit court of the United States, the time in which an execution can issue on a judgment or decree there rendered depends upon the laws of the United States, and not upon the laws of the State. The amended record in a suit in equity showed that the final decree therein was entered on May 12. The execution, which was issued on June 8, recited that, at a certain term of the court, which was recited correctly, and, under a *videlicet*, on April 12, judgment was recovered; and in this respect it followed the record as

originally made, in which April was written instead of May by a clerical error. *Held*, in an action by an officer against the recipients of property attached by him in the suit recited in said record, that the execution was valid. *Nims v. Spurr*, 138 Mass. 209.

1. *Harper v. Terry*, 16 La. 216.

2. *Stewart v. Stocker*, 13 Serg. & R. (Pa.) 199; s. c., 15 Am. Dec. 589. So, if issued after the statutory time, it is merely voidable. *Morgan v. Evans*, 72 Ill. 586; s. c., 22 Am. Rep. 154.

The effect of irregularly issuing an execution is, in general, to render it voidable at the instance of the debtor. *Allen v. Portland Stage Co.*, 8 Me. 207; *Elliott v. Knott*, 14 Md. 121; *Corson v. Walker*, 16 Mo. 68; *Earle v. Thomas*, 14 Tex. 583; *Willard v. Whipple*, 40 Vt. 219.

3. *Scribner v. Whitcher*, 6 N. H. 63; s. c., 23 Am. Dec. 708; *Regan v. Washburn* (La.), 3 So. Rep. 178.

An execution issued before the record of the judgment is read and signed in open court, as required by statute, may be set aside at cost of execution-plaintiff on application of the execution-defendant, or it may be enjoined. *Kent v. Fullenlove*, 38 Ind. 522.

A statute providing that "it shall be the duty of the clerk to draw up each day's proceedings at full length," which shall be read in open court and signed by the judge, and that no process shall issue on any judgment until it is so read and signed, is directory; and a single judgment may be read and signed, and execution issued immediately. *Jones v. Carnahan*, 63 Ind. 229.

4. *Criswell v. Ragsdale*, 18 Tex. 443; *Nabours v. Cocke*, 24 Miss. 44; *Corbin v. Pearce*, 81 Ill. 461; *Roberts v. Stowers*, 7 Bush (Ky.), 295; *Albee v. Ward*, 8 Mass. 79.

So an execution issued on a judgment of a court not having jurisdiction of the subject-matter, is void on its face. *Marsh v. Sherman*, 12 Ind. 358. And see *Dunlap v. Southerlin*, 63 Tex. 38.

5. *Anderson v. Greensburg, etc., Co.*,

As a rule, any court competent to render judgment, may issue execution;¹ and it generally issues from the court in which the judgment is rendered, in accordance with the rules and practice of that court,² although by legislative enactment in many of the States, a transcript from a justice of the peace, or court of limited jurisdiction, may be filed in a court of general jurisdiction, and an execution issued thereon from the latter court will constitute a lien on the real estate, as well as the goods and chattels of the judgment debtor in case of a levy.³ The Supreme Court of the United States and the highest appellate courts of the different States often act by mandatory process on the court in which the judgment was rendered from which the appeal is taken, and compel that court to carry out and enforce the judgment in accordance with their decision.⁴

It is within the power of the Legislature to authorize executions to run throughout the State;⁵ but unless a transcript is filed, pursuant to some statute, in another county, they ordinarily can be issued and run only in the county in which the court rendering judgment has jurisdiction.⁶ But an execution to another county is merely irregular, and not absolutely void as against a good-faith purchaser at the sale.⁷

At common law an execution issued after the death of the judgment creditor without revival of the judgment, was at least voidable,⁸ if not absolutely void;⁹ but the practice varies in the

48 Ind. 467; *Flynn v. Morgan* (Conn.), 10 Atl. Rep. 466; *Sweringen v. Eberins' Admr.*, 7 Mo. 421; s. c., 38 Am. Dec. 463. And see in N. Y., *Marine Bank v. Van Brunt*, 49 N. Y. 160.

1. *U. S. v. Drennen*, Hempst. 320; *Freeman on Executions* (1876), § 10.

2. *Shattuck v. Cox*, 97 Ind. 242; *Freeman on Executions* (1876), §§ 10, 15; *Herman on Executions* (1878), 65, § 76.

3. *Brush v. Lee*, 36 N. Y. 49; *Altman v. Johnson*, 2 Mich. N. P. 41; *Am. Ins. Co. v. Gibson*, 104 Ind. 336.

But the mere filing of the transcript is not generally sufficient to authorize the clerk to issue execution. *Seaton v. Hamilton*, 10 Iowa, 394. In Indiana a certificate from the justice and an affidavit of the execution-plaintiff are necessary. For the practice in that State, see *Dehority v. Wright*, 101 Ind. 382; *Martin v. Prather*, 82 Ind. 535; *Fowler v. Griffin*, 83 Ind. 297.

4. *Pringle v. Lansdale*, 3 McCord (S. Car.), 489.

5. *Hickman v. O'Neal*, 10 Cal. 292.

6. *Sanders's Heirs v. Ruddle*, 2 T. B. Mon. (Ky.) 139; s. c., 15 Am. Dec. 148; *Shattuck v. Cox*, 97 Ind. 242; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; s. c., 46 Am. Dec. 489; *Bybee v. Ashby*, 2 Gilm. (Ill.) 151; s. c., 43 Am. Dec. 47.

In Maryland, when suit begun in one county is removed to another by the defendant, where plaintiff recovers judgment, he may have a *fiery facias* thereon directed to the sheriff of the former county. *Browning v. Loraw*, 58 Md. 524.

7. *Cox v. Nelson*, 1 T. B. Mon. (Ky.) 94; s. c., 15 Am. Dec. 89; *Commonwealth v. O'Cull*, 7 J. J. Marsh. (Ky.) 149; s. c., 23 Am. Dec. 393; *Sydnor v. Roberts*, 13 Tex. 598; s. c., 65 Am. Dec. 84; *Walden v. Davison*, 15 Wend. (N. Y.) 575; *Compare Bybee v. Ashby*, 2 Gilm. (Ill.) 151; s. c., 43 Am. Dec. 47; *Stephenson v. Doe*, 8 Blackf. (Ind.) 508; s. c., 46 Am. Dec. 489; *Collins v. Hudson*, 69 Ga. 684.

Where a sheriff sells land lying partly in his own county, and partly in an adjoining county, the sale will confer title as to the portion in his own county, but not to the balance. *Alfred v. Montague*, 26 Tex. 232; s. c., 84 Am. Dec. 603; *Cassiday v. Norris*, 49 Tex. 613.

8. *Day v. Sharp*, 4 Whart. (Pa.) 339; s. c., 34 Am. Dec. 509; *Hughes v. Wilkinson*, 37 Miss. 491; *Wilson v. Campbell*, 33 Ala. 249.

9. *Stewart v. Nuckols*, 15 Ala. 225; s. c., 50 Am. Dec. 127; *May v. State Bank*, 2 Rob. (Va.) 56; s. c., 40 Am. Dec. 726; *Meyer v. Mintonye*, 106 Ill. 414.

different States.¹ So, at common law, an execution issued after the death of the defendant, if not tested in his lifetime, and without revival of the judgment, was irregular, and either voidable, or absolutely void.² But an execution tested during the lifetime of the defendant was regular, although not actually issued and delivered until after his death.³ An execution on a judgment against several defendants may issue against all, even after the death of one of them, although it can be enforced only as against the survivors.⁴

An execution issued upon a dormant judgment is irregular⁵ and fraudulent as against a subsequent purchaser in good faith while the judgment remains dormant.⁶

3. *Direction and Delivery.* — The execution should usually issue to the sheriff, constable, or coroner in office at the time.⁷

Where the sheriff is a party to the action, the process should be directed to the coroner of the county.⁸

Where an execution is issued in the lifetime of the judgment debtor, the date of its delivery to the sheriff is immaterial, and need not be indorsed on it in order to sustain a levy and sale of lands in the seisin of the heir.⁹

4. *Alias Writs.* — An *alias* execution is a second and different

1. Herman on Executions (1878), 71, § 82; 568; 2 Tidd's Pr. 1120; Johnston v. Lynch, 3 Bibb (Ky.), 334; Holt v. Lynch, 18 W. Va. 567.

In Massachusetts, if one of several plaintiffs dies, it may issue in the name of all, or, if the death be suggested, in the name of the survivors. Hamilton v. Lyman, 9 Mass. 14; Bowdoin v. Jordan, 9 Mass. 160. In Louisiana it may be enforced in the name of a deceased plaintiff. Rooks v. Williams, 13 La. 374. But not in Maryland. Trail v. Snouffler, 6 Md. 308.

2. Hildreth v. Thompson, 16 Mass. 191; State v. Michaels, 8 Blackf. (Ind.) 437; Swink v. Snodgrass, 17 Ala. 653; s. c., 52 Am. Dec. 190; Woodcock v. Bennett, 1 Cow. (N. Y.) 711; s. c., 13 Am. Dec. 568; Williams v. Weaver, 94 N. Car. 134; Erwin v. Dundas, 4 How. (U. S.) 77. It is held voidable merely, in Collingsworth v. Horn, 4 Stew. & Porter (Ala.), 237; s. c., 24 Am. Dec. 753; Harrington v. O'Reilly, 9 Smedes & M. (Miss.) 216; s. c., 48 Am. Dec. 704.

3. Dibble v. Taylor, 2 Speer's L. (S. Car.) 308; s. c., 42 Am. Dec. 368; Collingsworth v. Horn, 4 Stew. & P. (Ala.) 237; s. c., 24 Am. Dec. 753; Davis v. Oswalt, 18 Ark. 414; s. c., 68 Am. Dec. 182; Montgomery v. Kealhofer (Tenn.), 5 S. W. Rep. 54. *Contra*, Bristow v. Payton's Admx., 2 T. B. Mon. (Ky.) 91; s. c., 15 Am. Dec. 134. For the practice in certain States, see Herman on Executions (1878), 74, § 84.

4. Thompson v. Bondurant, 15 Ala. 346; s. c., 50 Am. Dec. 136; Woodcock v. Bennett, 1 Cow. (N. Y.) 711; s. c., 13 Am. Dec.

5. Brown v. Long, 4 Ired. (N. Car.) 190; s. c., 36 Am. Dec. 43; State v. Morgan, 7 Ired. (N. Car.) 387; s. c., 47 Am. Dec. 329; Lytle v. Lytle, 94 N. Car. 683. Voidable only. Meader Co. v. Aringdale, 58 Tex. 447; Ripley v. Arledge, 94 N. Car. 467.

6. Ball v. Shell, 4 Wend. (N. Y.) 222; Kellogg v. Griffin, 17 Johns. (N. Y.) 274.

7. Herman on Executions (1878), 66, § 77; Freeman on Executions (1876), § 40.

8. Bowen v. Jones, 13 Ired. L. (N. Car.) 25; s. c., 55 Am. Dec. 426; Heileg v. Lemley, 74 N. Car. 250; 1 Black. Com. *349; Weston v. Coulson, 1 W. Bl. 506; Blance v. Mize, 72 Ga. 96. And in general, where the court is satisfied that the sheriff is not a proper person to execute the writ, it may be issued to a coroner or elizor appointed by the court. Penn v. Isherwood, 5 Gill (Md.), 206; Walter v. Dennison, 24 Vt. 551.

Where the sheriff is a party, or where he and his wife are the uses of a judgment, he cannot make a valid levy on lands under an execution issued to him upon such judgment. Knight v. Morrison (Ga.), 3 S. E. Rep. 689; Bowen v. Jones, 13 Ired. L. (N. Car.) 25; s. c., 55 Am. Dec. 426. No suggestion of the reason for issuing to the coroner, however, need be made on the judgment roll previously thereto. Barston v. Gutch, 5 N. & M. 109; 3 Ad. & E. 451.

9. Hanson v. Barnes' Lessee, 3 Gill & J. (Md.) 359; s. c., 22 Am. Dec. 322.

execution, issued at a different time, and properly after the return of the original execution; and an execution altered merely by change of date, is not properly an *alias*.¹ Subsequent writs of the same kind are called *pluries*.² As the *alias* is based upon the original writ, that writ should be returned before the *alias* is issued.³ But an *alias* or second execution issued before the return of the first may not be absolutely void,⁴ and no one but the defendant can ordinarily take advantage of the irregularity.⁵ It is a general rule that no writ, either original, *alias*, or *pluries*, can issue to enforce a judgment already satisfied.⁶ And where property sufficient to satisfy the judgment has been levied on, and no return is made showing a sale or other disposition of the levy, an *alias* execution should not be issued.⁷ Nor should an *alias* be issued where the original execution is lost, the proper practice in such case being to establish a copy of the original.⁸ If the first execution be actually returned unsatisfied, although before the return-day, there is no irregularity in issuing another execution before the return-day.⁹ An *alias* should show on its face that another execution has preceded it.¹⁰ It reaches back to the original, and protects all rights obtained thereunder;¹¹ and a vested right to its issuance cannot be affected by subsequent legislation.¹²

III. Form and Contents. — The execution must follow and correspond with the judgment;¹³ but mere clerical mistakes, or failure

1. Roberts v. Church, 17 Conn. 142.

2. 2 Abb. Law Dict. 284, tit. "Pluries."

3. Turner v. Walker, 3 Gill & J. (Md.) 377; Cairns v. Smith, 8 Johns. (N. Y.) 337; Miller v. Purnell, 6 Taunt. 370; Neff v. Hagaman, 78 Ind. 57; Cutler v. Colver, 3 Cow. (N. Y.) 30.

4. State v. Page, 1 Spear's Law (S. Car.), 408; s. c., 40 Am. Dec. 608; Chapman v. Dyett, 11 Wend. (N. Y.) 31; s. c., 25 Am. Dec. 598; Doe dem. Mace v. Dutton, 2 Ind. 309; s. c., 52 Am. Dec. 510.

5. Chapman v. Dyett, 11 Wend. (N. Y.) 31; s. c., 25 Am. Dec. 598. And he may be estopped by failing to complain until after sale. Richey v. Merritt, 108 Ind. 347. And see Johnson v. Murray, 112 Ind. 154.

6. Fowler v. Currie, 2 Dana (Ky.), 52; s. c., 26 Am. Dec. 436; Freeman on Executions (1876), § 470.

A party put in possession by execution in ejectment, if again disturbed, cannot have another execution on the same judgment. Hinton v. McNeil, 5 Ohio, 509; s. c., 24 Am. Dec. 315; 2 Wheat. Selw. N. P. 565. But where the writ is not fully executed and returned, and the plaintiff immediately abandons possession to the party ejected, through fear of such party, an *alias* may be awarded. Gresham v. Dunn, 3 Metc. (Ky.) 287; s. c., 77 Am. Dec. 174.

7. McIver v. Ballard, 96 Ind. 76; Lasselle

v. Moore, 1 Blackf. (Ind.) 226; Bailey v. Gentry, 1 Mo. 164.

But when an execution is apparently satisfied by a levy on sufficient real estate, if it turns out that a portion thereof cannot be held by the levy, the judgment creditor may have an *alias* execution for the part of the debt unsatisfied, without surrendering the portion of the real estate held by the levy. Rice v. Cook, 75 Me. 45.

8. Rushin v. Shields, 11 Ga. 636; s. c., 56 Am. Dec. 436. Compare Burkle v. Luce, 1 N. Y. 163; Corning v. Burdick, 4 McLean (U. S.), 133.

9. Pennington v. Yell, 11 Ark. 212; s. c., 52 Am. Dec. 262.

10. Scott v. Allen, 1 Tex. 508. But a second execution should not be quashed merely because it is not entitled an "*alias* execution." Bushong v. Taylor, 82 Mo. 671.

11. Bouton v. Lord, 10 Ohio St. 454; Brasfield v. Whittaker, 4 Hawks (N. Car.), 6.

12. Dormire v. Cogly, 8 Blackf. (Ind.) 177. See also as to effect of Minnesota statute, Walter v. Greenwood, 29 Minn. 87.

13. Shackleford v. Hooper, 65 Ga. 366; Sprout v. Reid, 3 G. Greene (Iowa), 489; s. c., 56 Am. Dec. 549; Williams v. Atwood, 57 Ga. 190; Harmon v. Larned, 58 Ill. 167; Prescott v. Prescott, 62 Me. 428.

As to Parties an execution issued against

to recite the judgment with great strictness, will not ordinarily vitiate or avoid the execution.¹ Where an execution is issued against several defendants not equally liable, it should specify the amount to be collected from each.² It is required in most jurisdictions to be issued under seal of the court, but the want of a seal will not perhaps render it absolutely void.³ To state gener-

two on a judgment against one will be quashed. *Thompson v. Bondurant*, 15 Ala. 346; s. c., 50 Am. Dec. 136. And see note to *Graham v. Price*, 13 Am. Dec. 199, 202; also *Freeman on Executions*, § 43.

As to Amount the judgment and execution should correspond. *Sherwin v. Bliss*, 4 Vt. 96; *Coltraine v. McCaine*, 3 Dev. L. (N. Car.) 308; s. c., 24 Am. Dec. 256; *Wilson v. Fleming*, 16 Vt. 649. But a slight mistake in the amount made by the clerk will not render an execution void where it correctly describes the judgment. *Avery v. Bowman*, 40 N. H. 453; s. c., 77 Am. Dec. 728, and note 732; *Harris v. Alcock*, 10 Gill & J. (Md.) 226; s. c., 32 Am. Dec. 158; *Doe v. Rue*, 4 Blackf. (Ind.) 263; *Peck v. Tiffany*, 2 N. Y. 451.

As to Date the execution should correspond with the judgment; but if it so describes and identifies the judgment as to render certain its issuance thereunder, a mistake in the date will not vitiate it. *Stevens v. Roberts*, 121 Mass. 555; *Sprott v. Reid*, 3 G. Greene (Iowa), 489; s. c., 56 Am. Dec. 549; *Brown v. Beets*, 13 Wend. (N. Y.) 30; *Swift v. Agnes*, 33 Wis. 228.

1. *Avery v. Lewis*, 10 Vt. 332; s. c., 33 Am. Dec. 203; *Graham v. Price*, 3 A. K. Marsh. (Ky.) 522; s. c., 13 Am. Dec. 199; *Stevens v. Roberts*, 121 Mass. 555; *Franklin v. Merida*, 50 Cal. 289.

But a variance which destroys the identity of the execution is fatal. *Holbrook v. Pearce*, 15 Vt. 617.

So it is a fatal variance where an execution issued on a judgment for the penalty of a bond to be discharged upon the payment of damages, recites the judgment as for damages only. *Walker v. Marshall*, 7 Ired. L. (N. Car.) 1; s. c., 45 Am. Dec. 502.

And a levy under an execution against the "Water Lot Company" has been held invalid where the judgment was against the "Water Lot Company of the city of Columbus." *Bradford v. Water Lot Co.*, 58 Ga. 280. But the rule as to variance in the names of parties has not been applied with so much strictness in most cases. *Blake v. Blanchard*, 48 Me. 297; *Couch v. Atkinson*, 62 Ala. 633; *Hume v. Conduitt*, 76 Ind. 598. An execution against P. B. Clements on a judgment against J. P. Clements is invalid. *Battle v. Guedry*, 58 Tex. 111.

A material variance between a *fi. fa.* and the judgment on which it is founded is

good ground for quashing the former, or rejecting it when offered in evidence in a claim case arising thereunder.

A suit being in the name of M. and N., surviving executor and executrix of B., for the use of another, the judgment being for the plaintiffs, and the *fi. fa.* being in the name of M. and N. for the use of the same party, the variance was not material. *Monghon v. Brown*, 68 Ga. 207.

The omission of the word "hundred" in the recital of the amount of the judgment in the body of an execution may be supplied by the amount of the judgment, indorsed on the back of the execution, as required by law. And an execution is not rendered invalid as to the debt by the failure to set out the items of costs in words on the back thereof. *Warder v. Millard*, 8 Lea (Tenn.), 581.

Two executions, and the sheriff's deed thereon, recited judgments of the year 1875, while the judgment rolls showed that they were rendered in 1876. There being other evidence to show that the executions were in fact issued on these judgments, held, that this variance was but a clerical mispison, and would not invalidate the execution. *Davis v. Kline*, 76 Mo. 310.

Where in an attachment against a non-resident, after service by publication and without any appearance, judgment is rendered against the defendant, and upon such judgment a writ is issued which, instead of being simply an order of sale, is a command to satisfy the judgment out of any goods and chattels of defendant, and for want of goods and chattels out of the special real estate attached in the action, and on such writ a portion of the said real estate is sold,—held, that while the form was irregular, yet the irregularity was not sufficient to avoid the writ, or vitiate the sale made under it. Generally speaking, neither the process nor the action taken under it will be adjudged void, when the very thing which ought to be done is specifically commanded, and only that thing is in fact done. *Merwin v. Hawker*, 31 Kan. 222.

2. *Martin v. Rice*, 16 Tex. 157.

3. *Hunter v. Burnsville Turnp. Co.*, 56 Ind. 213; *Dominick v. Eaker*, 3 Barb. (N. Y.) 17; *Arnold v. Nye*, 23 Mich. 286, 293; *People v. Dunning*, 1 Wend. (N. Y.) 16; *Dever v. Akin*, 40 Ga. 429; *Taylor v. Courtney*, 15 Neb. 190; *Rose v. Ingram*,

ally the requisites of executions as to their form and contents, it may be said that "they must intelligibly refer to the judgment, stating the name of the court from which they are issued, the name of the county wherein the judgment was rendered, the names of the parties, the amount of the judgment, if it is for money the amount due thereon, and the time of the rendition of such judgment."¹

98 Ind. 276. Compare *Woolford v. Dugan*, 2 Ark. 131; s. c., 35 Am. Dec. 52; *Den v. Bank*, 3 Dev. L. (N. Car.) 279; s. c., 22 Am. Dec. 722; *Tackett v. State*, 3 Verg. (Tenn.) 392; s. c., 24 Am. Dec. 582; *Ins. Co. v. Hallock*, 6 Wall. (U. S.) 556; *Hutchins v. Edson*, 1 N. H. 139.

1. *Herman on Executions* (1878), 42, § 55. And see *Taney v. Woodmansee*, 23 W. Va. 709.

In addition to the authorities already cited, the following may be consulted as to the effect of different errors and defects in the form of executions.

Void Executions.—An execution issued by a justice of the peace, not returnable according to law, is absolutely void, although it would be merely erroneous if issued from a court of general jurisdiction. *Stevens v. Chouteau*, 11 Mo. 382; s. c., 49 Am. Dec. 92; *Estes v. Long*, 71 Mo. 608.

So an execution issued by a justice, which fails to show in whose favor it was issued, is void on its face; and an indorsement on its back, being no part thereof, cannot be looked to in aid of the defect. *Cooper v. Jacobs*, 82 Ala. 411. And a paper issued by a justice to a constable reciting the judgment, but without any words of command or direction, will not justify a levy by that officer. *Gaskill v. Aldrich*, 41 Ind. 338. And see generally authorities cited in *Herman on Executions* (1878), 51, § 65.

Voidable and Irregular Executions.—Voidable and irregular executions cannot ordinarily be attacked collaterally, nor by any one but the execution debtor. *Swiggart v. Harber*, 4 Scam. (Ill.) 364; s. c., 39 Am. Dec. 418; *Mace v. Dutton*, 2 Ind. 309; *Johnson v. Murray*, 112 Ind. 154; *Bacon v. Cropsey*, 7 N. Y. 195.

An execution tested by mistake at the wrong time or place is merely erroneous, and not void. *Jackson v. Bowling*, 10 Ark. 578; *Jones v. Cook*, 1 Cow. (N. Y.) 309; *Porter v. Goodman*, 1 Cow. (N. Y.) 413; *Douglas v. Haberstro*, 88 N. Y. 611; *Williams v. Weaver*, 94 N. Car. 134.

An execution is not rendered void by error of the clerk in fixing the return day. *Goode's Admr. v. Miller*, 78 Ky. 235.

The omission, from a justice's execution, of the name of the county and township or city does not invalidate it, as against a stranger resisting the claims of the execu-

tion purchaser, and as against him the defect may be cured and the judgment identified by parol evidence. *Elliott v. Hart*, 45 Mich. 234.

An execution under which land was sold, formal in other respects, recited that the plaintiff in whose favor the judgment was rendered was dead, and gave the name of one who, it stated, had administered on his estate. In a collateral attack upon the title acquired by a purchaser at a sale under the execution, *held*, there being but one mode recognized by statute by which information on which he could act could be communicated to a clerk, informing him of the death of a judgment creditor and of administration on his estate, it will be presumed that he obtained his knowledge of the facts in that mode. The writ was sufficient, and the seal of court attached thereto raises a presumption of authority for its issuance. *Scott v. Lyons*, 59 Tex. 593.

Where a note and a judgment recovered thereon were in the name of B., administrator for E., the fact that the execution issued thereunder described B. as administrator only, makes no difference, the words "administrator of E." being mere surplusage. *Safford v. Banks*, 69 Ga. 289. See also *Buswell v. Eaton*, 76 Me. 392.

The judgment on which an execution was issued, as recited in the writ, was for so much debt, so much damages, and costs; and the command to the sheriff was to make those respective sums. The judgment upon the record showed that the damages were to be released upon the payment of the debt, with interest thereon, and costs. On appeal from an order overruling a motion by the execution purchaser to quash the writ of *venditioni exponas*, it was *held* that this conditional release of the damages was an essential part of the judgment, and should not have been omitted in the recital of the judgment in the execution; that such variance did not render the process void, but only voidable. *Hall v. Clagett*, 63 Md. 57.

In an action to enjoin a judgment and execution and for account, a decree was rendered sustaining the judgment, and giving leave to defendant to issue his execution for balance due in the former case, and for the costs of this. Execution was issued, entitled of the later case, and the judgment debtor's

IV. Amendments. — Mere clerical mistakes or formal defects in an execution may, as a general rule, be amended so as to render effective all proper proceedings taken under the writ.¹ Unless the defect is such as to render the writ absolutely void, it may ordinarily be amended; and such amendment will, as between the parties, cure the irregularity, and leave the writ as though no such defect had ever existed.² Amendments of clerical mistakes are usually allowed as matter of course upon motion or by leave and order of court.³ But there are cases in which formal proceedings must

lands were sold thereunder. *Held*, that this execution was duly authorized and rightly entitled, but, if entitled wrong, that it was a mere irregularity which did not render the execution void. *Garvin v. Garvin*, 21 S. Car. 83.

A slight variance in the name of one of the parties in the judgment from that in the execution will not vitiate it where it is apparent from the pleadings and proceedings that the parties are the same. *Miller v. Willis*, 15 Neb. 13.

A writ of execution is not made void by the accidental omission of the plaintiff's name if it appears in the indorsement, which for purposes of identification forms part of the process. *McGuire v. Galligan*, 53 Mich. 453.

When a variance is found between the execution and the judgment, the question is one of identity; and if from the whole writ and the whole judgment record the court can feel assured that the execution was issued upon the judgment, the identity is established. *Harlan v. Harlan*, 14 Lea (Tenn.), 107.

An execution so defective that it is subject to be vacated and set aside on motion may not be treated as void when questioned in collateral proceedings, where the defects are amendable, or where all the essential facts necessary for the direction and protection of the sheriff are stated in the execution, or are plainly inferrible from the facts stated. *Wright v. Nostrand*, 94 N. Y. 31.

Effect of Irregularity on Liability of Officer. — It is the general rule that an execution, regular on its face, issued from a court of competent jurisdiction, will protect the officer, and enable him to justify under it, even if the judgment be erroneous. *Bank of U. S. v. Bank of Washington*, 6 Pet. (U. S.) 8; *Hill v. Haynes*, 54 N. Y. 153; *Read v. Markle*, 3 Johns. (N. Y.) 523; *Rue v. Perry*, 63 Barb. (N. Y.) 42; *Dunlap v. Hunting*, 2 Denio (N. Y.), 643; s. c., 43 Am. Dec. 763; *Day v. Sharp*, 4 Whart. (Pa.) 339; s. c., 34 Am. Dec. 509. See also *Averett v. Thompson*, 15 Ala. 678; *Atkinson v. Satcher*, 23 Ark. 101; *Bergin v. Heywood*, 102 Mass. 414; *Robinson v.*

Barrows, 48 Me. 185; *Carter v. Clark*, 28 Conn. 512; *Brown v. Mason*, 40 Vt. 157; *Mangold v. Thorpe*, 33 N. J. L. 134; *Parish v. Wilhelm*, 63 N. Car. 50; *Cooley on Torts*, 459. And generally an execution that is merely voidable and capable of amendment will afford protection to the officer. *Cogburn v. Spence*, 15 Ala. 549; s. c., 50 Am. Dec. 140; *Cody v. Quinn*, 6 Ired. L. (N. Car.) 191; s. c., 44 Am. Dec. 75; *Savacool v. Boughton*, *Bigelow's Lead. Cas. on Torts*, 277, note; s. c., 21 Am. Dec. 181, and note. But a void execution, not fair on its face, affords no protection. *Campbell v. Sherman*, 35 Wis. 103; *Rosen v. Fischel*, 44 Conn. 371; *Mitchell v. Foster*, 12 Ad. & El. 472; *Cooley on Torts*, 464.

1. *Corthell v. Egery*, 74 Me. 41; *Rose v. Ingram*, 98 Ind. 276; *Ross v. Luther*, 4 Cow. (N. Y.) 158; s. c., 15 Am. Dec. 158; *Cawthorn v. Knight*, 11 Ala. 579; *Corwith v. State Bank*, 18 Wis. 560; s. c., 86 Am. Dec. 793.

Clerical errors in an execution may be amended on trial of an action against the sheriff for not levying it. *Hargrave v. Penrod*, *Breese* (1 Ill.), 401; s. c., 12 Am. Dec. 201.

Error in the amount to agree with judgment. *Stevenson v. Castle*, 1 Chit. 349.

Execution regular on its face, but varying from judgment, may be amended after sale. *Bybee v. Ashby*, 2 Gilm. (Ill.) 151; s. c., 43 Am. Dec. 47; *Bissell v. Kip*, 5 Johns. (N. Y.) 89; *Doe dem. Wilkins v. Rue*, 4 Blackf. (Ind.) 263; s. c., 29 Am. Dec. 368.

In Georgia, executions from the Superior Court should be directed to "all and singular the sheriffs of said State and their lawful deputies;" but a direction to "all and singular the sheriffs of said State" only will not require the quashing of the *fi. fa.*, the defect being amendable. *Cheaney v. Beall*, 69 Ga. 533.

2. *Adams v. Higgins* (Fla.), 1 So. Rep. 321; *Goode's Admr. v. Miller*, 78 Ky. 235.

3. *Peck v. Tiffany*, 2 N. Y. 451; *Hutchins v. Doe*, 3 Ind. 528; *Toomer v. Purkey*, 1 Mill (S. Car.), 323; s. c., 12 Am. Dec. 634; *Purcell v. McFarland*, 1 Ired. L. (N. Car.) 34; s. c., 35 Am. Dec. 734.

be taken for that purpose, and notice given to parties interested.¹ And no amendment should be allowed when it would destroy or injuriously affect the rights of third persons acquired in good faith and without notice.² So, an execution that is absolutely void, or does not so indicate the judgment or record on which it is based that a reference thereto will disclose all matters necessary to its certainty and validity, cannot be amended.³

V. Property Subject to Execution.—At common law, land itself was not subject to execution,⁴ but by the statute of Westm. 2, 12 Edw. I. c. 18, and that of 5 Geo. II. c. 7, this restriction was withdrawn.⁵ In this country, at the present time, land is generally subject to execution;⁶ although it is not always primarily liable, as there are statutes in many of the States requiring that the personal property of the debtor be first exhausted.⁷

As a general rule, only such property as the owner or debtor himself might sell can be taken on execution against him;⁸ but all of such property of every description is, unless claimed as exempt or otherwise protected by law, subject to the execution.⁹ Thus chattels of almost every kind, wearing-apparel generally excepted, are and were, at common law, liable to be sold on execution;¹⁰ and so with leases for a term of years,¹¹ and trade-

1. *Bybee v. Ashby*, 2 Gilm. (Ill.) 151; 11 Ired. (N. Car.) 627; 1 Washb. Real Prop. (2d ed.) *466.

s. c., 43 Am. Dec. 47.

2. *Williams v. Sharpe*, 70 N. Car. 582.

3. *Cummins v. Holmes*, 109 Ill. 15; *Hart v. McDade*, 61 Tex. 208.

An execution on a judgment *in rem*. in attachment, describing it as a judgment *in personam*, cannot be amended. *Deakins v. Rex*, 60 Md. 593. Compare *Sabin v. Austin*, 19 Wis. 423.

4. 3 Black. Com. *418. "Lands not being alienable by the feudatory, and therefore not liable for the payment of his debts, it was presumed that he was trusted only upon his personal security; and the judgment, being in pursuance of the contract, was only to recover a personal thing, and the execution following the judgment went only against the goods." *Per Bland, Chancellor*, in *Coombs v. Jordan*, 3 Bland's Ch. (Md.) 284; s. c., 22 Am. Dec. 236, 249.

5. *Hanson v. Barnes's Lessee*, 3 Gill & J. (Md.) 359; s. c., 22 Am. Dec. 322; 3 Black. Com. *418, *419; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528; s. c., 49 Am. Dec. 189, and note 233.

6. *Freeman on Executions* (1876), § 279; 1 Washb. on Real Prop. (2d ed.) *464. And note where the statutory provisions of the different States, making land and various interests therein subject to execution, are concisely stated.

7. See *Herman on Executions* (1878), 141, § 114; *Place v. Riley*, 98 N. Y. 1; *Aldrich v. Wilcox*, 10 R. I. 405; *Bartholomew v. Hook*, 23 Cal. 277; *Sloan v. Stanley*,

11 Ired. (N. Car.) 627; 1 Washb. Real Prop. (2d ed.) *466.

Under such a statute, real estate may be taken first if both parties consent. *Smith v. Randall*, 6 Cal. 47; s. c., 64 Am. Dec. 475. So, where no personal property is offered on demand. *Graves v. Merwin*, 19 Conn. 96; *Sloan v. Stanley*, 11 Ired. (N. Car.) 627.

8. *Coombs v. Jordan*, 3 Bland, Ch. (Md.) 284; s. c., 22 Am. Dec. 236; *French v. Mehan*, 56 Pa. St. 286; *Gentry v. Wagstaff*, 3 Dev. (N. Car.) 270; *Knox v. Hunt*, 18 Mo. 243.

A contingent interest not yet acquired is not subject to execution. *Smith v. Whitfield*, 67 Tex. 124; *Baker v. Copenbarger*, 15 Ill. 103. Compare *White v. McPheeters*, 75 Mo. 286.

So, land or crops raised on land held by husband and wife by entireties cannot be sold on execution against one. *Patton v. Rankin*, 68 Ind. 245; s. c., 34 Am. Rep. 254; *Davis v. Clark*, 26 Ind. 424.

9. *Woodward v. Hopkins*, 2 Gray, 210; *Henson v. Edwards*, 10 Ired. (N. Car.) 43.

As to where the separate estates of married women may be seized on execution, see leading article by J. F. Kelly, 21 Cent. L. J. 44.

10. *Herman on Executions* (1878), 144, § 116; *Woodward v. Hopkins*, 2 Gray (Mass.), 210; *Henson v. Edwards*, 10 Ired. (N. Car.) 43.

11. *Kile v. Glebner*, 114 Pa. St. 381; *Shelton v. Codman*, 3 Cush. (57 Mass.)

fixtures which the execution defendant has the right to remove.¹ Growing crops are usually subject to execution as personal property.² Equitable interests in real estate,³ and various other interests therein, have been held subject to levy and sale.⁴ Property

318; *Coombs v. Jordan*, 3 Bland's Ch. (Md.) 284; s. c., 22 Am. Dec. 236; *Williams v. Downing*, 18 Pa. St. 60.

1. *State v. Bonham*, 18 Ind. 231; *Freeman on Executions* (1876), § 114; *Kile v. Giebner*, 114 Pa. St. 381; *Cooper v. Johnson*, 143 Mass. 108; *Teaff v. Hewitt*, 1 Ohio St. 511; s. c., 59 Am. Dec. 634 and note, 657.

2. See CROPS. *Lindley v. Kelly*, 42 Ind. 294; *Preston v. Ryan*, 45 Mich. 174; *Craddock v. Riddlesberger*, 2 Dana (Ky.), 205; *Whipple v. Foot*, 2 Johns. (N. Y.) 418; *Jones v. Flint*, 10 Ad. & El. 753.

In Kentucky, although a growing crop is not subject to execution until the first day of October, yet, under the 439th section of the Civil Code, a court of equity, upon the return of "no property," will subject the crop, with due regard to the rights of both creditor and debtor, before that time. *Farmer's Bank v. Morris*, 79 Ky. 157.

A tenant's interest in a growing crop of grain raised on shares may be levied on, and the sheriff may take possession of, the entire crop for that purpose; but he can sell only the tenant's undivided interest. *Bernal v. Hovions*, 17 Cal. 541; s. c., 79 Am. Dec. 147. And see *Putnam v. Wise*, 1 Hill (N. Y.), 235; s. c., 37 Am. Dec. 309, and note 317. It is otherwise as to the interest of a mere crop. *Per Brazier v. Ansley*, 10 Ired. L. (N. Car.) 12; s. c., 51 Am. Dec. 408 and note, 410.

The natural produce of the earth itself, such as grass and trees, is, unless otherwise treated by the owner, part of the realty, and not subject to execution as personal property. *State v. Gemmill*, 1 Houst. (Dela.) 9; 1 Washb. Real Prop. (2d ed.) *2, 3; *Slocumb v. Seymour*, 36 N. J. L. 138. And see note to *Norris v. Watson*, 55 Am. Dec. 160, 161; *Rogers v. Elliott*, 59 N. H. 201; s. c., 47 Am. Dec. 192.

3. At common law a mere equitable interest, without possession, was not subject to execution. *Herman on Executions* (1878), § 142. But it generally is under the modern statutes on the subject. *Herman on Executions*, 192, § 142; *Coombs v. Jordan*, 3 Bland's Ch. (Md.) 284; s. c., 22 Am. Dec. 236; *Fredericks v. Corcoran*, 100 Pa. St. 413; *Smith v. Cockrell*, 66 Ala. 64; *Hammond v. Gordon*, 93 Mo. 223.

An equitable estate in remainder is held subject to execution in Missouri. *White v. McPheeters*, 75 Mo. 286.

In Alabama (Code, § 3209) the equity of redemption of a mortgagor may be sold on

execution against him, whether he or the mortgagee is in possession. *Gassenheimer v. Moulton*, 2 So. Rep. 652. But not formerly in Illinois. *Watson v. Reissig*, 24 Ill. 281; s. c., 76 Am. Dec. 746. But see *Rev. St. 1874*, ch. 77, §§ 3, 10.

In Tennessee an execution operates only on an estate in which the legal title is coupled with the beneficial interest, or the legal and equitable interests are merged or combined in the same person. *Henderson v. Hill*, 9 Lea (Tenn.), 25; *Pratt v. Phillips*, 1 Sneed (Tenn.), 543; s. c., 60 Am. Dec. 162, and note 166.

In Georgia the equitable title in lots drawn in a land lottery was held not subject to sale on execution. *Henderson v. Hackney*, 23 Ga. 383; s. c., 68 Am. Dec. 529; *Garlick v. Robinson*, 12 Ga. 340.

Equitable interests in personalty have been held in some cases not subject to execution. *Rose v. Bevan*, 10 Md. 463; s. c., 69 Am. Dec. 170; *Harris v. Alcock*, 10 Gill & J. (Md.) 251; s. c., 32 Am. Dec. 158.

4. Where land was sold, and part of the purchase-money paid, and a bond for title given, a note being taken from the purchaser for the balance, it was held that the title remaining in the vendor was subject to levy under a *fi. fa.* against him. *Bell v. McDuffie*, 71 Ga. 264; *Hardee v. McMichael*, 68 Ga. 678; *Hammond v. Johnston*, 93 Mo. 198.

Where a levy has been made on realty as belonging to a defendant who is in fact a life tenant, the life estate may be sold, although sale of the remainder might be enjoined. *Jones v. Crawley*, 68 Ga. 175.

In Texas an interest in land is subject to levy and sale on execution pending proceedings by or against the owner for partition. *Brown v. Renfro*, 63 Tex. 600.

The interest of a miner in his mining claim on public lands is property subject to execution. *McKeon v. Bisbee*, 9 Cal. 137; s. c., 70 Am. Dec. 642.

The interest of a fraudulent debtor in lands purchased in another's name is subject to execution. *Dunnica v. Coy*, 24 Mo. 167; s. c., 69 Am. Dec. 420.

The undivided interest of a judgment debtor in one of several tracts of land, in all of which he owns an undivided interest with the same tenant in common, may be levied on and sold. *Aycock v. Kimbrough*, 61 Tex. 543.

So, a vested remainder or reversionary interest in land may be levied on and sold during the continuance of the life estate.

fraudulently conveyed is subject to execution by statutory provision, or otherwise, in many jurisdictions.¹

At common law, money judgments, notes, accounts, and choses in action generally, could not be taken on execution;² but this rule has been changed in many of the States.³ And so, in the case of mortgaged chattels, although not subject to execution against the mortgagor at common law,⁴ they may now often be levied upon and sold.⁵

Property *in custodia legis* is not subject to levy and sale on execution.⁶ And such incorporeal rights as interests in patents and copyrights cannot be seized.⁷ Nor can an unpublished manu-

Wilkinson v. Chew, 54 Ga. 602; Wiley v. Bridgman, 1 Head, 68. But a contingent remainder is held not subject to execution. Jackson v. Middleton, 52 Barb. 9; Watson v. Dodd, 68 N. Car. 528. Nor is land held by entireties by husband and wife. Dodge v. Kinsey, 101 Ind. 102; Carver v. Smith, 90 Ind. 222; s. c., 46 Am. Rep. 210.

1. Holman v. Elliott, 65 Ind. 78; Johnston v. Field, 62 Ind. 377; Scott's Exrs. v. Scott, 3 S. W. Rep. (Ky.) 598; Rose v. Story, 1 Pa. St. 190; s. c., 44 Am. Dec. 121; Dodd v. Adams, 125 Mass. 398; Hall v. Sands, 52 Me. 355; Booth v. Bunce, 33 N. Y. 139; Freeman on Executions (1876), §§ 136-158; Bump, Fraud. Convey. (3d ed.) 238, 239.

So held as to property acquired by exchange of property fraudulently obtained. Abney v. Kingsland, 10 Ala. 355; s. c., 44 Am. Dec. 491. And see McCloskey v. Stewart, 63 How. Pr. (N. Y.) 142.

2. Freeman on Executions (1876), § 112; McClelland v. Hubbard, 2 Blackf. (Ind.) 361; Ingalls v. Lord, 1 Cow. (N. Y.) 240; Ransom v. Minor, 3 Sandf. (N. Y.) 692; Humble v. Mitchell, 11 Ad. & El. 205.

A judgment cannot be seized, even under a statute permitting the seizure of choses in action. Osborn v. Cloud, 23 Iowa, 104. And see McBride v. Fallon, 63 Cal. 301. Compare Adams v. Hackett, 7 Cal. 187; Safford v. Maxwell, 23 La. Ann. 345. And see statutory change in Iowa Code, § 3046.

3. Bay v. Saulspough, 74 Ind. 397; State v. Judge, 28 La. Ann. 884; Davis v. Mitchell, 34 Cal. 87; Freeman on Executions (1876), §§ 111, 112.

In Pennsylvania, money can be taken by the officer only "when he can find no other real or personal estate of the defendant." Reedy v. Commonwealth, 35 Pa. St. 166; s. c., 78 Am. Dec. 330.

4. Badlam v. Tucker, 1 Pick. (Mass.) 389, 399; King v. Hanger, 3 Bulstr. 17; Sherman v. Davis, 137 Mass. 132, 133; Thompson v. Stevens, 10 Me. 27; King v. Bailey, 3 Mo. 332; Chicago Lumber Co. v. Fisher, 18 Neb. 334; Vanslyck v. Mills, 34 Iowa, 375.

5. Spark v. Compton, 70 Ind. 393; Hackleman v. Goodman, 75 Ind. 202; Kimball v. Morrison, 40 N. H. 117; Folsom v. Clemence, 111 Mass. 273; Nelson v. Ferris, 30 Mich. 497; Dyer v. Cady, 20 Conn. 563; Williams v. Gallick, 11 Oreg. 337.

And so in any event if the mortgage is fraudulent. Sherman v. Davis, 137 Mass. 132; Brown v. Snell, 46 Me. 490; Russell v. Dyer, 33 N. H. 186.

6. Hackley v. Swigert, 5 B. Mon. (Ky.) 86; s. c., 41 Am. Dec. 256; Pipher v. Fordyce, 88 Ind. 436; Bradley & Dortch v. Keesee, 5 Coldw. (Tenn.) 223; s. c., 94 Am. Dec. 246; First Nat. Bank v. Dunn, 97 N. Y. 149; s. c., 49 Am. Rep. 517.

Property in Custodia Legis. — Replevied property, pending the litigation. Bates County Nat. Bank v. Owen, 79 Mo. 429; Pipher v. Fordyce, 88 Ind. 436. Property in the hands of a receiver. Edwards v. Norton, 55 Tex. 405; Columbian Book Co. v. De Golyer, 115 Mass. 69; Turner v. Fendall, 1 Cranch, 117. Money in the hands of the sheriff. *Ex parte* Fearle & Lewis, 13 Mo. 467; s. c., 73 Am. Dec. 155; Hardy v. Tilton, 68 Me. 195; s. c., 28 Am. Rep. 34. *Contra*, Dolby v. Mullins, 3 Humph. (Tenn.) 437; s. c., 39 Am. Dec. 180. And see conflicting decisions compared in note, 55 Am. Dec. 264. Property in the hands of assignees, clerks, and various other officers of the court. See authorities collated in note to Hardy v. Tilton, 28 Am. Rep. 35, and in note to Pipher v. Fordyce, 22 Am. L. Reg. (U. S.) 666. Property delivered to officer by person arrested for crime. Morris v. Penniman, 14 Gray (Mass.), 220; s. c., 74 Am. Dec. 675; Robinson v. Howard, 7 Cush. (Mass.) 257.

Custody of law is such custody only as is rightfully assumed by the officer; "there is no such thing as an illegal custody of the law." Gilman v. Williams, 7 Wis. 329; s. c., 76 Am. Dec. 219.

7. Stevens v. Gladding, 17 How. (U. S.) 450. And see note to Ryan v. Lee, 10 Fed. Rep. 918. Except by a proceeding in equity. Ager v. Murray, 105 U. S. 126, 131.

script be levied on.¹ Property essential to the exercise of a railroad or similar corporate franchise cannot be taken, under an ordinary execution, when in use;² and generally where property of the execution debtor is so held by another that he cannot control or dispose of it, or where that other has a lien thereon, as bailee or the like, it cannot be reached by execution, at least without first paying the bailee's claim.³

VI. Exemption. — 1. *Nature and Extent of the Right.* — The common law had no favors to offer the debtor or his family in the way of exempting any portion of his property from execution for the benefit of his family; and, if he owned two gowns, one might be seized and sold.⁴ But modern legislation has removed this reproach to the law, and there is probably no State or civilized country in the world in which some kind of an exemption is not now allowed. These statutes are "designed as a protection for poor and destitute families,"⁵ and the law thus "seeks to mitigate the consequence of men's thoughtlessness and improvidence."⁶ They are based upon considerations of public policy and humanity, and should be liberally construed.⁷

1. *Dart v. Woodhouse*, 40 Mich. 399; s. c., 29 Am. Rep. 544.

2. *Susquehanna Coal Co. v. Bonham*, 9 Watts & S. (Pa.) 27; s. c., 42 Am. Dec. 315; *Northern Pac. R. R. Co. v. Shimmel*, 25 Am. L. Reg. 644 and note, 648, as to what is essential. *Great Northern Road v. Tohourdin*, 20 Am. & Eng. R. R. Cas. 562. Probably cars in actual use, and in many of the States rolling-stock generally, cannot be levied on as personal property; but there is much conflict in the authorities upon this question. Nor can the franchise itself be so taken. *Gue v. Tide-water Canal Co.*, 24 How. (U. S.) 263; 2 *Rover* on R. R. 901; *Youngman v. Elmira & W. R. Co.*, 65 Pa. St. 278.

3. *Manny v. Adams*, 32 Iowa, 165; *Samuel v. Agnew*, 80 Ill. 553; *Holbrook v. Baker*, 5 Me. 309; *Seymour v. Newton*, 105 Mass. 272; *Jones v. Bradner*, 10 Barb. (N. Y.) 193.

Not subject to Execution. — The purchaser of land on execution sale acquires no interest before the expiration of the time for redemption, which is subject to sale on execution. *Bowman v. People*, 82 Ill. 246; s. c., 25 Am. Rep. 316. And see *Kidder v. Orcott*, 40 Me. 589; *Smith v. Taylor*, 11 Lea (Tenn.), 738; *Den v. Steelman*, 5 Halst. (N. J.) 193. *Contra*, *Slater's Appeal*, 28 Pa. St. 169; *Page v. Rogers*, 31 Cal. 293.

And the following have been held not subject to sale on execution: Municipal lands of a city held in trust for its inhabitants. *Townsend v. Greely*, 5 Wall. 326; *Darlington v. N. Y.*, 31 N. Y. 164. Improvements by an individual on lands of the U. S. *Rhea v. Hughes*, 1 Ala. 219;

s. c., 34 Am. Dec. 772; *Brown v. Massey*, 3 Humph. (Tenn.) 470. Compare *Switzer v. Skiles*, 3 Gilm. (Ill.) 529; s. c., 44 Am. Dec. 723. A church to pay the society debts where the pews are owned by individuals. *Bigelow v. Cong. Society*, 11 Vt. 283; *Revere v. Gannett*, 1 Pick. (Mass.) 169. Water-works of a city. *New Orleans v. Morris*, 105 U. S. 600.

A seat in a stock exchange is not property subject to execution in any form. It is a mere personal privilege or license to buy and sell at the meetings of the board. It cannot be levied on or sold under a *fierti facias* or attachment execution. *Pancoast v. Gowen*, 93 Pa. St. 66; *Eliot v. Merchants' Exch. of St. Louis*, 28 Alb. L. J. 512; s. c., 4 Am. & Eng. Corp. Cas. 58, 64; *Barclay v. Smith*, 1 Am. & Eng. Corp. Cas. 298. Compare *Powell v. Waldron*, 89 N. Y. 331. And see *Dos Passos* on Stock Brokers, 86-97.

4. *Herman on Executions* (1878), 86, § 92. Wearing-apparel, and perhaps other property upon the person of the debtor, however, could not be seized. Co. Lit. 47 a.; *Field v. Adams*, 12 Ad. & E. 649; *Mack v. Parks*, 8 Gray (Mass.), 517; *Gorton v. Falkner*, 4 T. R. 565; *Maxham v. Day*, 16 Gray, 213. Compare *State v. Dilliard*, 8 Ired. L. (N. Car.) 102; s. c., 38 Am. Dec. 708; *Green v. Palmer*, 15 Cal. 411.

5. *Woodward v. Murray*, 18 John. (N. Y.) 400.

6. *Kneettle v. Newcomb*, 22 N. Y. 249, 251, *per Denio*, J.

7. *Butner v. Bowser*, 104 Ind. 255; *Puett v. Beard*, 86 Ind. 172; s. c., 44 Am. Rep.

In nineteen States constitutional provisions are found exempting certain property of resident debtors from execution and sale;¹ and in sixteen States homestead exemptions are provided for.² In several of the States, as will be seen from a reference to the notes, both kinds of exemption prevail. But whether the exemption be of a certain amount of property to be selected by the debtor, or of specific articles, or a homestead exemption, the chief purpose of its existence is to protect families from want, and prevent a man's creditors from taking from his family, or those dependent on him for support, the necessities of life, or means of gaining that support.³ Indeed, Herman says, "The right of exemption is for the *sole* purpose of protecting families from want and misfortune, and as a guard against their being impoverished by stripping them of the necessities of life and the means of support."⁴

2. *Who may Claim.* — The various statutes giving the right of exemption usually confine it to resident "householders," "house-keepers," or "heads of families." These terms have often been before the courts for construction. "Householder" and "house-keeper" are each defined by Abbott as "the head of a family keeping house;"⁵ but this definition is little better than a *petitio principii*, and does not throw much light upon the subject. It is at least questionable if these terms are synonymous. "Householder" would seem to be the more comprehensive term, and in Indiana it is held that a householder is not necessarily a housekeeper.⁶ It

280; *Gilman v. Williams*, 7 Wis. 329; s. c., 76 Am. Dec. 219; *Jarvais v. Moe*, 38 Wis. 446; *Montague v. Richardson*, 24 Conn. 338; s. c., 63 Am. Dec. 173; *Robinson v. Wiley*, 15 N. Y. 494; *Howe v. Adams*, 28 Vt. 541; *Beavan v. Hayden*, 13 Iowa, 122; *Wassell v. Tunnah*, 25 Ark. 101; *Megehe v. Draper*, 21 Mo. 510; *Good v. Fogg*, 61 Ill. 450; *Roff v. Johnson*, 40 Ga. 555; *Alvord v. Lent*, 23 Mich. 369; *Gregory v. Latchem*, 53 Ind. 449.

1. These States are Alabama, Arkansas, California, Colorado, Florida, Georgia, Indiana, Illinois, Louisiana, Maryland, Michigan, Minnesota, North Carolina, Nevada, South Carolina, Texas, Wisconsin, West Virginia, and Virginia. See *Stimson's Am. Stat. Law*, § 81.

In Alabama and North Carolina the exemption does not prevail as against artisan's liens. N. C. Const., 10, 4; Ala. Const., 10, 4. Nor in Arkansas and West Virginia, as against a purchase-money debt for the same property. Nor in South Carolina, Florida, and West Virginia, as against a levy for taxes. *Stimson's Am. Stat. Law*, § 81.

In Alabama the right to the exemption may be waived by written instrument. Ala. Const. 10, 7.

2. This is the case in Alabama, Arkansas,

California, Colorado, Georgia, Florida, Illinois, Kansas, Michigan, Nevada, North Carolina, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Stimson's Am. Stat. Law*, § 83.

In Kansas, Arkansas, and Nevada, this exemption is of no avail as against a mortgage or specific lien, and so in Michigan as to mortgages; and in many of the States it is unavailing as against a purchase-money debt for the same property, or a sale for taxes. *Stimson's Am. Stat. Law*, § 84.

3. *Shipe v. Repass*, 28 Gratt. (Va.) 716, 733; *Sears v. Hauks*, 14 Ohio St. 498, 501.

4. *Herman on Executions* (1878), 89, § 94.

An exemption of six months' provision for a householder and his family is for the benefit of his children who have reached their majority, as well as those who have not, if they have no other home than his. *Stilson v. Gibbs*, 53 Mich. 280.

5. 1 *Abbott's L. Dict.* 574, tit. "Householder."

6. *Astley v. Capron*, 89 Ind. 167. The following cases have pretty well settled the question as to who are householders in Indiana, under the exemption laws: —

A widower who lives with his children at the house of his father-in-law, pays their

seems impossible to give a thoroughly satisfactory definition of these terms, but any one is to be deemed a householder upon whom rests the duty of supporting the members of his family or household.¹ The head of a family is the chief or manager of a family or collective body of persons living together in one house, or within the same curtilage, and occupying a relation to one another of a more or less permanent and domestic character.² A more satisfactory idea, however, of the meaning of these terms will be gained by referring to the authorities cited below.³ Where the right

board and supplies them with clothing and necessities, is a householder. *Lowry v. McAlister*, 86 Ind. 543. So is a man who, without wife or child, but with a hired servant, occupies a house and maintains a household. *Kelley v. McFadden*, 80 Ind. 536. And a widower who continues to occupy the same property after his wife's death, the title being in his daughter, without paying therefor except by way of taxes and improvements, but contributes to the living expenses of his daughter's family, who reside with him at his request, without being necessarily dependent on him for support, has also been held to be a householder. *Bipus v. Deed*, 106 Ind. 135. One who lives with his sister, owing personal property with her, and contributing with her to household expenses by his labor, is included. *Graham v. Crockett*, 18 Ind. 119. One removing from one part of the State to another does not lose his right to exemption as a householder. *Norman v. Bellman*, 16 Ind. 156.

1. *Bunnell v. Hay*, 73 Ind. 452; *Thomp. on Homesteads & Exempts.* (1878) sects. 45, 46.

2. *Tyson v. Reynolds*, 52 Iowa, 431; *Arnold v. Waltz*, 53 Iowa, 706; s. c., 36 Am. Rep. 248; *Lane v. Phillips* (Tex.), 6 S. W. Rep. 610; *Wilson v. Cochran*, 31 Tex. 677; *Race v. Oldridge*, 90 Ill. 250; s. c., 32 Am. Rep. 27. The duty of the managing member to support the others is sometimes made the test. *Calhoun v. Williams*, 32 Gratt. (Va.) 18; s. c., 34 Am. Rep. 759, 763; *Thomp. on Homesteads & Exemp.* §§ 45, 46, 47.

3. **Householder.** — One living with a housekeeper and a son by her, although not legally married, he having so lived with her for twenty years. *Beil v. Keach*, 80 Ky. 42.

A widower may be, although all his children may have married and left him. *Silloway v. Brown*, 12 Allen (Mass.), 30; *Barney v. Leeds*, 51 N. H. 253; *Blackwell v. Broughton*, 56 Ga. 390; *Kimbrel v. Willis*, 97 Ill. 494; s. c., 12 Cent. L. J. 211.

A landlord who retains one room, the tenant preparing the food. *Brown v. Brown*, 68 Mo. 388; s. c. (reported as *Brown v. Stratton*), 8 Cent. L. J. 46.

In New York, "the head, master, or person who has charge of, and provides for, a family." *Bowne v. Witt*, 19 Wend. (N. Y.) 475; *Woodward v. Murray*, 18 Johns. (N. Y.) 400.

An unmarried merchant who rents and sleeps in a store is not a householder. *Brown v. State*, 57 Miss. 424.

An unmarried man keeping house, and having his farm-hands living with him, but having no children or others dependent upon him, is not a "householder or head of a family." *Calhoun v. Williams*; 32 Gratt. (Va.) 18; s. c., 22 Am. Rep. 759.

A widower having two daughters, both married, one of whom, with her husband, boards with him, is not a housekeeper with a family. *Carter v. Adams* (Ky.), 4 S. W. Rep. 36.

Head of a Family. — See FAMILY. A man with a wife. *Kitchell v. Burgwin*, 21 Ill. 45; *Brown v. Brown*, 68 Mo. 388; *Cox v. Stafford*, 14 How. Pr. (N. Y.) 519. Even though his wife may have left him. *Whitehead v. Tapp*, 69 Mo. 415.

A widower with dependent children, — *Barney v. Leeds*, 51 N. H. 268; *Coughanan v. Hoffman* (Idaho), 13 Pac. Rep. 231; *Wood v. Wheeler*, 7 Tex. 20; *Whalen v. Cadman*, 11 Iowa, 226 — or a widow with whom her children live. *Becker v. Becker*, 47 Barb. (N. Y.) 497; *Bachman v. Crawford*, 3 Humph. (Tenn.) 214.

A married woman, abandoned by her husband, living with and supporting her child. *Nash v. Nonnént*, 5 Mo. App. 545; *Frazier v. Syas*, 10 Neb. 115; s. c., 35 Am. Rep. 466. And see *Kenley v. Hudelson*, 99 Ill. 500; s. c., 39 Am. Rep. 31. But a married woman residing, without children, in Alabama, while her husband is a non-resident, is not the head of a family. *Keiffer v. Barney*, 31 Ala. 192.

An unmarried person of either sex, who supports or has control over others living together as a family, may be the head of a family. *Revalh v. Kraemer*, 8 Cal. 72; *Connaughton v. Sands*, 32 Wis. 387; *McMurray v. Shuck*, 6 Bush (Ky.), 111; *Arnold v. Waltz*, 53 Iowa, 706; *Ellis v. White*, 47 Cal. 73.

A bachelor with servants and employees, but no one dependent on him for support,

to claim an exemption as a resident householder, housekeeper, or head of a family once attaches to a person, it is not lost by temporary absence,¹ and the protection of the law extends to the housekeeper, while *in transitu*, within the State.²

The right of exemption is a personal privilege, and can usually be claimed only by the debtor,³ although in his absence, or under special circumstances, his wife may make the claim, or his agent or attorney may make it for him.⁴ It is doubtful if a partner can claim an exemption out of partnership property; but the authorities differ upon this question.⁵ In several of the States an exemption is allowed only in actions on contract,⁶ while in others the right exists in actions *ex delicto* as well as *ex contractu*.⁷ Costs are usually given or withheld by statute, and where the right of exemption is confined to cases of debt by contract, it seems that

is not. *Garaty v. Du Bose*, 5 S. Car. 493; *Calhoun v. McLendon*, 42 Ga. 405; *Calhoun v. Williams*, 32 Gratt. (Va.) 18. But an unmarried man with whom his widowed sister and her children live, and by whom they are supported, is the head of a family. *Wade v. Jones*, 20 Mo. 75. A husband, without children, permanently separated from his wife, and not supporting her, is not. *Linton v. Crosby*, 56 Iowa, 386; s. c., 41 Am. Rep. 107.

Where a woman is a resident of the State of Kansas at the time of her marriage, and afterward continues to be a resident of the State in fact, but marries a man in the State of Missouri who has never been a resident of Kansas, *held*, nevertheless, that the wife is such a resident of the State of Kansas that she may hold property exempt from judicial process under the exemption laws of the State of Kansas; and she may also be such a head of a family in Kansas as to hold property in like manner exempt from judicial process. *Fish v. Street*, 27 Kan. 270.

Under sect. 2, art. 9, of the Arkansas Constitution of 1874, a debtor who is married, though not the head of a family, is entitled to the chattel exemption of five hundred dollars therein secured, whether it be the wife or the husband. The provision is for the benefit of all of either sex, who are either married or the heads of families. *Memphis & L. R. Ry. v. Adams*, 46 Ark. 159.

A widow remaining, after her husband's death, upon their farm, and carrying it on as her only means of support, her children having married and left her, has been *held* to be the "head of a family engaged in agriculture." *Collier v. Lattimer*, 8 Baxt. (Tenn.) 420; s. c., 35 Am. Rep. 711.

1. *Carrington v. Herrin*, 4 Bush (Ky.), 624; *Griffin v. Sutherland*, 14 Barb. (N. Y.) 456; *Bunnell v. Hay*, 73 Ind. 452. Nor is

continuous actual occupation of a home-stead necessary. *Euper v. Alkire*, 37 Ark. 283. But it may be lost by the breaking up of the family. *Thompson on Homesteads & Exemp.* §§ 70, 71.

2. *Anthony v. Wade*, 1 Bush (Ky.), 110; *Mark v. State*, 15 Ind. 98.

3. *Smyth's Homest. & Exemp.* (1875) § 535; *Terry v. Wilson*, 63 Mo. 493.

It is not vendible or assignable. *Eberhart's Appeal*, 39 Pa. St. 509; s. c., 80 Am. Dec. 536.

4. *Wilson v. McElroy*, 32 Pa. St. 82; *Waugh v. Burket*, 3 Grant Cas. (Pa.) 319; *Regan v. Zeeb*, 28 Ohio St. 483.

5. That he cannot. *Pond v. Kimball*, 101 Mass. 105; *Love v. Blair*, 72 Ind. 281; *Guptil v. McFee*, 9 Kan. 30; *Kingsley v. Kingsley*, 39 Cal. 665; *State ex rel. v. Spencer*, 64 Mo. 355; *Bonsall v. Comly*, 44 Pa. St. 442; *In re Blodgett*, 10 Nat. Bank Reg. 145; *Rhodes v. Williams*, 12 Nev. 20; *Gaylord v. Imhoff*, 26 Ohio St. 317; *Spiro v. Paxton*, 3 Lea (Tenn.), 75; s. c., 31 Am. Rep. 630.

That he can. *Stewart v. Brown*, 37 N. Y. 350; *Burns v. Harris*, 67 N. Car. 140; *In re Young*, 3 Nat. Bank Reg. 440; *In re Rupp*, 4 Nat. Bank Reg. 95; *Blanchard, Williams & Co. v. Paschal*, 68 Ga. 32; s. c., 45 Am. Rep. 474; *State v. Kenan*, 94 N. Car. 296.

6. *State ex rel. Wingler v. McIntosh*, 100 Ind. 439; *St. L. I. M. & S. Ry. Co. v. Hart*, 38 Ark. 112; *Kenyon v. Gould*, 61 Pa. St. 292; *Gill v. Edwards*, 87 N. Car. 76; *Schouton v. Kilmer*, 8 How. Pr. (N. Y.) 527; *Robinson v. Wiley*, 15 N. Y. 489; *Davis v. Henson*, 29 Ga. 345.

7. *Loomis v. Gerson*, 62 Ill. 11; *Conroy v. Sullivan*, 44 Ill. 451; *Smith v. Ormans*, 17 Wis. 395. See also *Thompson on Homesteads & Exemptions* (1878), §§ 380, 381; *Freeman on Executions* (1876), § 217.

no exemption can be claimed as against an execution issued upon a judgment for costs.¹ Other illustrations, showing when and under what circumstances the right exists, will be found in the adjudged cases.²

1. *State ex rel. Wingler v. McIntosh*, 100 Ind. 439; *Russell v. Cleary*, 105 Ind. 502; *Schouton v. Kilmer*, 8 How. Pr. (N. Y.) 527; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396. Compare *Lane v. Baker*, 2 Grant Cas. (Pa.) 424.

2. In Alabama, as against a judgment rendered for the recovery of the penalty given by statute against a mortgagee for failure to enter satisfaction of the mortgage upon the margin of the record, after its payment (Code of 1876, § 2223), there is no constitutional or statutory exemption. *Williams v. Bowden*, 69 Ala. 433.

The claim of the State against a defaulting public officer is both a tort and a crime, and no exemption of property can be claimed or allowed against it. *Vincent v. State*, 74 Ala. 274.

A surety in a judgment confessed under the statute for the fine and costs in a prosecution for a misdemeanor is entitled to a homestead exemption as against an execution issued on such judgment. The State for use, etc., *v. Allen*, 71 Ala. 543.

Where, under the law, no property of defendant is exempt from execution for fine and costs, no property of his surety in like manner is exempt. *Irvin v. State*, 6 Lea (Tenn.), 588.

An execution on a judgment in favor of the State against a defaulting tax-collector, for taxes due the State collected and not paid over as required by law, cannot be levied upon the homestead of the defaulting tax-collector. *Ren v. Driskell*, 11 Lea (Tenn.), 642.

An exemption cannot be claimed as against an execution for city taxes, even though no certificate that it was issued for such an obligation be indorsed on the process. *Oliver v. White*, 18 S. C. 235.

In Vermont, the statute of exemptions is not available as against distress for taxes, except as specified in section 375, R. L. and No. 11, Acts of 1882. *Hackett v. Amsden*, 56 Vt. 201.

At common law, the husband is liable for the tort of his wife, not on account of any breach of the marriage contract, but as an incident of the marriage relation or status. Therefore, where judgment was rendered against a husband for the tort of his wife, he could not claim any part of his property as exempt from sale on execution thereunder, upon the ground that his liability for his wife's tort resulted from his marriage contract with her. But under section 5120, Rev. St. Ind. 1881, in force

since Sept. 19, 1881, husbands are not liable for the torts of their wives. *McCabe v. Berge*, 89 Ind. 225.

A widow, by concealing an ante-nuptial contract, whereby she had relinquished all interest in her husband's estate, obtained from his administrator personal property of the value of six hundred dollars as of right as widow. For this wrong the administrator afterwards sued her and obtained judgment. Held, that the judgment was for a tort, and not upon contract, and no property was, under section 703, Rev. St. Ind. 1881, exempt from execution issued upon it. *Nowling v. McIntosh*, 89 Ind. 225.

A judgment for a penalty provided by statute for running by a toll-gate is not founded upon a contract, express or implied, and the judgment-debtor is not entitled to claim property as exempt from execution and sale on such judgment. *Keller v. McMahan*, 77 Ind. 62.

The comptroller-general's execution against a defaulting tax-collector and his sureties is an execution for taxes in the true intent and meaning of the constitutions of 1868 and 1877, and may be enforced against personalty set apart and exempt from ordinary judgments and executions, in possession of the said collector or his sureties. *Cahu v. Wright*, 66 Ga. 119.

A bail-bond is a debt by contract, and the exemption laws apply as well to a judgment and execution on it as to executions for any other debt. The exemption laws are for the protection of the poor, and the State is therefore impliedly included in them, and subject to their operation. *State v. Williford*, 36 Ark. 155; s. c., 38 Am. Rep. 34.

Exemptions from execution on debts existing at the time of the adoption of the Constitution of 1868 are governed by the statute of exemptions then in force. *Moore v. Boozer*, 42 Ark. 385.

The statutory action for use and occupation is of the nature of assumpsit on an implied promise, and not an action *ex delicto*; and is subject to the exemption of the constitution as a debt by contract. *St. L. I. M. & S. Ry. Co. v. Hart*, 38 Ark. 112.

Sect. 1255 of the Mississippi Code of 1880 which, before the amendment thereof, provided that "No property shall be exempt from execution, when the process is for rent," was applicable as well where the

3. *What may be claimed.*—The statutory provisions in the different States, as to what property may be claimed as exempt, are not altogether similar, but they may be placed in three general classes: (1) those allowing the debtor a certain amount of property, (2) those exempting certain specified articles or kinds of personal property, and (3) those exempting homesteads. Under the first class, controversies seldom arise as to what may be claimed, the most common, perhaps, being in cases of alleged fraudulent conveyances; but it seems reasonably well settled that where the total value of a debtor's property, including that alleged to be fraudulently transferred, does not exceed the amount exempt from execution, his creditors cannot seize the property so transferred, even in the hands of the transferee.¹ In other words, "property exempt from execution is not susceptible of fraudulent alienation."²

Under the statutes of the second class, exempting specific articles or particular kinds of property, controversies are numerous. Thus, in many of the States, "tools," or "tools of the debtor's trade" are exempt from execution, and the courts have often been called upon to determine what those terms include.³ Where a

process was a *fiery facias* from a personal judgment for rent, as where it was an attachment for rent, the object and effect of the statute being to abolish all exemption against demands for rent, without regard to the form of the action pursued. *Ransom v. Duff*, 60 Miss. 901.

The homestead of a defendant is not subject to seizure and sale by virtue of an execution on a judgment recovered by the United States in a civil action, if, had a private party been the plaintiff, it would be exempt, by the law of the State where it is situate. *Fink v. O'Neil*, 106 U. S. 272. And see *Gilman v. Williams*, 7 Wisc. 329; s. c., 76 Am. Dec. 219. So the State stands on the footing of other creditors. *State v. Pitts*, 51 Mo. 183.

1. *Lannoner v. King*, 49 Ark. 299; *Bridgers v. Howell* (S. Car.), 3 S. E. Rep. 790; *Burdge v. Bolin*, 106 Ind. 175; s. c., 55 Am. Rep. 724; *Buckley v. Wheeler*, 52 Mich. 1; *Bump. Fraud. Convey.* (3d ed.) 245. Compare *Maudlove v. Burton*, 1 Ind. 39; *Holman v. Martin*, 12 Ind. 553.

And where the debtor fraudulently conceals other property equal in value to the property claimed as exempt, that alone will not deprive him of an otherwise valid claim of exemption. *Elder v. Williams*, 16 Nev. 416.

2. *Derby v. Weyrich*, 8 Neb. 174; s. c., 30 Am. Rep. 827; *Union Pac. R. Co. v. Smersh*, 22 Neb. 751; *Taylor v. Duestenburg*, 109 Ind. 165; *Bernard v. Brown*, 112 Ind. 53.

But there are peculiar or exceptional

cases in which the debtor may lose the right of exemption by the fraudulent denial of his ownership, or the like, even where he might otherwise have claimed it. *Gilleland v. Rhoads*, 34 Pa. St. 187; *Rogers v. McCauley*, 22 Minn. 384; *Chambers v. Salie*, 29 Ark. 407.

3. As to what is meant by "trade," see *Atwood v. De Forest*, 19 Conn. 513; *Enscoe v. Davis*, 44 Conn. 93; *Boston Belting Co. v. Ivens*, 28 La. Ann. 695.

The business of a contractor is not a trade. *In re Whetmore, Deady* (U. S.), 585.

The Wisconsin statute, which exempts from execution "the tools and implements, or stock in trade, of any mechanic, miner, or other person, used or kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value" (subd. 8, sect. 2982, R. S.), applies to the stock of goods on sale by a merchant. *Wicker v. Comstock*, 52 Wis. 315.

In Kansas, a merchant-tailor who is the head of a family and a resident of the State, is entitled to an exemption of such portion of his stock in trade as he may select, up to the statutory limit of value; and this right is absolute, and does not depend upon any claim or selection to be made by him. *Rice v. Nolan*, 33 Kans. 28.

A photographer is not a mechanic within the meaning of the Tennessee statute exempting from execution one set of mechanic's tools in the hands of each mechanic. *Story v. Walker*, 11 Lea (Tenn.), 515; s. c., 47 Am. Rep. 305.

man has more than one occupation or vocation, he is not thereby precluded from claiming such articles or "tools of trade," as he would be entitled to claim if he were engaged in but one trade.¹ And the benefit of the exemption law is not lost by a temporary suspension of the trade, with the intention of resuming it.² The business must, however, be a lawful one to warrant the exemption.³

As to what articles come within the meaning of the terms "tools," "implements," or "instruments," as used in the exemption laws, there is much diversity of opinion, and there seems to be no inflexible criterion for all cases. As a rule, however, expensive and cumbrous machinery and materials are not included.⁴ Printing-presses and type have been thought by some

Where a person edits a newspaper, runs a job-printing office, and is engaged as an agent in the business of loaning money, he cannot claim as exempt from seizure and sale upon an execution a job-printing press owned by him, unless he derives his principal support from the business in the exercise of which such press is used. *Jenkins v. McNall*, 27 Kan. 532; s. c., 41 Am. Rep. 422.

A dentist is regarded as a mechanic in Michigan, — *Maxon v. Perrott*, 17 Mich. 332, — but not in Mississippi. *Whitcomb v. Reid*, 31 Miss. 567.

A resident of Kansas, not married and not the head of a family, carried on as his sole business that of "an insurance agent and abstractor of titles," and, in doing so, used the following articles of property: "One iron safe and one set of abstracts and one cabinet and table." *Held*, that under subdivision 3 of § 4 of the exemption laws (Comp. Laws of 1879, p. 438), the above-mentioned articles are "instruments" within the meaning of said subdivision 3, and are exempt from execution against an insurance agent and abstractor. *Davidson v. Lechrist*, 28 Kan. 324.

A pool-table belonging to a saloon is not, as matter of law, exempt from execution as apparatus necessary to enable the saloon-keeper to carry on his business. *Goozen v. Phillips*, 49 Mich. 7.

The Massachusetts statute is construed as being only for the benefit of mechanics, artisans, and handicraftsmen, or others, who earn their livelihood by manual labor and skill. *Wallace v. Bartlett*, 108 Mass. 52. And it does not apply to those engaged in buying and selling merchandise, as grocers, shopkeepers, and the like; *Smith v. Gibbs*, 6 Gray (72 Mass.), 298. *Wilson v. Elliot*, 7 Gray (Mass.), 69.

1. *Seeley v. Gwillim*, 40 Conn. 106; *Bequillard v. Bartlett*, 19 Kan. 382; *Patten v. Smith*, 4 Conn. 450; s. c., 10 Am. Dec. 166, 168; *Eager v. Taylor*, 9 Allen (Mass.),

156. In *Baker v. Willis*, 123 Mass. 194; s. c., 25 Am. Rep. 61, a tinner was allowed to claim his cornet as exempt, on the ground that its use furnished him a further means of support. But it has been held in Wisconsin that cumulative exemptions cannot be claimed by multiplying employments. *Bevitt v. Crandall*, 19 Wis. 531.

In Michigan the exemption is in favor of the trade or business in which the debtor is wholly or principally engaged; and this has been held to mean that taking the most time and attention, without regard to its profitability. *Morrill v. Seymour*, 3 Mich. 64; *Kenyon v. Baker*, 16 Mich. 373. But see *Stewart v. Welton*, 32 Mich. 59.

A person cannot, by multiplying his employments, claim cumulatively several exemptions, created by the statute for several distinct pursuits. The fact, however, that a debtor carries on two or more pursuits at the same time does not deprive him of all exemption. If he has two or more separate pursuits, the exempted articles must belong to his main or principal pursuit or business. *Jenkins v. McNall*, 27 Kan. 532; s. c., 41 Am. Rep. 422.

A debtor cannot have, however, more than one such exemption at the same time; and when such exemption has once been claimed, the property selected by the debtor and allotted to him, so long as he retains it, and it is undiminished in value, he is not entitled to a further exemption. *Weis v. Levy*, 69 Ala. 209.

2. *Caswell v. Keith*, 12 Gray (Mass.), 351; *Harris v. Haynes*, 30 Mich. 140; *Wilkinson v. Alley*, 45 N. H. 551.

But the right to exemption may be lost by permanent abandonment of the trade. *Atwood v. De Forest*, 19 Conn. 513; *Davis v. Wood*, 7 Mo. 162.

3. *Walsch v. Call*, 32 Wis. 159.

4. *Kilburn v. Demming*, 2 Vt. 404; s. c., 21 Am. Dec. 543, and note, 552; *Batchelder v. Shapleigh*, 10 Me. 135; *Buckingham v. Billings*, 13 Mass. 82; *Ford v. Johnson*,

of the courts to be included,¹ while others have taken the contrary view.² A liberal construction, however, is generally given to these terms, and a great many articles of different kinds have been held to be within their true intent and meaning.³

In some of the statutes, "household furniture" is exempted from execution; and by this is meant articles for use of the family as instruments of the household, rather than such as are merely ornamental.⁴ Food, clothing, and necessary provisions for family use, may be claimed under the statutes of several of the States.⁵ Various other classes of articles are exempt in some of the States,

34 Barb. (N. Y.) 364; *Richie v. McCauley*, 4 Pa. St. 471; *Meyer v. Meyer*, 23 Iowa, 359; s. c., 92 Am. Dec. 431; *Henry v. Sheldon*, 35 Vt. 427; s. c., 82 Am. Dec. 644.

1. *Green v. Raymond*, 58 Tex. 80; s. c., 44 Am. Rep. 601; *Salle v. Waters*, 17 La. Ann. 482; *Patten v. Smith*, 4 Conn. 450; s. c., 10 Am. Dec. 166.

2. *Buckingham v. Billings*, 13 Mass. 32; *Danforth v. Woodward*, 10 Pick. (Mass.) 423; s. c., 20 Am. Dec. 531.

3. Thus, ploughs, shovels, harrows, and even mowers, owned and used by farmers, have been held exempt under such statutes. *Wilkinson v. Alley*, 45 N. H. 551; *Pierce v. Gray*, 7 Gray (Mass.), 68; *Humphrey v. Taylor*, 45 Wis. 251; s. c., 30 Am. Rep. 738. But in *Garrett v. Patchin*, 29 Vt. 248, a mower was held not to be a "tool necessary for upholding life."

A surgeon's instruments are tools of his trade. *Robinson's Case*, 3 Abb. Pr. (N. Y.) 466.

A barber's chair is exempt as a tool. *Allen v. Thompson*, 45 Vt. 172.

A farmer's whip is not *prima facie* exempt. *Savage v. Davis*, 134 Mass. 401.

A music-teacher's piano is within the meaning of a law exempting "furniture and tools or implements necessary to carry on his or her trade or business." *Amend v. Murphy*, 69 Ill. 337. So of the violin and bow of a fiddler. *Goddard v. Chaffee*, 2 Allen (Mass.), 395.

So a clock, stove, screen, pitcher, and table-cover, used in the business of a milliner, are included in "tools, implements, and fixtures." *Wood v. Keyes*, 14 Allen (Mass.), 236. So with a sewing-machine. *Rayner v. Whicher*, 6 Allen (Mass.), 292.

Whether a physician's wagon and harness are "tools of his occupation," exempt from execution, is a mixed question of law and fact; the most that can be said as matter of law being that they may be tools of his profession, if, in the particular case, it is reasonably necessary for him to use them as tools. *Richards v. Hubbard*, 59 N. H. 158; s. c., 47 Am. Rep. 188. To same

effect, *Rice v. Wadsworth*, 59 N. H. 100; *Dains v. Prosser*, 32 Barb. 290; *Somers v. Emerson*, 58 N. H. 48.

4. *Towns v. Pratt*, 33 N. H. 345; *Tanner v. Billings*, 18 Wis. 163; *Dunlap v. Edgerton*, 30 Vt. 224.

"Necessary" household furniture does not mean such as is absolutely indispensable, but such as is requisite to decent living and comfort. *Montague v. Richardson*, 24 Conn. 338; *Haswell v. Parsons*, 15 Cal. 266.

The exemption of household and kitchen furniture does not include any other than furniture for the family, and will not include beyond this furniture used in hotels and restaurants. *Heidenheimer v. Blumenkron*, 56 Tex. 308.

5. Corn kept for family use is exempt in Arkansas. *Atkinson v. Gatcher*, 23 Ark. 101. Potatoes in the ground. *Carpenter v. Harrington*, 25 Wend. (N. Y.) 370; s. c., 37 Am. Dec. 239.

Cloth left with a tailor by the debtor to be made into clothes for the debtor is exempt under a statute exempting "necessary wearing-apparel of the debtor." *Richardson v. Buswell*, 10 Met. (Mass.) 506; s. c., 43 Am. Dec. 450.

Food prepared by a restaurant-keeper for his boarders is not exempt from execution under the Iowa Code, §§ 3072, 3073. *Coffey v. Wilson*, 65 Iowa, 270.

Groceries kept in store by a merchant as part of his stock in trade are not "provisions found on hand for family use" within the meaning of sect. 9 of the Execution Law (Wag. Stat. p. 603), which exempts such provisions from sale under execution against the head of a family. *State ex rel. v. Conner*, 73 Mo. 572.

Wheat is held not exempt under a statute exempting flour. *Salsbury v. Parsons*, 36 Hun (N. Y.), 12.

Seed-wheat being necessary to the business of wheat-farming is material which, within the limits defined by Comp. L. § 6101, is exempted from execution against the farmer. *Stilson v. Gibbs*, 46 Mich. 215.

such as wagons,¹ teams,² and cattle, and stock of different kinds.³

Homestead. — A homestead is the place where the house is, and "it represents a portion of land with the dwelling-house, where the family resides, with the usual and customary appurtenances, including out-houses of every kind necessary or convenient for family use."⁴ It is a place of residence as contra-distinguished

1. A hearse is a "wagon," and exempt from execution under sect. 2982, Rev. St. Wis., as amended by ch. 117, Laws of 1882. *Spikes v. Burgess*, 65 Wis. 428. So are carriages and buggies in Texas. *Nichols v. Claiborne*, 39 Tex. 363. And a four-wheeled wagon has been held a "cart" in Alabama. *Favers v. Glass*, 22 Ala. 621. So a dray may be a "wagon." *Cone v. Lewis*, 64 Tex. 331; s. c., 53 Am. Rep. 767. But a hackney-coach is not. *Quigley v. Gorham*, 5 Cal. 418; s. c., 63 Am. Dec. 139.

2. A single horse may be exempt under a statute exempting a "team." *Wilcox v. Hawley*, 31 N. Y. 648; *Lockwood v. Younglove*, 27 Barb. (N. Y.) 505.

And the word "horse" includes "mule." *Allison v. Brookshire*, 38 Tex. 202.

The vehicle is sometimes included as part of the team. *Corp. v. Griswold*, 27 Ia. 379; *Dains v. Prosser*, 32 Barb. (N. Y.) 290.

The court instructed the jury that, "to be a teamster, within the meaning of the law and of the statute concerning exemptions, a man need not necessarily drive his team. In the sense of the statute one is a teamster who is engaged with his own team or teams in the business of teaming; that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one." *Held*, correct. *Elder v. Williams*, 16 Nev. 416.

3. A pair of two-year-old steers have been held exempt as "a yoke of oxen," although not broken. *Berg v. Baldwin*, 31 Minn. 541. So a single ox may be included in a "yoke of oxen." *Bowzey v. Newbegin*, 48 Me. 410; *Mallory v. Berry*, 16 Kan. 293.

The exemption of forage is an independent right not conditioned upon the debtor's having the exempt animals to consume such forage. Hence, when the plaintiff owned only an exempt cow and horse, and the defendant, a sheriff, barely left him hay enough to keep them through the winter, and sold a quantity of hay needed to keep all the stock exempted by statute, such sheriff is liable in trespass. *Kimball v. Woodruff*, 55 Vt. 229.

4. *Smyth's Homest. & Exemp.* § 68. See also *Philleo v. Smalley*, 23 Tex. 394.

"The land and dwelling appropriated as a permanent residence of a family." 1 Abb. L. Dict. 567, tit. "Homestead." There can be no homestead without a dwelling-house of some sort. *Coolidge v. Wells*, 20 Mich. 79; *Franklin v. Coffee*, 18 Tex. 413.

In some States it must consist of but one body or tract of land. *Hornby v. Sikes*, 56 Wis. 382. And see *Walters v. People*, 18 Ill. 194; *True v. Morrill*, 28 Vt. 672; *Kresin v. Mace*, 15 Minn. 116.

In others it seems that it need not lie in one body, the true tests being use and value. *Gregg v. Bostwick*, 33 Cal. 220; *Perkins v. Quigley*, 62 Mo. 498; *Martin v. Hughes*, 67 N. Car. 293; *Pryor v. Stone*, 19 Tex. 371; s. c., 70 Am. Dec. 341.

Where a judgment debtor owned several town lots, some of which—including that whereon was his dwelling, and he resided—were incumbered by prior liens (mortgages) to the extent of their full value, and the others were unincumbered, *held* that he had the right to have his homestead allotted from the unincumbered lands without reference to whether they embraced his dwelling and other buildings. *Flora v. Robbins*, 93 N. C. 38.

One who transfers, in fraud of his creditors, land not occupied or designated for homestead purposes, though the transfer be made before judgment on a debt existing at the date of the transfer, cannot defeat the lien of the judgment by afterwards procuring a reconveyance of the land and occupying it as a homestead. *Gaines v. Nat. Exchange Bank*, 64 Tex. 18.

An execution sale of a large tract of land, including the execution-defendant's homestead, which the sheriff failed to have set off prior to the sale, will not be set aside, when it is not shown that the defendant was the owner of the entire premises. *Farr v. Reilly*, 58 Ia. 399.

Where the wife is the owner of a stock of goods and merchandise valued at thirty-eight hundred dollars, and the husband is permitted by the wife to carry on the business of selling the goods as a retail dealer in his own name, and to buy other goods for the store to the amount of about five hundred dollars on credit, and thereafter, for a period of three months, continues to sell at retail, and then the goods on hand are exchanged for real estate which is at

from a place of business.¹ Yet if it constitutes the home-place and residence of the family, the mere fact that business is also carried on at the same place will not necessarily deprive it of the character of a homestead to the extent allowed by the statute.² If the homestead of a debtor is of less value than that which may be claimed under the statute, he cannot supply the deficiency by including in his claim other real estate rented to tenants.³ The homestead right is not a new estate in land, but is merely a right of exemption as to such estate as the debtor already has.⁴ It makes little difference therefor, unless otherwise provided by

once actually occupied by the husband and wife and their family as a homestead, and the conveyance of which is taken in the name of the wife, *held*, that as it does not appear that the goods bought by the husband on credit, or any of the proceeds thereof, are a part of the purchase-money or consideration for the homestead, the homestead is not subject to the claim of the creditors from whom the husband purchased the said five hundred dollars' worth of merchandise. *Tootle v. Stine*, 31 Kans. 66.

An unenclosed lot in a city, separated by a public square from the lot on which the home residence was erected, was used occasionally by the owner as a place on which he staked out his horse and calf, exercising in this no greater exclusive use than he could make of the unenclosed property of others. In November, 1877, this unenclosed lot was levied on under execution against the owner, and sold. *Held*, that the use made of the property for homestead purposes was not sufficient to extend the protection of the homestead exemption from sale over it. *Effinger v. Cates*, 61 Tex. 590.

Where the title to the family residence is in the wife, it is nevertheless the homestead of the family, and is exempt from judgment or forced sale upon execution or other process, and in such case the head of the family is not entitled to the further exemption of five hundred dollars in personal property under the provisions of sect. 521 of the Civil Code. *Stout v. Rapp*, 17 Neb. 462.

Crops on Homestead Lands. — Crops growing on a rural homestead are exempt from forced sale. The exemption from sale of the homestead itself was to enable the owner to support himself and family, and this object would be defeated if the creditor were permitted to seize and sell the growing crops. *Cobbs v. Coleman*, 14 Tex. 598, cited and approved; *Alexander v. Holt*, 59 Tex. 205.

Where the head of a family had an exemption set apart to him under § 2040 of the Code, and subsequently rented land,

and used the property so exempted in making a crop, the crop thus made, after paying the rent, would not be subject to the prior debts of the head of the family, although there may have been an increase in the amount of such crop over the amount of the exemption used in making it, and although the debtor may have worked and managed for his family in making such increase. *Kupferman v. Buckholtz*, 73 Ga. 778.

Grain which was harvested from lands constituting a homestead (lands which before the declaration of homestead were community property) is not, as such, exempt from execution. *Horgan v. Amick*, 62 Cal. 401.

1. *Tumlinson v. Swinney*, 22 Ark. 400; *Gregg v. Bostwick*, 33 Cal. 227; *Cassilman v. Packard*, 16 Wis. 115; *Wilson v. Cochran*, 31 Tex. 677; *Johnson v. Moser*, 66 Iowa, 536.

2. *Ackley v. Chamberlain*, 16 Cal. 184; *Lazell v. Lazell*, 8 Allen, 575; *Gregg v. Bostwick*, 33 Cal. 228; *Orr v. Shraft*, 22 Mich. 260; *Kelly v. Baker*, 10 Minn. 154; *Goldman v. Clark*, 1 Nev. 607; *Estate of Delaney*, 37 Cal. 176; *Harriman v. Queen Ins. Co.*, 49 Wis. 84.

As to the rights of people occupying different rooms or floors in the same building, see 1 Am. L. Reg. (U. S.) 577. In *Mayfield v. Maasden*, 59 Iowa, 517, the debtor occupied all but the first story of a building as a family residence, the first story being used as a business room, and it was *held* that the first floor was subject to execution, and the balance exempt.

3. *Hoitt v. Webb*, 36 N. H. 158; *Dyson v. Shealy*, 11 Mich. 527; *Kaster v. McWilliams*, 41 Ala. 302; *Greeley v. Scott*, 2 Woods (U. S.), 657; s. c., 2 Cent. L. J. 361; *Tiernan v. Creditors*, 62 Cal. 280.

4. *Braeme v. Craig*, 12 Bush (Ky.), 404; *Gee v. Moore*, 14 Cal. 472; *Brennan v. Wallace*, 25 Cal. 114; *Herman on Executions*, 121, § 105; *Pennington v. Seal*, 49 Miss. 518.

It must exist at the time a specific lien would otherwise attach; and if it does not, subsequent occupancy will give no right to

statute, what may be the nature of the debtor's interest or estate, for the right of homestead attaches to it just so far as it already exists, without either increasing or diminishing it.¹

The right may be lost by abandonment; but mere temporary absence, with the intention of returning, will not constitute an abandonment.² In some of the States alienation of the home-

exemption as against such lien. *Kelly v. Dill*, 23 Minn. 435; *Bullem v. Hiatt*, 12 Kan. 98; *Hines v. Duncan*, 79 Ala. 112; s. c., 58 Am. Rep. 580.

Land or a town lot cannot be exempt from execution as a homestead, unless it is occupied as a residence at the time of the levy of the execution; and a *supersedeas* issued upon a claim of homestead, where there is no such residence, should be quashed. *Patrick v. Baxter*, 42 Ark. 175. But in Mississippi it is held sufficient if the homestead is acquired after levy, and occupied at the time of the sale. *Jones v. Hart*, 62 Miss. 13; *Irvin v. Lewis*, 50 Miss. 363.

Defendant, with the purpose of making it his homestead, acquired title to a tract of land by deed recorded before plaintiff's debt was contracted. After the debt was contracted, defendant sold a homestead which was exempt from execution, and with the proceeds erected a dwelling-house on the land, and used it as a homestead. *Held*, that as against the plaintiff's debt the new homestead was not exempt from execution. *Wag. Stat.* pp. 698, 699, §§ 7, 8; *Stanley v. Baker*, 75 Mo. 60.

If, at the time of levy, a condition of things exist entitling defendant to homestead, he may properly claim it. Thus, where judgment was obtained against the head of a family, and he afterwards ceased to be such, but again, and before levy made, married a wife, he is entitled to his homestead exemption as against such judgment. *Chafee v. Rainey*, 21 S. C. 11. This case distinguished from *Pender v. Lancaster*, 14 S. C. 25, and *Jones v. Miller*, 17 S. C. 380, and *Pender v. Lancaster* explained and limited.

Where personal property levied on under an execution was claimed as exempt by the defendant in execution, and the claim was contested, and at the time of the levy and of making the claim the defendant was a resident of this State, his subsequent removal from the State, and residence in another State at the time of the trial of the contest, cannot deprive him of his right to an exemption of the property levied on from the payment of the execution. *McCrary v. Chase*, 71 Ala. 540.

In an action of replevin by M. against R., a constable, for goods levied upon under an execution, which were claimed as exempt from levy and sale, where it

appeared that the wife of M. owned a house and lot which had been occupied as a family homestead, but from which M. and his family had removed before the levy, *held* that M., after he had removed his family from the house and lot of his wife, and no longer occupied it as a homestead, was entitled to the exemption provided for in section 3 of the Act of April 9, 1869 (66 Ohio L. 50). *Ryan v. Miller*, 40 Ohio St. 232.

In October, 1877, the judgment of W. against K. became a lien upon K.'s real estate. In June, 1878, but before the property was about to be levied upon or seized under an order of sale, it was occupied by K. and his family as a homestead. *Held*, that under an order for the sale of the premises, issued in January, 1879, and as against such judgment lien, K. is entitled to an assignment of a homestead in such property. *Wildermuth v. Koenig*, 41 Ohio St. 180.

1. *Thomp. Homesteads & Exemp.* §§ 165, 166; and authorities cited in note to *Pryor v. Stone*, 70 Am. Dec. 344; *Potts v. Davenport*, 79 Ill. 455; *In re Swearingin*, 17 Nat. Bank Reg. 138; *McGrath v. Sinclair*, 55 Miss. 89, 93.

Thus, a debtor may have a homestead in leasehold property. *Watts v. Gordon*, 65 Ala. 546; *Hogan v. Manners*, 23 Kan. 551; s. c., 33 Am. Rep. 199.

So where he has merely an equitable estate. *Blue v. Blue*, 38 Ill. 9; *Hewitt v. Rankin*, 41 Iowa, 35; *Cheatham v. Jones*, 68 N. Car. 153; *Morgan v. Stearns*, 41 Vt. 398; *Allen v. Caldwell*, 55 Mich. 8; *State v. Diveling*, 66 Mo. 375.

And according to the weight of authority and the better reason, it attaches even to an undivided interest in land. See authorities cited *pro* and *con* in note to *Wolf v. Fleischacker*, 63 Am. Dec. 121, 122; *Freeman, Coten. & Part.* § 54; *Thomp. Homest. & Exemp.* §§ 180-189. But probably not to partnership realty. *Rhodes v. Williams*, 12 Nev. 20; *Short v. McGruder*, 22 Fed. Rep. 46; *Drake v. Moore*, 66 Iowa, 58; *Kingsley v. Kingsley*, 39 Cal. 665.

2. *Tumlinson v. Swinney*, 22 Ark. 400; s. c., 76 Am. Dec. 432; *Walters v. People*, 18 Ill. 194; s. c., 65 Am. Dec. 730; *Taylor v. Hargous*, 60 Am. Dec. 607, and note. The intention of the owner is the main test. *Fyffe v. Beers*, 18 Iowa, 4; *Howard v. Logan*, 81 Ill. 383; *West River Bank v.*

stead is expressly prohibited, or otherwise limited, by statute; and there can be no alienation in such cases, except in the statutory mode.¹

Insurance money due, where the homestead has been destroyed by fire, is protected the same as the house would have been, and is not subject to levy or garnishment in the hands of the insurance company.²

Pension Money.—Under sect. 4747, Rev. St. U. S. 1878, pension money, due a pensioner from the United States, is exempt from execution until it reaches the hands of the pensioner.³

4. *How claimed.*—*Waiver.*—The debtor must claim his exemption, or he will generally be regarded as having waived it.⁴ Whether he can contract to waive it in advance, is a disputed question.⁵ The right is not lost, as a rule at least, if claimed at

Gale, 42 Vt. 27; Locke v. Rowell, 47 N. H. 46.

Continuous actual occupation is not necessary to preserve the homestead. A removal from it for a temporary purpose, or with the intention of re-occupying it, is not such an abandonment as will forfeit the homestead right. Euper v. Alkire, 37 Ark. 283.

1. See Thomp. Homest. & Exemp. §§ 466, 474; Moughon v. Masterson, 59 Ga. 835; Wing v. Cropper, 35 Ill. 256; Spoon v. Van Fossen, 53 Iowa, 494; Poole v. Gerrard, 65 Am. Dec. 482 and note; Barton v. Drake, 21 Minn. 299; Wheatley v. Griffin, 60 Tex. 209; Ring v. Burt, 17 Mich. 465; Long v. Mostyn, 65 Ala. 543. The most common restriction is, that the husband and wife shall join in the deed, and where this is the case such joinder is absolutely essential to divest the homestead right. Greenwood v. Maddox, 27 Ark. 648; Dunn v. Tozer, 10 Cal. 167; Patterson v. Kreig, 29 Ill. 514; Barnett v. Mendenhall, 47 Iowa, 296; Tong v. Eifort, 80 Ky. 152; Clark v. Shannon, 1 Nev. 568.

In the absence of any statute restricting alienation of homesteads, the right of the owner to alienate his property exists to the same extent as if he were not entitled to claim it as a homestead. Smith v. Malone, 10 S. C. 39; Rector v. Rotton, 3 Neb. 171; In re Cross, 2 Dill. (U. S.) 320.

The owner of a homestead, which is not liable to execution for a debt against him, can convey it to a purchaser, who will take it exempt from the same liability. Holland v. Kreider, 86 Mo. 59. The right of homestead itself, as distinguished from the property, is personal, and cannot be alienated. Hewitt v. Templeton, 48 Ill. 367; Bowman v. Norton, 16 Cal. 213; Chamberlain v. Lyell, 3 Mich. 458; Barker v. Rollins, 30 Iowa, 412.

2. Houghton v. Lee, 50 Cal. 101; Cameron v. Fay, 55 Tex. 58.

3. Cranz v. White, 27 Kan. 319; s. c., 41 Am. Rep. 408; Payne v. Gibson, 5 Lea (Tenn.), 173; Farmer v. Turner, 64 Iowa, 690; Folschow v. Werner, 51 Wis. 85; Eckert v. McKee, 9 Bush (Ky.), 355.

But such exemption does not extend to real estate purchased therewith. Cavanaugh v. Smith, 84 Ind. 380; Faurote v. Carr, 108 Ind. 123; Webb v. Holt, 57 Iowa, 712; Spelman v. Aldrich, 126 Mass. 113; Jardain v. Fairton, etc., Asso., 44 N. J. Law, 376. Compare Farmer v. Turner, 64 Iowa, 690; Folschow v. Werner, 51 Wis. 85.

4. State v. Melogue, 9 Ind. 196; Green v. Blunt, 59 Iowa, 79; Wicker v. Comstock, 52 Wis. 315; Pond v. Kimball, 101 Mass. 105; Spittle v. Frost, 15 Fed. Rep. 299; People v. Palmer, 46 Ill. 398; s. c., 95 Am. Dec. 418; Angell v. Johnson, 51 Iowa, 625; s. c., 33 Am. Rep. 152. Compare Vanderhorst v. Bacon, 38 Mich. 669; s. c., 31 Am. Rep. 328.

5. The better reason and the weight of authority would seem to support the doctrine that he cannot. Carter's Admr. v. Carter, 20 Fla. 558; s. c., 51 Am. Rep. 618; Kneetle v. Newcomb, 22 N. Y. 250; s. c., 78 Am. Dec. 186; Recht v. Kelly, 82 Ill. 147; s. c., 25 Am. Rep. 310; Branch v. Tomlinson, 77 N. Car. 388; Levicks v. Walker, 15 La. Ann. 245; Motley v. Ragan, 10 Bush (Ky.), 156; s. c., 19 Am. Rep. 61; Maloney v. Newton, 85 Ind. 565. Contra, Bowman v. Smiley, 31 Pa. St. 225; s. c., 72 Am. Dec. 738 and note, 741; Case v. Dunmore, 23 Pa. St. 94; Brown v. Leitch, 60 Ala. 313; Hosington v. Huff (under special statute), 24 Kan. 793.

Giving a delivery bond for the property is not a waiver of the right to afterwards claim it before sale. Eltzroth v. Webster, 15 Ind. 21; s. c., 77 Am. Dec. 78; Desmond v. State, 15 Neb. 438.

any time before sale.¹ The debtor must bring himself and his property within the statute by an affirmative showing.² The claim is usually made by schedule, or by otherwise making selection, and notifying the officer of the property claimed;³ and where the statute requires that such steps shall be taken, they form

1. *Jordan v. Aurey*, 10 Ala. 276; *Pate v. Swan*, 7 Blackf. (Ind.) 500; *State ex rel. Fulkerson v. Emmerson*, 74 Mo. 607; *Shepherd v. Murrill*, 90 N. Car. 208; *Slaughter v. Detiney*, 15 Ind. 49; *McClusky v. McNeeley*, 8 Ill. 578. *Compare Weaver's Appeal*, 18 Pa. St. 307; *Yost v. Heffner*, 69 Pa. St. 68. Before order of sale is granted. *Toenes v. Moog*, 78 Ala. 558. And see *Morris v. Shafer*, 93 Pa. St. 489; *Wright v. Grabfelder*, 74 Ala. 460.

2. *Boesker v. Pickett*, 81 Ind. 554; *Guise v. State*, 41 Ark. 249; *Briggs v. McCullough*, 36 Cal. 542; *Swan v. Stephens*, 97 Mass. 7; *Griffin v. Sutherland*, 14 Barb. (N. Y.) 456; *Smyth's Homest. & Exemp.* (1875) § 536.

Proof of facts sufficient to show a right of homestead on the trial of an action of ejectment by the purchaser of the premises under execution, at a date subsequent to that of the judgment, is not a defence to the action. To avail against the sheriff's deed, the homestead right must have existed at the time the judgment became a lien. *Chappell v. Spire et al.*, 106 Ill. 472.

3. *Healy v. Conner*, 40 Ark. 352; *State v. Boulden*, 57 Md. 314; *State ex rel. Stallings v. Read*, 94 Ind. 103; *Bingam v. Marcy*, 15 Ill. 290.

In Arkansas, it is the duty of a judgment debtor who claims exemption of his property from sale, to give to the creditor five days' notice of filing the schedule of exemption; but this notice may be waived by the creditor, and is waived by appearing before a justice, or before the circuit court on appeal, and contesting the right to the exemption. *Garrett v. Wade*, 46 Ark. 493; *Brown v. Doneghey*, 46 Ark. 497.

The presentation of one schedule does not necessarily exclude the debtor from presenting another, correcting it, by describing other property. *Boesker v. Pickett*, 81 Ind. 554.

Plaintiff had a two-seated buggy and two wagons, all of which he used in and about the business of carrying on a stone-quarry. Defendant, as constable, came to levy an execution upon the buggy, but plaintiff claimed it as exempt, but made no objection to defendant's levying upon the wagons. *Held*, that plaintiff had a right to choose which of the vehicles he would hold as exempt, and that defendant was liable for not respecting such choice. *Parker v. Haley*, 60 Ia. 325.

The court instructed the jury that, "If a

teamster owns more than one team; that is, if he owns more than two horses or mules, and their necessary harness and equipments, and more than one wagon,—it is his right and privilege under the law to select and designate two animals and their harness, etc., and one wagon, *suitable for use* therewith, or with two animals, as his exempt property; and when so selected and pointed out, the law will recognize and protect them as his exempt property, provided they were actually in use by such teamster in his business of teaming, by which he earned his living at the time of the levy by an officer; and such selection may be made without regard to the value or quality of the property selected." *Held*, correct. *Elder v. Williams*, 16 Nev. 416.

If a debtor, owning two cows, is entitled, after the seizure and removal of one of them on an execution against him, to elect which cow shall be exempt from execution, under the Gen. Sts. c. 133, § 32, cl. 4, he must make such election within a reasonable time; and if he fails so to elect, the officer may make an election for him, and he is bound by such election. If one of two cows belonging to a debtor is seized upon an execution against him on the morning of one day, and is not removed from his premises until the evening of the next day, a jury would be warranted in finding that he had waived his right to elect which cow should be exempt from execution, under the Gen. Sts. c. 133, § 32, cl. 4, by not making such election until six days after the removal. *Savage v. Davis*, 134 Mass. 401.

When the personal property which a resident debtor had selected as exempt has been taken from him by judicial process, or has been otherwise lost to him, or has deteriorated in value, without fault on his part, or has been consumed in the maintenance of himself or family, or has been applied by him to the payment of his debts, such debtor has the right, in lieu thereof, to select and retain other property as exempt to him, notwithstanding the former claim of exemption. *Weis v. Levy*, 69 Ala. 209.

Under article ix., section iii., paragraph 1, of the constitution of 1877, each head of a family is entitled to an exemption of household and kitchen furniture and provisions not exceeding three hundred dollars in value, which is not affected by a waiver of homestead; but, in order to carry this

conditions precedent to the validity of the exemption.¹ Sometimes, however, as under several of the statutes exempting homesteads, no such steps are required; and mere occupation of property, as a homestead by the family, is sufficient notice of its character.²

VII. Lien and Priority.—At common law an execution was a lien on personal property from the time of its *teste*.³ But this was altered in the time of Charles II., by statute, the principles of which have been adopted in many of the States of this country, making the writ a lien only from the time of its delivery to the officer.⁴ In other States it binds such property only from the date of the levy or seizure.⁵ The judgment itself in many of the States constitutes a lien on real estate from the time of its rendi-

right into execution, the property must not only be selected by himself and wife, but also set apart by the ordinary. A mere personal claim to certain property as so selected, with no official action thereon, is not sufficient. *Sasser v. Roberts*, 68 Ga. 252.

Where an execution-defendant claims real estate as exempt from execution in the manner required by statute, the sheriff cannot make a valid sale thereof by disregarding the claim of exemption, and neglecting to have an appraisal of the property claimed as exempt; nor will the fact that perjury was committed in swearing to a false schedule give validity to such sale. *Over v. Shannon*, 91 Ind. 99.

An alternative writ of *mandamus* requiring a sheriff to cause an appraisal to be made of goods levied on, so that the debtor may select such as may be claimed to be exempt from levy and sale, should show that the debtor is a person entitled to claim the exemption. *State v. Bowden*, 18 Fla. 17.

1. *Lawton v. Bruce*, 39 Me. 486; *Manning v. Dove*, 10 Rich. L. (S. Car.) 403; *Smyth's Homest. & Exempt.* § 56; *Mann v. Welton*, 21 Neb. 541.

The homesteader should make his selection at the time of the appraisal and assignment, and give notice of any exception to the action of the appraisers then or within a reasonable time thereafter and before sale. *Flora v. Robbins*, 93 N. Car. 38.

A man who has not occupied premises, and who fails to interpose his claim to have them exempt until after the sheriff has sold, is not allowed the benefit of the exemption statutes. *Waugh v. Montgomery*, 67 Ala. 573.

A debtor cannot maintain an action in the circuit court to have a homestead assigned to him. He must follow the statutory proceedings, which are exclusive. *Myers v. Ham*, 20 S. Car. 522.

The homestead right of an execution-defendant is not forfeited by his omission to select his homestead, if, being within reach, he is not actually notified of the levy or of the proceedings thereunder, and therefore does not know that any occasion has arisen to make a selection. *Griffin v. Nichols*, 51 Mich. 575.

2. *Holden v. Pinney*, 6 Cal. 234; *Reynolds v. Pixley*, 6 Cal. 165.

When a schedule of the homestead has been filed against an execution, it is not necessary to file another against an *alias* execution on the same judgment, where there has been no change of circumstances. *Euper v. Alkire*, 37 Ark. 283.

3. *Cro. Eliz.* 174; *Payne v. Drewe*, 4 East, 538; *Jones v. Jones*, 1 Bland's Ch. (Md.) 443; s. c., 18 Am. Dec. 327; *Davis v. Oswalt*, 18 Ark. 415; s. c., 68 Am. Dec. 182; *Johnson v. Ball*, 1 Verg. (Tenn.) 290; s. c., 24 Am. Dec. 451; *Green v. Johnson*, 2 Hawks (N. Car.), 309; s. c., 11 Am. Dec. 163.

4. 29 Car. II. c. 3, s. 16; *Davis v. Oswalt*, 18 Ark. 415; *Collingsworth v. Horn*, 4 Stew. & P. (Ala.) 237; s. c., 24 Am. Dec. 753; *Million v. Riley*, 1 Dana (Ky.), 359; s. c., 25 Am. Dec. 149; *Ray v. Birdseye*, 5 Denio (N. Y.), 619; *Layton v. Steel*, 3 Harr. (Del.) 512; *Duncan v. McCumber*, 10 Watts (Pa.), 212; *Tullis v. Brawley*, 3 Minn. 277; *Brown v. Barnes*, 8 Mo. 26; *Cones v. Wilson*, 14 Ind. 465; *Childs v. Jones*, 60 Ala. 352.

5. *Johnson v. Gorham*, 6 Cal. 195; s. c., 65 Am. Dec. 501; *Reeves v. Seborn*, 16 Iowa, 234; *Dodge v. Mack*, 22 Ill. 93; *Hamilton v. Hamilton*, 1 Dutch. (N. J.) 544; *French v. Allen*, 50 Me. 437; *Knox v. Webster*, 18 Wis. 406; *Furlong v. Edwards*, 3 Md. 99; *McMahon v. Green*, 12 Ala. 71; *Weisenfeld v. McLean*, 96 N. Car. 248.

So as to partnership property in Arkansas. *Harris v. Phillips*, 49 Ark. 58.

tion,¹ but in others there is no lien on real estate until execution is issued or levied.² Provision is usually made for continuing or preserving the lien;³ and if no such steps are taken, it will expire with the end of the statutory period.⁴ There are various ways, also, in which it may be lost or postponed before that time.⁵

1. Herman on Executions (1878), 267, § 183, and 275, § 186; Freeman on Judgments (3d ed.), § 339.

2. In *Alabama* the judgment is not a lien, and none exists until the execution is issued and delivered to the officer. Perkins v. Brierfield, 77 Ala. 403.

In *Tennessee* the lien of the execution on realty begins with the levy. Anderson v. Taylor, 6 Lea (Tenn.), 382.

Liens of judgments of the U. S. courts, and proceedings to obtain satisfaction thereof, are regulated by State laws. Koning v. Bayard, 2 Paine (U. S.), 251; Wood v. Chamberlain, 2 Black (U. S.), 430.

A pre-existing judgment is not a lien on after-acquired real estate, but an independent lien may be created upon such property by an execution issued upon said judgment accompanied by a levy. Ross & Co.'s Appeal, 106 Pa. St. 82.

3. Thus, where the lien dates from the *teste* of the writ, the issuing of subsequent writs in proper time and form will take precedence of executions issued between the issue of the original and such subsequent writs. Brashfield v. Whittaker, 4 Hawk. (N. Car.) 309. So the lien may be kept alive by regularly renewing the execution as provided by statute. King v. Kenare, 38 Ala. 63; Forman v. Proctor, 9 B. Mon. (Ky.) 324.

Where executions have been regularly issued on a judgment, without the lapse of an entire term, the continuity of the lien is not broken by the fact that an execution issued on the judgment, which was so irregular, informal, and imperfect that it would have been quashed on motion, was returned by the order of the plaintiff, and, on the same day, another execution, curing the defects of the first, was issued. Clark v. Spencer, 75 Ala. 49.

Upon the granting of a rule to open judgment, after a levy has been made thereunder, the lien of such levy is preserved, pending such rule, by operation of law. *A fortiori* will the lien be preserved where it has been specially so directed in the order granting the rule. Kittinger's Appeal, 101 Pa. St. 540; Reid v. Lindsey, 104 Pa. St. 159.

Where a levy has been made, but no sale, a *venditioni exponas* may issue. Herman on Executions, 331, § 215. And it will retain the lien of the original writ as against other writs issued at the time it. Taylor v. Mumford, 3 Hemp. (U. S.) 66.

4. Patterson v. Fowler, 23 Ark. 459; Sims v. Eslava, 74 Ala. 594.

Missouri.—The levy of an execution before the expiration of the lien of the judgment, will continue the lien beyond the statutory period of its existence, and until the sale. Riggs v. Goodrich, 74 Mo. 108.

Illinois.—A judgment ceases to be a lien on real estate if execution is not issued thereon within one year from its date; but execution may be sued out within seven years from the date of the judgment, and it then becomes a lien on the real estate of the debtor from its delivery to the proper officer; but if he has conveyed the same, and his deed is recorded before such execution is placed in the hands of the officer, no lien will attach, and no title will pass by a levy and sale. Ford v. Marcall, 107 Ill. 136.

5. The delay and return of an execution "unsatisfied," by order of plaintiff, nine months after levy, releases the lien. Speelman v. Chaffee, 5 Colo. 247.

A lien acquired by the levy of an execution on land is lost as against a subsequent *bona fide* purchaser without notice, by waiting four years before selling. Allen v. Levy, 59 Miss. 613. And see Lovick v. Crowder, 8 B. & C. 132.

But it has been held that a delay to sell land for about twenty-six months after the levy did not displace the lien of the execution. Harmon v. May, 40 Ark. 146.

When an execution is placed in the hands of a sheriff with instructions not to sell, or not to sell until further orders, its lien is postponed to that of any subsequent execution-creditor who establishes his lien while the older execution is thus kept dormant. Ala. Gold Life Ins. Co. v. McCreary, 65 Ala. 127; Hickman v. Caldwell, 4 Rawle (Pa.), 376; s. c., 27 Am. Dec. 274. But not as against the execution-defendant or his representatives. Keel v. Larkin, 72 Ala. 493.

The lien of an execution, so long as it is kept alive, cannot be defeated or impaired by the activity of creditors acquiring a junior lien; nor is it lost by mere neglect to force a levy and sale: there must be culpable laches or fraud on the part of the creditor to work its loss. Mathews v. Mobile Mut. Ins. Co., 75 Ala. 502; McCoy v. Reed, 5 Watts (Pa.), 302; Herman on Executions (1878), 270, § 183.

The issue of an *alias* before disposal of the property taken under the original writ,

The officer should ordinarily levy the executions in the order in which they are received,¹ but where two or more creditors have the right to execution, or two or more judgment liens on real estate accrue at the same time, the execution first issued and levied will have priority.² As among different execution-creditors the maxim *Qui prior est tempore, potior est jure*, usually applies with full force and effect,³ although its benefits may be lost by laches or negligence, and it will then give way to the maxim, *Vigilantibus et non dormientibus jura subserviunt*.⁴

may destroy the lien of the original. *Harrison v. Wilson*, 2 A. K. Marsh. (Ky.) 547. *Compare West v. St. John*, 63 Iowa, 287.

An *alias* of the same *teste* as other writs is not postponed by indulgences granted on the original. *Walpole v. Ink*, 9 Ohio St. 142.

1. *Kenyon v. Ficklin*, 6 B. Mon. (Ky.) 414; s. c., 44 Am. Dec. 776; *McClelland v. Slingluff*, 7 W. & S. (Pa.) 134; s. c., 42 Am. Dec. 224; *Smallcomb v. Cross*, 1 Ld. Raym. 251; *Ohlson v. Pierce*, 55 Wis. 205.

2. *Lowry v. Reed*, 89 Ind. 442; *Shirley v. Brown*, 80 Mo. 244; *Million v. Commonwealth*, 1 B. Mon. (Ky.) 310; s. c., 36 Am. Dec. 580; *Ray v. Harcourt*, 19 Wend. (N. Y.) 495; *Jones v. Davis*, 2 Ala. 730; *Field v. Milburn*, 9 Mo. 492; *Rust v. Pritchett*, 5 Harring. (Del.) 260; *Rockhill v. Hanna*, 15 How. (U. S.) 189; *Knox v. Webster*, 18 Wis. 406; *Adams v. Dyer*, 8 Johns. (N. Y.) 347; s. c., 5 Am. Dec. 344.

3. *Broome's Leg. Max.* *260, *266; *Herman on Executions* (1878), 262, § 181.

4. *Herman on Executions* (1878), 274, § 185; *Elston v. Castor*, 101 Ind. 426; s. c., 51 Am. Rep. 754.

Priorities of Liens.—The following citations illustrate the application of these rules as interpreted by the courts.

A judgment creditor who has an execution levied upon land, and files his bill to remove an obstruction, as a fraudulent conveyance, has a prior lien over a creditor who afterwards obtains judgment, has execution issued and levied and land sold within twelve months, and before the hearing of the bill filed by the first judgment creditor. Such action is not an abandonment of his right, equity, or lien, but is in aid and furtherance thereof. *Shepherd v. Woodfolk*, 10 Lea (Tenn.), 593.

S. purchased certain real estate at master commissioner's sale. An execution in favor of M., a judgment creditor of S., was levied on the premises *before* S. had possession or a deed of the same. *Held*, that M.'s levy was invalid, and that K., another judgment creditor of S., in whose favor an execution was levied on said premises *after* S. had possession and a deed of the same,

acquired a lien thereon, and should be first paid out of the proceeds of the sale thereof. *Gowell v. Kelsey*, 40 Ohio St. 117.

In a contest over a fund in the hands of the sheriff, arising from the sale of trust property, if the equitable claims of the *fi. fas.* are equal, that founded on the oldest *fi. fa.* will take the fund. Where a vendor who had given a bond for title subsequently recovered judgment for the balance of purchase-money due, filed a deed to the vendee, and had the property levied on, in a contest over the fund arising from the sale of the property, the lien of his *fi. fa.* was held superior to that of a younger *fi. fa.*, founded on a debt for money borrowed to pay part of the purchase-money. *Allen v. Sharp*, 65 Ga. 417.

Under the Alabama statute, "If an *alias* be sued out before the lapse of an entire term, and delivered to the sheriff *before* the sale of the property under a junior execution, the lien created by the delivery of the first execution must be preferred" (Code, § 3211); and by necessary implication, if the *alias* is not delivered to the sheriff before the sale under the junior execution, the lien of the junior execution must be preferred, and the purchaser at the sale under it acquires a superior title to a purchaser at a subsequent sale under the senior execution. *Lancaster v. Jordan*, 78 Ala. 197.

A *vendi. exponas*, with a command to make any part of the judgment unsatisfied by the property mentioned in the writ, by levy on any other property of the defendant, is a lien from its receipt by the sheriff upon personal property of the defendant, subject to execution, within the county, prior to a chattel mortgage thereon afterwards executed. *Durbin v. Haines*, 99 Ind. 463.

Where land is sold under several executions, some issuing for the collection of personal debts of the land-owner, some to enforce a lien for equality of partition, the latter claims are entitled to priority in the distribution of the proceeds. *Thompson v. Peebles*, 85 N. C. 418.

Where a number of judgments are rendered by a circuit court against the same

VIII. Staying, Setting Aside, and Quashing Writ. — Courts of general jurisdiction have an inherent supervisory power over their process, and may quash, stay, or set aside an execution, whenever it is necessary to prevent or correct abuse thereof, according to the justice and equity of each particular case.¹ This power extends even to the granting of a perpetual stay or *supersedeas*.² But the trial court has no inherent authority to stay an execution after a judgment or decree of the appellate court.³

In many of the States there are special statutes, or "stay laws," providing for the stay of execution during a certain period, upon the filing of a bond, or the giving of other security as therein prescribed.⁴ In order to obtain a stay under such statutes, their provisions must be strictly complied with.⁵ The statutes of the various States differ widely upon this subject, but the authorities cited in the note below will indicate the practice and course to be pursued under many of them.⁶

defendant, on the same day, are duly signed on the next day, and, upon *præcipes* filed in immediate succession, executions are issued in like manner by the clerk, the issuing is but one transaction, and no priority exists. *State v. Cisney*, 95 Ind. 265.

The question of priority of liens will not be determined in a proceeding for the trial of the right of property. *Raysor v. Reid*, 55 Tex. 266.

Where a *fi. fa.*, issued in 1874 for State and county taxes of that year, was levied in March, 1875, and transferred in July of that year, it fell under the operation of the Act of 1875, which required the recording of the transfer within thirty days in order that the transferee should have the same rights and lien as the State and county. The Act of 1879 extended the time for recording, but, not having complied with it, it did not relieve the transferee from the loss of his lien, resulting from his failure to record the transfer under the Act of 1875. Therefore, in a contest between the transferee and the holder of a *fi. fa.*, founded on a mortgage made after the issuing of the tax *fi. fa.*, and before its transfer, the mortgage *fi. fa.* would take precedence. *Murray v. Bridges*, 69 Ga. 644.

1. *Sanchez v. Carriaga*, 31 Cal. 170; *Sawin v. Mt. Vernon Bank*, 2 R. I. 382; *Cornell v. Dakin*, 38 N. Y. 253; *Granger v. Craig*, 85 N. Y. 619; *Rutland v. Pippin*, 7 Ala. 469; *Steere v. Stafford*, 12 R. I. 131; *Ketchum v. Crippen*, 37 Cal. 223; *Commonwealth v. Magee*, 8 Pa. St. 240; s. c., 49 Am. Dec. 509 and note, 513; *Henderson v. Henderson*, 66 Ala. 556.

2. *Monroe v. Upton*, 50 N. Y. 593; *Keeler v. King*, 1 Barb. (N. Y.) 390; *Parks v. Goodwin*, 1 Mich. 35; *Harrison v. Sales*, 6 Pa. St. 393.

3. *Dibrell v. Eastland*, 3 Yerg. (Tenn.) 507; *Marysville v. Buchanan*, 3 Cal. 212.

4. The essential provisions of a number of these statutes are given in *Herman on Executions* (1878), 595, § 392, and in the note to *Commonwealth v. Magee*, 49 Am. Dec. 509, 515.

5. *The Roanoke*, 3 Blatchf. (U. S.) 390; *Penna. R. Co. v. Commonwealth*, 39 Pa. St. 403; *Lockwood v. Dills*, 74 Ind. 56; *McIntosh v. Shotwell*, 6 Blackf. (Ind.) 281, 282; *Mokelumne, etc., v. Woodbury*, 10 Cal. 188.

But where a judgment debtor has in good faith, and within the time provided by law, filed a bond for stay of execution, and which bond has been approved by the proper approving officer, notice of such approval being given such debtor; and where it is afterwards ascertained that such bond fails to conform to the requirements of law, and upon application being made upon notice or leave to amend, and such leave being granted by the court, and the defective bond being amended,—such amended bond, upon an application for a *mandamus* to compel the issuance of an execution, will be held good, and a writ of *mandamus* denied. *State ex rel. Cleary v. Russell*, 17 Neb. 201.

An undertaking for stay of execution of a judgment on the docket of a justice of the peace, executed after the time allowed by law, in pursuance of an agreement of the parties, is valid as a common-law contract, if supported by a sufficient consideration, though it may not be effective as a statutory undertaking. *Boling v. Young*, 38 Ohio St. 135.

6. *Alabama*.—When the decree, which is sought to be superseded, declares a lien on lands for a specific sum of money, and orders the register to sell the lands for its

A motion for a new trial, or an appeal, will not, *per se*, without the filing of a bond or the granting of a *supersedeas* operate as a

payment after default, the bond, to operate as a *supersedeas*, must be framed and taken (under § 3928 of the Code) in such sum and with such condition as will indemnify and secure appellee from loss or delay in the execution of the decree; if it is affirmed, and if independent security for the costs of appeal is not given, it should also cover them. *Ex parte Sibert*, 67 Ala. 349.

Arkansas.—There is no appeal from the refusal of a justice of the peace to issue a *supersedeas* upon filing a schedule of exempted property, and a judgment on such appeal in the circuit court is *coram non judice*, and void. The remedy is by *mandamus*. *Smith v. Ragsdale*, 36 Ark. 297.

The lien of a justice's judgment and stay-bond is confined to the defendant's personal property in the township in which the judgment was rendered. *Carroll v. Gillespie*, 41 Ark. 468.

A decree fixing a lien on land for payment of purchase-money was appealed by defendant to the Supreme Court, and he gave *supersedeas* bond in the usual form for the payment of damages and cost, and to satisfy the decree if affirmed, or any other the Supreme Court should render against the defendant. No personal judgment was rendered against the defendant, nor could have been under the facts stated. *Held*, that no judgment could be rendered in the Supreme Court against the appellant and his sureties in the *supersedeas* bond upon affirmation of the decree, and a judgment here against them is, on motion, set aside. *Stephens v. Shannon*, 44 Ark. 178.

California.—Where an undertaking is given under sect. 942, C. C. P., to stay the execution of a judgment or order directing the payment of money, and the judgment or order is affirmed, the prevailing party is entitled—if the appellant does not pay the judgment or order within thirty days after the filing of the *remittitur*—to have judgment against the sureties upon his motion; and of this motion the law requires no notice, for the sureties stipulate in the undertaking that judgment may be so entered. *Meredith v. Santa Clara Mining Assn.*, 60 Cal. 617.

In *Indiana* all judgments may be relieved unless otherwise provided by statute. *Develin v. Wood*, 2 Ind. 102; *Ensley v. McCorkle*, 74 Ind. 240. But the right is entirely controlled by statute. *Vincennes Nat. Bank v. Cockrum*, 64 Ind. 229. There is also a statute curing defects in stay-bonds. *Hawes v. Pritchard*, 71 Ind. 166. See also, as to the practice and effect of the bond, *Baker v. Merriam*, 97 Ind. 539; *Leech v. Perry*, 77 Ind. 422; *Sterne v. McKinney*, 79 Ind. 578.

In an action on a bond executed by the defendants to the plaintiff for a stay of execution pending proceedings in error in an action taken from the district court of Brown County to the Supreme Court of the State, it is not a good defence to the action to show that the proceedings in error in the Supreme Court were instituted more than a year after the rendition of the judgment in the district court, or to show that the parties entered into an agreement whereby the defendants were not to prosecute any proceedings in error in the Supreme Court, and the plaintiff was to waive execution for the period of one year, which the plaintiff did, and that after more than one year had elapsed the defendants did not pay the judgment, but instituted proceedings in error in the Supreme Court to reverse the judgment, which proceedings were afterward, on motion of the plaintiff, dismissed by the Supreme Court. *Co-operative Assn. v. Rohl*, 32 Kan. 663.

In *Missouri* an appeal, with statutory bond, from a judgment awarding a peremptory *mandamus*, operates as a *supersedeas*. *State ex rel. v. Lewis*, 76 Mo. 370.

Under Comp. St. Neb. c. 20, § 17, where a stay has been taken by filing bond with sureties in accordance therewith, and payment is not made as required by the statute and the bond, it is the duty of the county judge to issue a joint execution, upon demand, against both judgment debtor and sureties. *State v. Fleming*, 21 Neb. 321.

In *Tennessee* as to the creditor, the surety on the cause of action is treated as a principal, although, as between such surety and a stayor for the principal debtor alone, the stayor is liable to execution before the surety. *Stafford v. Montgomery*, 85 Tenn. 329. See also *Hogshead v. Williams*, 55 Ind. 145; *Reissner v. Dessar*, 80 Ind. 307.

An order for the stay of execution on two judgments against T. C. W. & Co., and P. and T. and W., does not authorize the justice to enter the stay upon a judgment against T. C. W. & Co., although at the time another suit was pending before him against T. C. W. & Co. and P. and T. and W., judgment on which was not rendered until after date of order to stay. *Shipley v. Goodwin*, 13 Lea (Tenn.), 666.

An order of stay to the justice who rendered the judgment is sufficient which identifies the judgment with reasonable certainty by correctly describing, as far as it goes, the action or case in which the judgment has been rendered, and extrinsic evidence is admissible to aid the description. *Gwime v. Harrelt*, 12 Lea (Tenn.), 738.

At common law, the *supersedeas*, in order

stay of execution.¹ The effect of a stay, or *supersedes*, in ordinary cases is merely to suspend proceedings of the creditor to realize the benefits of his judgment during the period for which it runs,² and not of itself to discharge the debt.³

A motion or complaint to quash the writ ordinarily lies where an execution is improvidently issued, or so defective in form that a sale thereunder would be set aside for irregularity upon direct attack.⁴ Notice of the motion or proceeding should be given to all parties interested.⁵ The effect of quashing an execution that is merely irregular or voidable is to place the execution-plaintiff "in the position of having caused the acts done under the execution, prior to the quashing, to be done without warrant of law," but not to prejudice the rights of innocent third persons, such as purchasers at the sale.⁶

IX. Levy. — 1. *What constitutes.* — The levy of an execution is the seizure by the officer of the debtor's property, under the writ, and the taking possession of it, or subjecting it to his control.⁷ In order to constitute a valid levy upon personal property, it must be within view of the officer, and subject to his control at the

to stay proceedings on execution, must come before the levy. *Boyle v. Zacharie*, 6 Pet. (U. S.) 648; *Meriton v. Stevens*, Willes, 271, 280; 2 Tidd's Pr. 1072.

Verbal authority to enter one's name as stayor given to a justice away from his office will be binding after the entry. *Keeling v. Stokes*, 14 Lea (Tenn.), 419. See also *Leech v. Perry*, 77 Ind. 422.

In an action upon a *supersedes* bond the recovery is limited by the terms of the bond. *Gill v. Sullivan*, 62 Iowa, 529.

The stay-bond has the effect of a judgment confessed as against the surety. *Baker v. Merriam*, 97 Ind. 539; *Wishard v. Biddle*, 64 Iowa, 526.

1. Motion for new trial. *People v. Louck*, 28 Cal. 68. Appeal. *Castro v. Illies*, 22 Tex. 479; *Davis v. Tarwater*, 13 Ark. 52; *Bonnell v. Neely*, 43 Ill. 288; *Koecker v. Fidelity Trust Co.*, 103 Pa. St. 331; *Gawtry v. Adams*, 10 Mo. App. 28; *Thomas v. Nicklas*, 58 Iowa, 49; *Mitchell v. Gregory*, 94 Ind. 363. Compare *McFarland v. Moorings*, 56 Tex. 118.

2. *Curtis v. Root*, 28 Ill. 367; *Goldsborough v. Green*, 32 Md. 91; *Low v. Adams*, 6 Cal. 277.

It may, however, operate to release a levy. *Hamilton v. Henry*, 5 Ired. (N. C.) 218; *Trueman v. Barry*, 6 B. Mon. (Ky.) 536.

3. *McGinnis v. Lillard*, 4 Bibb. (Ky.) 490; *Arrington v. Sledge*, 2 Dev. (N. Car.) 359; *Oakes v. Williams*, 107 Ill. 154.

4. *Wright v. Rogers*, 26 Ind. 218; *Macy v. Lloyd*, 23 Ind. 60; *Freeman on Executions*, §§ 73-78; *Harrington v. O'Reilly*, 9 Smedes & M. (Miss.) 216; s. c., 48 Am. Dec. 704.

A motion to quash an execution does not open an inquiry into supposed errors or irregularities involved in the rendition of judgment. *Hall v. Clagett et al.*, 63 Md. 57. It may be quashed even after the return. *Page v. Coleman*, 9 Port. (Ala.) 275. Compare *Meador Co. v. Aringdale*, 58 Tex. 447; *Steers v. Morgan*, 66 Ga. 552.

5. *McKinney v. Jones*, 7 Tex. 598; s. c., 53 Am. Dec. 83; *Jewitt v. Marshall*, 3 A. K. Marsh. (Ky.) 153; *Dazey v. Orr*, 2 Ill. 535; *Bentley v. Cummings*, 8 Ark. 490; *McKissock v. Davis*, 18 Ala. 815; *Lynter v. Brewer*, 13 Iowa, 461; *Linn v. Hamilton*, 34 N. J. L. 305; *Eckstein v. Calderwood*, 34 Cal. 658; *Cline v. Green*, 1 Blatchf. (Ind.) 53.

6. *Van Campen v. Snyder*, 3 How. (Miss.) 66; s. c., 32 Am. Dec. 311, and note, 312; *Cox v. Nelson*, 1 T. B. Mon. (Ky.) 94; s. c., 15 Am. Dec. 89, and note, 92; *Whitman v. Taylor*, 60 Mo. 127; *Kerr v. Mount*, 28 N. Y. 659; *Chapman v. Dyett*, 11 Wend. (N. Y.) 31; s. c., 25 Am. Dec. 598.

7. *Leach v. Pine*, 41 Ill. 66; *Lloyd v. Wycoff*, 11 N. J. L. 218, 227; 2 Bouv. L. Dict. tit. "Levy."

"A levy is the act of taking possession of the property of a person condemned by the judgment of a competent tribunal to pay a certain sum of money, by a sheriff, constable, or other officer lawfully authorized thereto by virtue of an execution for the purpose of having such property sold according to law to satisfy the judgment." *Herman on Executions* (1878), 228, § 158.

time.¹ Some of the courts seem to hold that there must be a manual seizure, and actual possession taken by the officer;² but according to the weight of authority, it is sufficient if the property is under the control of the officer,³ and he may even leave it with the debtor to hold as his agent.⁴ He must, however, openly and unequivocally assert his title and right of dominion under the writ.⁵ The test generally adopted for determining the validity of a levy is this: Have the acts of the officer, in asserting his title to the goods under the writ, been such as would make him liable as a trespasser but for the protection afforded by the writ? If not, the levy will ordinarily be invalid.⁶ But the execution-defendant may dispense with any actual seizure for his own accommodation, and as between himself and the officer, the levy will be

1. *Lowry v. Coulter*, 9 Pa. St. 349; *Cary v. Bright*, 58 Pa. St. 70; *Barker v. Bininger*, 14 N. Y. 271; *Cawthorn v. McCraw*, 9 Ala. 519; *Logsdon v. Spivey*, 54 Ill. 104; *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619; *Linton v. Ford*, 46 Pa. St. 294; *Townsend v. Corning*, 40 Ohio St. 335; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287; *Brown v. Pratt*, 4 Wis. 513; s. c., 65 Am. Dec. 330.

"A mere paper levy is no levy at all." *Duncan's Appeal*, 37 Pa. St. 500; *Standard Oil Co. v. Bretz*, 98 Ind. 231.

But there may be exceptional cases, where the property need not be in view of the officer and under his control at the time, as, for instance, where it is locked up securely out of sight. *Stuckert v. Keller*, 105 Pa. St. 386. So in Mississippi, under the statute, possession need not be taken where the undivided interest of the debtor in a chattel is levied on, although it was otherwise at common law. *Willis v. Loeb*, 59 Miss. 169.

2. See *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287; *Newman v. Hook*, 37 Mo. 207.

3. *Barker v. Bininger*, 14 N. Y. 270; *Bond v. Willett*, 31 N. Y. 102; *Lloyd v. Wycoff*, 11 N. J. L. 218; *Sheffield v. Key*, 14 Ga. 528; *Jayne v. Dillon*, 28 Miss. 283; *Robuck v. Thornton*, 19 Ga. 149; *Bullitt v. Winstons*, 1 Munf. (Va.) 269; *Hill v. Harris*, 10 B. Mon. (Ky.) 120; s. c., 50 Am. Dec. 542; *Caldwell v. Fifield*, 4 Zab. (N. J.) 160.

4. *Trovillo v. Tilford*, 6 Watts. (Pa.) 468; s. c., 31 Am. Dec., 484; *Keyser's Appeal*, 13 Pa. St. 409; s. c., 53 Am. Dec. 487; *Weatherby v. Covington*, 3 Stro. (S. Car.) 27; s. c., 49 Am. Dec. 623; *Dillenback v. Jerome*, 7 Cow. (N. Y.) 294; *Carlisle v. Walthen*, 78 Ky. 365.

But it cannot be left with the owner to sell or treat as his own. *Urmderlich v. Roberts*, 67 Ind. 421; *Freeman on Executions*, § 261.

5. *Davidson v. Waldron*, 31 Ill. 120;

Beekman v. Lansing, 3 Wend. (N. Y.) 446; s. c., 20 Am. Dec. 707; *Portis v. Parker*, 8 Tex. 23; s. c., 58 Am. Dec. 95.

6. *Goode v. Longmire*, 35 Ala. 668; s. c., 76 Am. Dec. 309; *Westervelt v. Pinckney*, 14 Wend. (N. Y.) 123; s. c., 28 Am. Dec. 516; *Beekman v. Lansing*, 3 Wend. (N. Y.) 450; s. c., 20 Am. Dec. 707; *Learned v. Vandenburg*, 7 How. Pr. (N. Y.) 379; *Bryan v. Bridge*, 6 Tex. 141; *Smith v. Niles*, 20 Vt. 320; s. c., 49 Am. Dec. 782; *Allen v. McCalla*, 25 Iowa, 464; *Minor v. Smith*, 13 Ohio St. 79; *McBurnie v. Overstreet*, 8 B. Mon. (Ky.) 300. Compare *Carlisle v. Walthen*, 78 Ky. 365.

Illustrative Cases.—Merely looking at the goods and making a memorandum is not sufficient. *Camp v. Chamberlain*, 5 Denio, 198; *Morgan v. Johnson*, 27 La. Ann. 539; *Standard Oil Co. v. Bretz*, 98 Ind. 231. But where the officer levied on a lot of cotton without taking possession or even seeing it, and made return of a levy, it was *held* sufficient. *Banks v. Evans*, 10 Smedes & M. (Miss.) 35; s. c., 48 Am. Dec. 734. And a paper levy may be rendered effective by afterwards taking possession. *Dawson v. Sparks*, 77 Ind. 88.

Where the officer went to the debtor's farm and inventoried, with other property, cattle in another field and not in sight, it was *held* no levy as against a subsequent purchaser without notice. *Van Wyck v. Pine*, 2 Hill (N. Y.), 666.

Where the officer seized a few articles outside a store, and proclaimed a levy on the goods locked up inside, and out of sight, it was *held* insufficient. *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287; *Herron v. Hughes*, 25 Cal. 563. Compare *Stuckert v. Keller*, 105 Pa. St. 386.

Where an officer, in view of corn in a crib, nailed up the crib and indorsed the levy on the execution, and notified the defendant and others present not to disturb it, the levy was *held* valid. *Richardson v. Rardin*, 88 Ill. 124.

valid;¹ and taking a delivery or forthcoming bond will obviate the necessity of taking possession of the property.²

2. *How made.* — *Breaking Doors, etc.* — A levy effected by unlawful or fraudulent means is illegal and void.³ Thus, where the officer unlawfully gets possession of a debtor's property by breaking into his dwelling without proper authority, and then attaches or levies upon it, such attachment or levy will be void.⁴ The officer must wait until he can make peaceable entry, free from force or violence.⁵ But where he is once peaceably admitted into the house, he may force inner doors, or break open trunks and wardrobes, when necessary to make a levy.⁶

The usual mode of levying on real estate is to indorse the levy on the execution, describing the land as in a conveyance.⁷ The description ought to be certain, but it may be sufficient if it furnishes the means of identification.⁸

1. *Trovillo v. Tilford*, 6 Watts (Pa.), 468; s. c., 31 Am. Dec. 484; *Ray v. Harcourt*, 19 Wend. (N. Y.) 495; *Butler v. Maynard*, 11 Wend. (N. Y.) 548.

2. *Pugh v. Calloway*, 1 Ohio St. 488; *Roebuck v. Thornton*, 19 Ga. 149; *Hadley v. Hadley*, 82 Ind. 95; *Bain v. Lyle*, 68 Pa. St. 65.

3. *Freeman on Executions* (1878), § 256; *Closson v. Morrison*, 47 N. H. 482; s. c., 93 Am. Dec. 459 and note, 466; *Pomroy v. Parmlee*, 9 Iowa, 328; s. c., 74 Am. Dec. 328; *Deyo v. Jennison*, 10 Allen (Mass.), 410; *Nason v. Esten*, 2 R. I. 337; *Woodworth v. Kissam*, 15 Johns. (N. Y.) 186; *Mack v. Parks*, 8 Gray (Mass.), 517.

In levying execution, an officer has no right to seize and hold the whole of a debtor's property to satisfy a debt which, even if all exemptions were allowed, would be more than secured by the remainder; and if he thereby preclude the debtor from engaging in his customary business, and even from keeping house, his action is oppressive and unjustifiable. *Handy v. Clippert*, 50 Mich. 355.

4. *Isley v. Nichols*, 12 Pick. (Mass.) 270; s. c., 22 Am. Dec. 425; *Bailey v. Wright*, 39 Mich. 96; *Curtis v. Hubbard*, 4 Hill (N. Y.), 437; s. c., 40 Am. Dec. 292; *Welsh v. Wilson*, 34 Minn. 92.

Where, however, the officer demands admittance, and is refused, he may, in the presence of the execution defendant, break open a store or other building, not a dwelling, in order to make his levy on the goods and chattels therein. *Douglass v. State*, 6 Yerg. (Tenn.) 525; *Fullam v. Stearns*, 30 Vt. 443; *Bean v. Hubbard*, 4 Cush. (Mass.) 85.

5. *Snydacker v. Brosse*, 51 Ill. 357; *Boggs v. Vandyke*, 3 Harr. (Del.) 288; *McGee v. Gwan*, 4 Blackf. (Ind.) 18; *Calvert v. Stone*, 10 B. Mon. (Ky.) 152; *State v.*

Hooker, 17 Vt. 658; *People v. Hubbard*, 24 Wend. (N. Y.) 369. Compare *Allen v. Martin*, 10 Wend. (N. Y.) 300; s. c., 25 Am. Dec. 564; *Keith v. Johnson*, 1 Dana (Ky.), 604; s. c., 25 Am. Dec. 167.

6. *Hutchison v. Birch*, 4 Taunt. 619; *Williams v. Spencer*, 5 Johns. (N. Y.) 352; *State v. Thackam*, 1 Bay, 358; *Lee v. Gausel*, Cowp. 1.

7. *Herman on Executions* (1878), 288, § 191; *Duncan v. Matney*, 29 Mo. 368; *Isam v. Hooks*, 46 Ga. 309; *Fenno v. Coulter*, 14 Ark. 38; *Morgan v. Kinney*, 38 Ohio St. 610; 2 Bouv. L. Dict., tit. "Levy;" *Redlick v. Williams* (Tex.), 5 S. W. Rep. 375.

8. *French v. Allen*, 50 Me. 437; *Vogt v. Ticknor*, 48 N. H. 242; *Jenks v. Ward*, 4 Met. (Mass.) 404; *Grover v. Howard*, 31 Me. 546; *Phillips v. White*, 66 Ga. 753. Compare *Forbes v. Hall*, 51 Me. 568; *Pound v. Pullen*, 3 Yerg. (Tenn.) 338; *Taylor v. Cozart*, 4 Humph. (Tenn.) 433.

An entry on a *fi. fa.* in these words, "I have levied this *fi. fa.* on the house and lot formerly owned by J. D. Waddell, and now occupied by Henry May (and other property similarly identified), all situate in Cedartown, in Polk County, as the property of Charles W. Longworthy, non-resident, the same having been originally attached," contains a sufficient description of the property. *Longworthy v. Featherston*, 65 Ga. 165.

A levy which describes property levied on by reference to a record which makes it certain, is sufficient. Where a deed to which a levy referred for particular description of thirteen acres, on which it was made, conveyed two hundred and sixty-one acres of lots of land numbers 40 and 33, in a county named, stated that the parts of those lots conveyed lay broadside to each other on Flat Creek, and reserved thirteen

In levying upon a growing crop, the officer should openly perform some act as nearly equivalent to actual seizure as possible, such as going upon the premises, and announcing that he seizes the crop under the writ, or calling disinterested persons to witness his open assertion of the levy.¹

The writ of *habere facias possessionem* is executed by delivering to the plaintiff full and actual possession of the premises recovered.² The defendant and his goods, and all persons claiming under him, may, and should if necessary, be removed by the officer, so that the plaintiff may have full and peaceable possession.³

3. *Effect of Levy.* — The effect of a levy upon personal property is to take the right of possession from the debtor, and vest it in the officer, with the right to maintain an action to recover it from any one who interferes with such possession so long as the execution remains in force and unsatisfied.⁴ It brings the property

acres, including the shoals and water-power through the land so far above the shoals as necessary for any machinery that may be put up, together with the use of timber with which to build, the right of way to and from the shoals, etc., such description would seem to be sufficient as a basis for a levy on the thirteen acres. *Sears v. Bagwell*, 69 Ga. 429.

The circuit judge charged that a levy "that leaves one of the boundaries unenclosed, and not capable of being determined, would be void for uncertainty." *Held*, erroneous, for the reason it is impossible to conceive, when three sides are given, how the other could be incapable of being determined. If there is an owner on the fourth side, the line would be controlled by that ownership; and if no such ownership, a straight line would close the *hiatus*. *Stephens v. Taylor*, 6 Lea (Tenn.), 307.

An entry of levy in these terms, "I have this day levied the within *fi. fa.* on lots of land numbers 308, 309, 310, 332, all levied on as the property of [defendant in *fi. fa.*], to satisfy an execution issued from the 957th district of Baker County, G. M.; property pointed out by the plaintiff," was void for want of sufficient description; and when offered in evidence, together with the deed based thereon, they were inadmissible. *Brown v. Mongon*, 70 Ga. 756.

On objection before sale, a levy as follows would be held insufficient: "I have this day levied the within *fi. fa.* on nine hundred acres of land as the property of James B. Hart, one of the defendants; said property being situated in, and in the vicinity of, Union Point, Greene County, Georgia" (Union Point being an unincorporated village). But after sale has been made, and the rights of a purchaser have intervened, it should be left to the

jury, under all the facts of the case, to say whether the levy was sufficient. *Williams v. Hart*, 65 Ga. 201.

1. *Herman on Executions* (1878), 235, § 161.

A levy on "all the crops on Ball Place" was held sufficient. 65 Ga. 644.

To constitute a valid levy on standing corn, actual possession need not be taken. *Godfrey v. Brown*, 86 Ill. 454.

An officer who has levied on wheat in the mow has no authority to thresh it before sale. *Stilson v. Gibbs*, 40 Mich. 42.

2. *Farnsworth v. Fowler*, 1 Swan (Tenn.), 1; s. c., 55 Am. Dec. 718; *Herman on Executions* (1876), 530, 531, §§ 350, 351.

3. *Fiske v. Chamberlin*, 103 Mass. 495; *Howe v. Butterfield*, 4 Cush. (Mass.) 302; s. c., 50 Am. Dec. 785; *Kingsdale v. Maren*, 6 Mad. 27; 2 Tidd's Pr. *1247; *Howard v. Kennedy's Exrs.*, 4 Ala. 592; s. c., 39 Am. Dec. 307; *Freeman on Judgments*, § 171.

But removal of all the defendant's goods may not be necessary. *Scott v. Richardson*, 2 B. Mon. (Ky.) 507; s. c., 38 Am. Dec. 170. And where several tenements are held by the defendant, delivery of full possession of one may be good as to all. *Floyd v. Bethel*, 2 Rolle, R. 420.

4. *Howland v. Wells*, 9 N. Y. 173; *Martin v. Watson*, 8 Wis. 315; *Sherman v. Howell*, 40 Ga. 257; *Parker v. David*, 45 Miss. 488; *Fuller v. Loring*, 42 Me. 488; *Williams v. Herndon*, 12 B. Mon. (Ky.) 484; *Dezell v. Odell*, 3 Hill (N. Y.), 215; s. c., 38 Am. Dec. 628; *Brewster v. Vail*, 1 Spencer (N. J.), 56; s. c., 38 Am. Dec. 547; *Williams v. Herndon*, 12 B. Mon. (Ky.) 484; s. c., 54 Am. Dec. 551; *Weatherby v. Covington*, 3 Strobb. (S. Car.) 27; s. c., 49 Am. Dec. 623; *Dunkin v. McKee*, 23 Ind. 447.

So in Indiana where mortgaged chattels

in custodia legis, and prevents its seizure under other writs.¹ A levy on real estate does not divest the debtor of his title,² nor does it ordinarily continue the lien of the judgment;³ but where several judgments have been rendered at the same time, or the real estate has been acquired since the rendition of judgments against the debtor, a levy thereon under one of them will give a priority of lien.⁴

may be levied on, the officer is entitled to possession for the purpose of making the sale, and may maintain replevin for them against the mortgagee. *Foster v. Bingham*, 99 Ind. 505; *Sparks v. Compton*, 70 Ind. 393.

1. *Hagan v. Lucas*, 10 Pet. (U. S.) 400; *Pipher v. Fordyce*, 88 Ind. 436; *Freeman v. Howe*, 24 How. (U. S.) 450; *Covell v. Hyman*, 111 U. S. 176; *Winegardner v. Hafer*, 15 Pa. St. 144; *Sterling v. Welcome*, 20 Wend. (N. Y.) 228; *Hagan v. Lucas*, 10 Pet. (U. S.) 400; *Payne v. Dreame*, 4 East, 523; *Buckey v. Snouffer*, 10 Md. 149; *Smith v. McIver*, 9 Wheat. (U. S.) 532; *Riggs v. Johnson*, 6 Wall. (U. S.) 197; *Wood v. Lake*, 13 Wis. 34; *Lewis v. Buck*, 7 Minn. 104; *Hackley v. Swigert*, 5 B. Mon. (Ky.) 86; s. c., 41 Am. Dec. 256; *Hardy v. Tilton*, 68 Me. 195; s. c., 28 Am. Rep. 34, and note 35.

2. *Keaton v. Thomasson*, 2 Swan (Tenn.), 138; s. c., 58 Am. Dec. 55.

3. *Trapnall v. Richardson*, 13 Ark. 543; s. c., 58 Am. Dec. 338; *Isaac v. Swift*, 10 Cal. 71; *Freeman on Judgments* (3d ed.), § 349 a. *Compare Bank of Missouri v. Wells*, 12 Mo. 361; s. c., 51 Am. Dec. 163; *Durrett v. Hulse*, 67 Mo. 201.

4. *Lowry v. Reed*, 89 Ind. 442; *Michaels v. Boyd*, 1 Ind. 259; *Adams v. Dyer*, 8 Johns. (N. Y.) 347; s. c., 5 Am. Dec. 344.

Miscellaneous Cases as to Levies and their Effects.—Where, after a levy on personal property under an execution, the judgment is opened by the court to let the defendant into a defence, "all proceedings to be stayed, the sheriff to be secure in his levy," and a bond is given by defendant to the sheriff conditioned for the delivery of the property on demand, or for the payment of the amount of the execution, the lien of said levy is preserved as against a subsequent levy on the same property under another execution. *Slutter v. Kirkendall*, 100 Pa. St. 307.

A., having obtained judgment against B., issued writs of *fi. fa.* thereon, which were levied on certain goods. Said goods were claimed by B.'s wife, who obtained an issue under the interpleader act, and filed a bond, which was approved. The *fi. fas.* were thereupon returned "stayed by interpleader." B.'s wife failed, however, to file a declaration within the time required by rule of

court, thus abandoning her claim. A. thereupon issued writs of *alias fi. fa.* which were levied on the same goods. B.'s wife again claimed them, and obtained a rule for an issue to determine her ownership. A. then issued writs of *vend. ex.* directed against the goods, and obtained a rule to set aside the *alias fi. fas.* on the ground that they had been improvidently and improperly issued. B.'s wife then took a rule to set aside the writs of *vend. ex.* on the ground that A., by issuing the *alias fi. fas.*, had abandoned the levies under the original *fi. fas.* The court discharged both the rules for an issue, and that to set aside the writs of *vend. ex.*, and made absolute the rule setting aside the *alias fi. fas.* *Held*, that this was not error. *Menge v. Wiley*, 100 Pa. St. 617.

After a judgment has been rendered and execution has issued thereon, if the plaintiff in execution die, his administrator or executor, or perhaps his heirs-at-law, may have the execution levied; or any other person who owns such execution, or to whom it may have been transferred, may cause it to be levied. If the property levied on be claimed, then some one who controls the execution, as executor, administrator or transferee, must be made a party to the claim case for the purpose of securing the costs. If the sheriff should receive and collect the money due on an execution after the death of the plaintiff, the payment to him would be good, and would extinguish and satisfy the judgment, and the sheriff would hold for the use and benefit of such representative of the deceased as may have been or may be appointed to manage the estate. *Rogers v. Truett*, 73 Ga. 386.

That the levy of an execution against one defendant does not state as the property of whom the seizure is made, is no ground of illegality. Where illegality to execution levied on land is based on the falsity of the return of the constable that there was no personal property to be found, it is insufficient to allege that defendant has a sufficiency of personal property on which to levy; it should be distinctly averred that defendant had such property at the time of the levy, and that it was subject. *McKoy v. Edwards*, 65 Ga. 328.

Attachments returnable to a justice court

should be directed to the constables, and levied by one of them. A levy by the sheriff is bad. *Pearce & Renfro v. Renfro Bros.*, 68 Ga. 194.

In 1873 a constable could not levy a tax *fi. fa.* for more than fifty dollars. In a claim case arising out of a sale under such a levy, the execution and sheriff's deed were properly rejected from evidence. *Butler v. Davis*, 68 Ga. 173.

It is no ground for an affidavit of illegality that a *fi. fa.* from a justice's court was levied by a constable outside of the district where the judgment was entered, and outside of the county of defendant's residence, when it appears that the property levied on was found in the bailiwick of the officer making the levy; nor was it necessary that the *fi. fa.* should have been backed by a magistrate of the county of the defendant's residence to authorize the levy made in this case. *Lewis v. Wall*, 70 Ga. 646.

Where a levy has been made, and claim interposed, it requires an order of court for the sheriff to withdraw the *fi. fa.* from the claim papers, and make a new levy. Without this the new levy is not legal; nor is it rendered legal by the fact that the first levy was illegal, and was afterwards held to be so. *State v. Jeter*, 65 Ga. 256.

After a claim to property levied on has been placed in the hands of the sheriff, but before the papers have been returned into court, the plaintiff in *fi. fa.* may have a new levy made on other property without any order of court for that purpose. *Wyatt v. Chapman*, 66 Ga. 727.

Where a *fi. fa.* is claiming money in the hands of a sheriff, no order is necessary to withdraw it in order to make another levy. *Zachry v. Zachry*, 68 Ga. 158.

If a purchaser of land from one against whom there is a judgment desires to have other lands of his grantor first levied upon and sold to satisfy the judgment, it is his duty to give notice of his interest in the property bought by him, and to point out such other property, that the creditor may have it taken in execution. Where a purchaser of land from a judgment debtor having other land amply sufficient to satisfy the judgment, gives notice to the judgment-creditor of his rights, and requests him to levy upon the remaining lands of his grantor, and the creditor has the purchaser's land levied on first, and sold, the purchaser should apply to the court from which the execution issued in apt time to have the levy and sale set aside. His remedy in such case is complete at law by motion; and it is no sufficient excuse for neglecting such remedy that the purchaser was totally blind from his youth. *Dobbins v. Wilson*, 107 Ill. 17.

A joint judgment was rendered against

H. and others, upon which an execution was issued and levied upon lands of one of the other defendants, which was subject to the prior lien of an older judgment, but of value much exceeding both judgments. This land was sold to satisfy the senior judgment, and the sheriff having returned that fact upon the execution on the junior judgment, and an *alias* issuing, he levied it upon the lands of H., which he sold upon it to the plaintiff, who, in due time, obtained a sheriff's deed. *Held*, that the levy of the first execution was, until legally disposed of, a satisfaction of the judgment. *Held* also that the mere sale to satisfy the older lien did not, in view of the right to redeem therefrom, given by statute, divest the junior lien, and was not such a disposition of the property as warranted the levy on the lands of H. *Held* also that the purchaser, being the plaintiff, was charged with notice of the irregularity, and took nothing by his purchase and deed. *Neff v. Hagaman*, 78 Ind. 57.

Where an officer held several executions in favor of several plaintiffs, but against the same defendant, which he levied upon certain property as the property of such defendant, but the plaintiff herein claimed to be the owner of the property, and gave to the officer the notice prescribed by section 3055 of the Code, but gave only *one* notice, which was, however, made applicable to all the executions, and the execution-creditors thereupon joined in *one* indemnifying bond (Code, § 3056), *held*, that the one notice and the one indemnifying bond were a sufficient compliance with the statute, and that a separate notice and bond for each execution was not necessary. *Baxter v. Ray*, 62 Ia. 336.

The defendant, as sheriff, levied an execution on certain chattels as the property of the execution-defendant. Plaintiff gave notice that he was the owner of the chattels, and defendant demanded an indemnifying bond of the execution-plaintiff, which he refused to give, whereupon the defendant released the property, and returned the execution. *Held*, that these facts did not estop defendant from levying a second execution, issued upon the same judgment, upon the same property. *Clark v. Reininger*, 66 Ia. 507.

Where real estate was sold in fee-simple by the sheriff on execution, and was redeemed from such sale by a junior judgment creditor, while the redemption act of March 31, 1879 (Acts 1879, p. 176), was in force, and where such junior judgment creditor and redemptioner has sued out an execution on his judgment, with the additional recitals therein as provided in section 5 of such act, it is the duty of the sheriff first to levy such execution upon and sell the property redeemed, and the

same estate therein redeemed, and at such sale the execution creditor is a forced "bidder for his redemption money, with ten per cent interest thereon, and all costs, accrued since the redemption." In such case the rents and profits of the property redeemed cannot be sold, and therefore the failure of the sheriff to cause an appraisal of such rents and profits will not vitiate or avoid his sale of the property redeemed. *Taylor v. Morgan*, 95 Ind. 456.

Where it is not shown that the judgment debtor has personal property out of which a judgment rendered against him could have been made, and the return of the officer shows he was unable to find any goods and chattels whereon to levy, and therefore levied the execution upon real property belonging to the debtor, and the proceedings of the sale are in conformity with the statute, the district court, upon motion of the purchaser, — a third party, — should confirm the sale, although the officer did not see or demand of the debtor the amount of the execution before levying upon his real property, and did not make any extended search for personal property, because he was informed and believed he had sold all of it upon a prior execution against him. *Collins v. Ritchie*, 31 Kans. 371.

The statute, requiring the certificate of the oath administered to the appraisers, chosen to make a levy, to be written upon the back of the execution, is directory to the officer, and will not be considered as necessary to the validity of the levy in an action between the judgment debtor and an innocent purchaser from him in whose behalf the levy was made. *Hall v. Staples*, 74 Me. 178.

Persons residing and having taxable estates in a town, which, in its corporate capacity, is a stockholder in a railroad company, are not incompetent from interest, to act as appraisers in the levy of an execution against such company. *Fletcher v. Somerset R. R. Co.*, 74 Me. 434.

If land of a debtor, unincumbered by mortgage, is attached on mesne process, and afterwards seized under the Gen. Sts. c. 103, upon an execution issued on a judgment, and the officer suspends proceedings for more than two months on account of a prior attachment existing on the land, and, after the dissolution of the attachment, gives notice to the debtor of a sale of the land, under the St. of 1874, c. 188, the levy will be deemed to have been made at the time of such notice, and is ineffectual as against a title acquired by deed from the debtor recorded after the judgment, and before the notice of sale is given. *Hardy v. Safford*, 132 Mass. 332.

The amount due on a justice's judgment

is a jurisdictional fact in proceedings to levy on land under a transcript of the judgment; but it may be stated in the affidavit for the transcript, required by Comp. L. § 5382, to be filed with the justice; and if so set forth and promptly filed with the transcript in the office of the clerk of the circuit court, it need not be again stated in a separate affidavit to be filed with the clerk as provided in § 5383. *Smith v. St. Joseph Co.* Judge, 46 Mich. 338.

Where execution is levied on a mine, the judgment debtor is entitled, during the period allowed for redemption, to continue working it in a reasonable and prudent manner, as measured by the customary working before the execution sale; and he can dispose of the product. But improper, excessive, or wasteful mining can be restrained, and the person responsible for it be held liable in damages. *Ward v. Cape River Iron Co.*, 50 Mich. 522.

The interest of a tenant in common in a tract of land passes by the extent of an execution against him on the whole tract; but such levy does not affect the rights of the other tenants. *Davis v. Barnard*, 60 N. H. 550.

In a proceeding under the statute to try the right of property, a claimant's bond was executed, and on a trial the property was adjudged to be subject to the levy: judgment was rendered requiring the property to be returned, and for execution. The property levied on consisted of a sorghum-mill and evaporator, which were so heavy as to require wagons to remove them. Held, that a tender, by the claimant, of the property back to the officer, which was at that time not visible to the parties, but ten or fifteen miles removed from where the tender to return it was made, did not constitute such a return of the property as is contemplated by the statute. For facts on which the opinion is based, see statement of case. *Edwards v. Connolly*, 61 Tex. 30.

The issuance of an *alias fi. fa.* only raises a presumption of the waiver of a levy on land made under the previous *fi. fa.*, which is rebutted by an indorsement by the clerk of the levy on the *alias*, with a written direction to sell the land thus levied on, and a written agreement by the debtor himself that the land described in the levy might be sold by the sheriff at a designated time and place, which was done. *Harlan v. Harlan*, 14 Lea (Tenn.), 107.

Rights and Liabilities of Officer. — A sheriff, having in his hands two executions in favor of different creditors against property of the same debtor, and having in his power property known by him to belong to such debtor, and subject to levy, is absolutely bound to levy upon it so as to make the senior execution a lien prior to

X. Return of Writ.—The return is the written statement or certificate of the officer, showing what he has done in the way of executing the writ.¹ It should be signed by, or in the name of, the officer, and not in the name of a deputy.² It should show that all the requirements of the law have been complied with,³ and should set forth a brief account of all the acts of the officer under the writ, that the court may judge of their sufficiency.⁴ Where it can be fairly construed as sufficient, the court should so construe it.⁵ It should be written on the execution,⁶ and duly filed

that of the junior one, unless the senior execution-creditor has interfered with the discharge of the officer's duty in that behalf by some positive act indicating a waiver of his prior right, or a direction or consent on his part that his execution lie dormant or be postponed to the other. Ordinary diligence, honest motives, etc., are no defence to the officer in such a case. In an action against the officer by the senior execution-creditor in such a case, the answer alleged that at the time when the junior execution was levied, plaintiff well knew of the execution-defendant's interest in the property so levied upon, but did not inform the officer thereof, nor request him to levy thereon, and that it "was supposed and believed" by the officer and by the plaintiff that a levy of plaintiff's execution, previously made on other property, "would be amply sufficient to satisfy plaintiff's judgment." *Held* (on objection to evidence), no defence. The return of the sheriff to an execution is conclusive against him as to what property was levied upon. *Olson v. Pierce*, 55 Wis. 205.

A sheriff is protected in levying an execution, although he may have been notified of outside facts rendering it invalid. But *quare*, would the sheriff be protected where the facts rendering the execution void had occurred under his personal observation? *Tierney v. Frazier*, 57 Tex. 437.

Where the defendant in execution produced to the sheriff receipts from the judgment creditor acknowledging full satisfaction of the judgment, but specifying the receipt of a sum several dollars less than the judgment, and specifying also that the party giving the receipt would pay all costs, the officer was justified in declining to pass upon the genuineness and validity of the receipts, and in proceeding to make a levy. *Tierney v. Frazier*, 57 Tex. 437.

A bond was given to an officer with condition to indemnify him from all suits, damages, and costs whereto he might be liable or obliged by law to pay by reason of levying a certain execution. The owners of the property levied on recovered judgments against the officer, whereon executions were issued. *Held*, that, in an action on the bond, the obligor was liable for the

amount of the penalty, although the executions had not been paid by the obligee. *Cook v. Merrifield*, 139 Mass. 139.

In the absence of statutory prohibition, the claimant of property levied on by a sheriff, and as to which an indemnifying bond has been given the officer, is not restricted to his remedy on the bond, but may sue the sheriff for the trespass or conversion. *State ex rel. v. McBride*, 81 Mo. 349.

If one who brings replevin against a constable for goods taken on an execution against him is not in a situation to claim that they are exempt from levy, he cannot recover them, or escape judgment for the amount called for by the execution, on the ground that the constable has neglected to make an inventory. *Ferguson v. Washer*, 49 Mich. 390.

A sheriff and his indemnitors, sued for trespass in levying upon personal property, the legal title to which is in plaintiff, under an execution against the person from whom plaintiff acquired title, may not attack the transfer for fraud without proving a judgment against the transferrer. *McKinley v. Bowe*, 97 N. Y. 93.

1. *State v. Melton*, 8 Mo. 417; *Windle v. Ricardo*, 1 B. & B. 17; *Beall v. Shattuck*, 53 Miss. 358.

2. *Ryan v. Edwards*, 1 Ill. 163; *Rowley v. Howard*, 23 Cal. 401; *Ferguson v. Lee*, 9 Wend. (N. Y.) 258; *Emley v. Drum*, 36 Pa. St. 123. Compare *Miller v. Alexander*, 13 Tex. 497; *Callender v. Olcott*, 1 Mich. 344.

Where the officer cannot write, an entry of a levy written for him in his presence, and signed with his mark, is good. *Cox v. Montford*, 66 Ga. 62.

3. *Russ v. Gilman*, 16 Me. 209; *Williams v. Armory*, 14 Mass. 20; *Metcalf v. Gillett*, 5 Conn. 400; *Walsh v. Anderson*, 135 Mass. 65.

4. *Perry v. Dover*, 12 Pick. (Mass.) 206; *Henry v. Tilton*, 19 Vt. 447; *Merritt v. White*, 31 Mass. 438.

5. *Cogswell v. Warren*, 1 Curt. (C. C.) 223; *Bacon v. Bevan*, 44 Miss. 293; *State ex rel. v. Still*, 11 Mo. App. 283. The officer is presumed to have done his duty. *Hale v. Talbott*, 86 Ind. 447.

6. *Dickson v. Peppers*, 7 Ired. (N. Car.)

in the court, or with the proper officer.¹ Where land has been levied on, it must be so described in the return that it can be identified, at least with the aid of evidence *aliunde*.²

Where the return is incorrect or erroneous as to the facts, it may generally be amended so as to conform to the true state of facts on application to the court before the expiration of the term of the officer making it.³ And in order to accomplish justice, such an amendment may be permitted, even after the expiration of his term.⁴ Until actually filed in the proper office, and thus completed, it is under the control of the officer, and may be amended by him without leave of court.⁵ After the return is completed, an application for its amendment is addressed to the sound discretion of the court.⁶ It is certainly safest to give notice of the application,⁷ although some cases hold it unnecessary.⁸

The officer's return is conclusive as between the parties and their privies,⁹ and also as against the officer himself.¹⁰ In actions

429. But failure to indorse it thereon is a mere irregularity that may be supplied at any time. *Ingram v. Belk*, 2 Strobb. L. (S. Car.) 207; s. c., 47 Am. Dec. 591. *Compare* *Bybee v. Ashby*, 2 Gilm. (Ill.) 151; s. c., 43 Am. Dec. 47.

1. *Nelson v. Cook*, 19 Ill. 440; *State v. Melton*, 8 Mo. 417; *Garlick v. Sangster*, 9 Bing. 46; *Welsh v. Joy*, 13 Pick. (Mass.) 482; *Beall v. Shattuck*, 53 Miss. 358.

2. *Duval v. Waters*, 1 Bland, Ch. (Md.) 569; s. c., 18 Am. Dec. 350; *Berry v. Griffith*, 2 Harris & G. (Md.) 337; s. c., 18 Am. Dec. 309; *Payne v. Billingham*, 10 Iowa, 360; *Webb v. Bumpass*, 9 Porter (Ala.), 201; s. c., 33 Am. Dec. 310.

"That is certain which can be made certain." *Swan's Lessee v. Parker*, 7 Yerg. (Tenn.) 490.

3. *Mahurin v. Brackett*, 5 N. H. 9; *Chase v. Merrimack Bank*, 19 Pick. (Mass.) 564; s. c., 31 Am. Dec. 163; *Williams v. Moore*, 68 Ga. 585; *Sawyer v. Harmon*, 136 Mass. 414; *Woodward v. Harbin*, 4 Ala. 534; s. c., 37 Am. Dec. 753; *Malone v. Samuel*, 3 A. K. Marsh. (Ky.) 350; s. c., 13 Am. Dec. 172; *McArthur v. Currie*, 32 Ala. 75; *Dunn v. Rogers*, 43 Ill. 260; *Thornton v. Miskimmon*, 48 Mo. 219; *Clayton v. State*, 24 Ark. 16; *Hutchins v. Comrs.*, 16 Minn. 13.

But an amendment will not be allowed so as to injuriously affect the rights of innocent third persons. *Williamson v. Wright*, 75 Me. 35; *Banister v. Higginson*, 15 Me. 73; s. c., 32 Am. Dec. 134; *Emerson v. Upton*, 9 Pick. (Mass.) 167; *Foreman v. Carter*, 9 Kan. 674.

4. *Scruggs v. Scruggs*, 46 Mo. 271; *Avery v. Bowman*, 39 N. H. 393; *Johnson v. Donnell*, 15 Ill. 97; *Palmer v. Thayer*, 28 Conn. 237; *Keen v. Briggs*, 46 Me. 467;

Dwiggins v. Cook, 71 Ind. 579; *Adams v. Robinson*, 1 Pick. (Mass.) 461; *Petition of Lake* (R. I.), 10 Atl. Rep. 653. *Compare* *Shores v. Whitworth*, 8 Lea (Tenn.), 660; *Armstrong v. Easton*, 1 B. Mon. (Ky.) 66; *Jessup v. Gragg*, 12 Ga. 261.

5. *Welch v. Joy*, 13 Pick. (Mass.) 477; *Spencer v. Fuller*, 68 Ga. 73; *Nelson v. Cook*, 19 Ill. 440; *Spoor v. Holland*, 8 Wend. (N. Y.) 445; *State v. Melton*, 8 Mo. 417; *Wilcox v. Mondy*, 89 Ind. 232, 234.

6. *Johnson v. Day*, 17 Pick. (Mass.) 108; *Austin v. Jordan*, 5 Tex. 130; *Rowell v. Small*, 30 Me. 30; *Baker v. Davis*, 22 N. H. 27; *Pierce v. Strickland*, 2 Story (U. S.), 292; *Miller v. Shackleford*, 4 Dana (Ky.), 264; *Wilcox v. Mondy*, 89 Ind. 232.

7. *Coopwood v. Morgan*, 34 Miss. 368; *Barlow v. Standford*, 82 Ill. 298.

8. *Rickards v. Ladd*, 4 Pac. C. L. J. 52; *Morris v. Trustees*, 15 Ill. 269; *Kitchen v. Reinsky*, 42 Mo. 427.

9. *Barrows v. National Rubber Co.*, 13 R. I. 48; *Flaniken v. Neal*, 67 Tex. 629; *Sawyer v. Harmon*, 136 Mass. 414; *Hotchkiss v. Hunt*, 56 Me. 252; *Reeves v. Reeves*, 33 Mo. 28; *Ringold v. Edwards*, 71 Ark. 86; *Clough v. Moore*, 34 N. H. 381; *Bowen v. Parkhurst*, 24 Ill. 257; *Rice v. Goff*, 58 Pa. St. 116; *Cozine v. Walter*, 55 N. Y. 304; *Egery v. Buchanan*, 5 Cal. 56; *Phillips v. Elwell*, 14 Ohio St. 240; *Haynes v. Wheat*, 9 Ala. 239; *Ayres v. Duprey*, 27 Tex. 593; *Barrett v. Copeland*, 18 Vt. 67; *McDonald v. Leewright*, 31 Mo. 29; s. c., 77 Am. Dec. 631; *Heath v. Missouri, etc., R. Co.*, 83 Mo. 624; *Fry v. Gillaspie*, 61 Ind. 478. *Compare* *Waddell v. Judson*, 12 La. Ann. 13; *Butts v. Francis*, 4 Conn. 424.

10. *Shotwell v. Hamblin*, 23 Miss. 156; s. c., 55 Am. Dec. 83; *Planter's Bank v.*

by the officer to recover the goods levied upon,¹ or for his fees,² and in actions between third parties, where the matters stated in the return are collaterally in issue, it is usually *prima facie* evidence of such matters.³

XI. Satisfaction and Discharge. — A levy upon personal property apparently sufficient in value to satisfy the execution, operates as a *prima facie* satisfaction thereof.⁴ And the debtor may be discharged thereby, although the officer wastes the property levied on.⁵ So, at common law, holding the body of the debtor under a *ca. sa.* is a satisfaction, and the arrest is *prima facie* evidence thereof.⁶ In a majority of the States a levy on land does not operate, even *prima facie*, as a satisfaction;⁷ but in Indiana, if the land be of sufficient value, it raises a presumption of satisfaction.⁸ Where, however, without fault of the plaintiff, the levy fails to produce actual satisfaction, the presumption of satisfaction may ordinarily be rebutted by proof of such fact.⁹ So there is no satisfaction by the levy where personal property is abandoned or restored to the debtor's possession at his request,¹⁰ nor when taken from the creditor by legal process.¹¹ Payment by the debtor to the proper officer holding the execution is a satisfaction.¹²

Walker, 3 Smed. & M. (Miss.) 421; Walters v. Moore, 90 N. Car. 41; Butler v. State, 20 Ind. 169.

1. Stanton v. Hodges, 6 Vt. 64; Cornell v. Cook, 7 Cow. (N. Y.) 310; Earl v. Camp, 16 Wend. (N. Y.) 562.

2. Herman on Executions, 395, § 243.

3. Field v. U. S., 9 Pet. (U. S.) 183; Allen v. Gray, 11 Conn. 95; Bott v. Burnell, 9 Mass. 96; Henderson v. Evans, 14 Barb. (N. Y.) 15; Kendall v. White, 3 Me. 245.

4. Doe ex dem. Shelton v. Hamilton, 23 Miss. 496; s. c., 57 Am. Dec. 149; Johnson v. Tuttle, 9 N. J. Eq. 365; Hannes v. Bonnell, 23 N. J. L. 159; Newsom v. McLendon, 6 Ga. 392; Trenary v. Cheever, 48 Ill. 28; Bennett v. McGrade, 15 Minn. 132; Wade v. Watt, 41 Miss. 248; Folsom v. Chelsey, 2 N. H. 432; Green v. Burke, 23 Wend. (N. Y.) 490; McElwee v. Jeffries, 7 S. Car. 228; U. S. v. Dashiell, 3 Wall. (U. S.) 688, 699; Lindley v. Kelly, 42 Ind. 294, 307; Chandler v. Higgins, 109 Ill. 602; State v. Six, 80 Mo. 61.

By some courts it is said to operate *per se* as a satisfaction. Barber v. Reynolds, 44 Cal. 520; Martin v. Carter, 27 Ill. 294; Hunt v. Breeding, 12 S. & R. (Pa.) 37; s. c., 14 Am. Dec. 665; Blair v. Caldwell, 3 Mo. 353; Campbell v. Carey, 5 Harr. (Del.) 427; Harmon v. State ex rel. Pelton, 82 Ind. 197; Campbell v. Spence, 4 Ala. 543; s. c., 39 Am. Dec. 301.

5. Campbell v. Spence, 4 Ala. 543; s. c., 39 Am. Dec. 301; Harmon v. State, 82 Ind. 197; State ex rel. Wilber v. Saylers,

19 Ind. 432; Reynolds v. Ingersoll, 11 Smed. & M. (Miss.) 249; s. c., 49 Am. Dec. 57.

6. Stover v. Duren, 3 Strobb. (S. Car.) 448; s. c., 51 Am. Dec. 634.

7. Peale v. Bolton, 24 Miss. 630; Shepard v. Rowe, 14 Wend. (N. Y.) 260; Robinson v. Brown, 82 Ill. 279; White v. Graves, 15 Tex. 183; Overley v. Hart, 62 Ga. 493; Fry v. Branch Bank, 16 Ala. 282; Trappall v. Richardson, 13 Ark. 543; s. c., 58 Am. Dec. 338; Freeman on Executions, § 282.

8. Lindley v. Kelly, 42 Ind. 294; McCabe v. Goodwine, 65 Ind. 288.

9. Newsom v. McLendon, 6 Ga. 392; Mody v. Harper, 28 Miss. 615; Candle v. Dare, 7 Ark. 46; Cravens v. Wilson, 35 Tex. 52; Trenary v. Cheever, 48 Ill. 28; People v. Hopson, 1 Denio (N. Y.), 574; Tate v. Anderson, 9 Mass. 92; Wade v. Watt, 41 Miss. 248; Chandler v. Higgins, 109 Ill. 602.

10. Peck v. Tiffany, 2 N. Y. 451; Cornelius v. Burford, 28 Tex. 202; Willis v. Jelineck, 27 Minn. 18; Churchill v. Warren, 2 N. H. 298; s. c., 9 Am. Dec. 73; Allen v. Johnson, 4 J. J. Marsh. (Ky.) 235; Williams v. Boyce, 11 Mo. 537; Dilling v. Foster, 21 S. C. 334; Conway v. Wilson (N. J.), 11 Atl. Rep. 734.

11. Alexander v. Polk, 39 Miss. 737; Bean v. Seyfert, 12 Phila. (Pa.) 224; Banks v. Evans, 10 Smed. & M. (Miss.) 35; s. c., 48 Am. Dec. 734.

12. Beard v. Millikan, 68 Ind. 231; Morris v. Lake, 9 Smed. & M. (Miss.) 521; s. c., 48 Am. Dec. 724.

Surrender of the property under a forthcoming or delivery bond is held in some of the cases to constitute a satisfaction,¹ but in other cases the contrary is held.²

But the officer can accept payment only in money. *Crutchfield v. Robins*, 5 Humph. (Tenn.) 15; s. c., 42 Am. Dec. 417, and note 419. The holders of a mortgage *fi. fa.* against the estate of a deceased debtor had certain transactions with a legal firm of which the administrator was a member, and gave to them an order on the attorney of the plaintiffs in *fi. fa.* to pay over the proceeds thereof to them. The administrator caused the *fi. fa.* to be satisfied, and charged the amount to the estate. *Held*, that this was a payment of the *fi. fa.* If an order on plaintiff's attorney be given for the proceeds in his hands, and the person receiving the order gets such proceeds, it is a payment of the *fi. fa.*, and the land is no longer subject thereto. *Wilkinson & Wilson v. Thigpen*, 71 Ga. 497.

A complaint to enjoin the collection of a judgment, and obtain an entry of satisfaction, averred the levy, in 1875, of an execution, issued on the judgment, upon goods of value exceeding the judgment; that the sheriff ever after kept possession of the goods until the last were sold in 1878; that the goods were lawfully appraised at a sum greater than the judgment; that divers other *feri facias* writs were issued from time to time, and levied on such of the goods as remained unsold; that other unauthorized appraisements were made, and the whole of the goods finally sold without regard to appraisement in 1878, so that there was left a considerable balance of the judgment apparently unpaid. The answer did not controvert the irregular issue of writs of *feri facias*, when writs of *vendi*. should have issued, nor that unauthorized appraisements were made; but it averred that none of the goods were sold for less than two-thirds of the appraised value, and that, in fact, they were all sold for more than their actual value. *Held*, that the answer was good. *Burr v. Mendenhall*, 80 Ind. 49.

Where a judgment creditor causes real estate to be sold upon execution issued for a part only of his judgment, he cannot afterwards sell the debtor's right to redeem, upon another execution issued upon the remainder of his judgment; and it makes no difference that the second execution is issued under a decree in another action, where it appears that the *debt* in both actions is the same, and that the execution plaintiff is entitled to but one satisfaction. *Hardin v. White*, 63 Iowa, 633.

A. and B., who were partners, entered into an agreement in writing to settle their partnership affairs. Two judgment notes

had been signed by the firm, and delivered to C. & Co. The agreement stipulated that B. should pay one of said judgments, or procure a release therefor; and it was further agreed that said "A. shall have the right to pay, or cause to be paid, in the event of said B. failing to do so, as herein provided, both of C. & Co.'s judgments; and in that event said A. shall have the right . . . to collect from said B. the amount of the debt, interest, and costs of one of said judgments." B. failed to pay either of said judgments, and A. was compelled to pay both of them. He then issued an attachment execution upon one of the judgments, in the name of the legal plaintiff, to his own use, for the purpose of collecting the amount thereof from B. The court set aside the attachment, on the ground that the payment of the judgment by A. was a satisfaction of the debt, and that he had no power to keep the judgment on foot, and issue an execution against his partner and co-defendant. *Held*, that this was error. *Brown & Sons v. Black*, 96 Pa. St. 482.

1. *Wright v. Yell*, 13 Ark. 503; s. c., 58 Am. Dec. 336; *Harrison v. Wilson*, 2 A. K. Marsh. (Ky.) 547; *Davis v. Hoopes*, 33 Miss. 173; *Hoyt v. Hudson*, 12 Johns. (N. Y.) 207; *Taylor v. Hulme*, 4 W. & S. (Pa.) 407; *Young v. Reed*, 3 Verg. (Tenn.) 296.

2. *Cole v. Robertson*, 6 Tex. 356; *Hopkins v. Land*, 4 Ala. 427, 431; *Curtis v. Root*, 28 Ill. 367; *Rhea v. Preston*, 75 Va. 757.

Distribution of Proceeds. — If a debtor makes a payment to his creditor holding several demands against him, and does not, at the time of payment, direct how it shall be applied, the creditor may appropriate it to any of the demands; but where a creditor, holding several *fi. fas.* and an open account against his debtor, received a payment from him, and failed for seven years to appropriate it to any of the demands, other creditors having in the mean time obtained judgment, and a fund arising from the sale of the debtor's property being in court for distribution, the creditor will not be allowed to appropriate the payment to the open account and take the fund in court by reason of his oldest *fi. fa.* The law will appropriate the amount paid to the oldest *fi. fa.* held by the creditor. *Gunn v. Carter*, 69 Ga. 646.

The contest being between the holders of two *fi. fas.* over a fund alleged to be in the hands of the sheriff, and terminating in a judgment ordering the fund to be paid

to one of them, that the other excepted and gave a *supersedeas* bond conditioned to pay "the eventual condemnation money" would not render him and his surety liable, after an affirmation, to a judgment on the bond for the amount of the fund in dispute. Their liability would not extend beyond costs and damages in case of a frivolous exception.

That on the motion to enter judgment on the bond it appeared that the other contestant was also the purchaser at the sheriff's sale, and had never paid the amount of his bid, would not alter the case. Such fact formed no part of the rule to distribute; the Code provides a remedy against defaulting purchasers at sheriffs' sales. *Oliver v. State*, 66 Ga. 602.

Where a judgment is rendered against N., and afterward N. sells and conveys a portion of his real estate to R. in fee, subject however to the lien of the judgment; and afterward such real estate is sold at judicial sale to satisfy such judgment; and after the satisfaction of such judgment, a surplus fund still remains in the hands of the officer, it being a portion of the proceeds of such sale, and the officer delivers this surplus fund to the clerk of the district court,—*held*, that R., as the representative of N., is entitled to such surplus fund. *Butler v. Craig*, 29 Kan. 265.

When two or more writs of executions against the same debtor are delivered to an officer on the same day, no preference can be given to either; if a sufficient sum of money be not made to satisfy all the executions, the amount shall be distributed to the several creditors in proportion to the amount of their respective demands. This rule applies to executions issued by justices of the peace. *State v. Hunger*, 17 Neb. 216.

The owner of land incumbered by a judgment lien may recover from the judgment creditor an excess over the balance due on the judgment, received by the latter on a sale under a *vendi.*; notwithstanding the judgment creditor was the purchaser, and the owner was not a party to the judgment. *Sparrow v. Hosack*, 40 Ohio St. 253.

Money raised by sale of the debtor's land under execution, must be applied to that execution (and others in his hands) in preference to the claim of a prior judgment creditor whose execution was not in the hands of the sheriff at the time of the sale; but the lien of such prior judgment on the land is not thereby affected. *Worsley v. Bryan*, 86 N. C. 343.

Where land is sold at sheriff's sale, only those creditors whose claims were liens on the land at the time of the sale, and the owner of the land, can participate in the distribution of the proceeds.

Land of H. was sold as the property of

K., who was the vendor of H. The proceeds were awarded to a judgment creditor of H., and the balance to H. as owner. R., a judgment creditor of K., whose judgment had not been revived, as against H., claimed the fund on the ground that H. had made a prior promise to K. to pay R.'s judgment, and that he had by a parol contract with K. assumed the debt and promised to pay it. *Held*, that R. had no standing to participate in the distribution. *Rudy's Appeal*, 94 Pa. St. 338.

A., a creditor of B., reduced his claim to judgment constituting a lien on B.'s land. Subsequently B., in fraud of C., another creditor, conveyed the land to D. C. reduced his claim to judgment, and duly revived it from time to time. A. also revived his judgment, but neglected to notify D., the terre-tenant. C. subsequently issued execution upon his judgment, and sold B.'s interest in the land. *Held*, that the conveyance by B. to D., was not in fraud of A., and that A.'s neglect to revive his judgment as against the terre-tenant did not entitle him to participate in the proceeds of the sheriff's sale. *Haak's Appeal*, 100 Pa. St. 59.

The rights of those claiming to participate in the proceeds of a sheriff's sale are to be determined by their status as shown by the record at the time of the sale. All liens then on the land, except first mortgages and other fixed liens, are divested by the sale, and the lien-holders are turned over to the proceeds. No lien upon the fund, and consequently no right to participate in its distribution, can ordinarily be acquired afterwards. *Indiana Co. Bank's Appeal*, 95 Pa. St. 500.

When two or more pieces of real estate are sold in parcels for distinct sums, upon a junior judgment not reached in the distribution, the costs incurred upon the execution process alone should be divided by the number of separate pieces of realty sold, and the resulting amount charged to the fund realized from each. *Bryant's Appeal*, 104 Pa. St. 372.

A. advanced money to B., and took his judgment therefor. The money was advanced on the faith of an entry of satisfaction of a judgment which was prior to A.'s judgment. Upon the application of the equitable assignee of the prior judgment, the court struck off the entry of satisfaction. In the distribution of the proceeds of a sheriff's sale of B.'s real estate, *held*, that A. was entitled to be paid in full before the prior judgment could participate in the distribution. *Harner's Appeal*, 94 Pa. St. 489.

Where the fund produced by a sheriff's sale of real estate is insufficient to pay liens prior to the judgment under which the sale is made, the plaintiff in the writ issued

XII. Supplementary Proceedings. — 1. *Nature and Purpose.* — In many, if not all, of the code States there are statutes providing for proceedings supplementary to, or in aid of, execution, designed to accomplish more speedily or effectively the object of a creditors' bill under the old equity practice, by compelling a discovery by the execution-defendant of his assets, or by reaching them in the hands of others.¹

These statutes differ slightly in detail, but are similar in their scope and general features. They form a substitute for the creditors' bill;² and Indiana seems to be the only State authorizing a trial of questions of law and fact in such cases, as in ordinary civil actions.³ In some of the States they are held to be proceedings in the original action,⁴ while in others they are treated as independent or separate proceedings.⁵

2. *Parties.* — Any creditor who is entitled to collect a judgment, or some portion thereof, in his own name, may institute the proceeding.⁶ But other creditors cannot, in Indiana at least, be made parties upon their own motion to share *pro rata* in the dis-

thereon is entitled to receive out of the fund the costs incurred in order to effect the sale only, and not those incurred prior to his execution. *Bryant's Appeal*, 104 Pa. St. 372.

Lands being offered for sale under a senior execution, the debtor, judgment creditors, and mortgagees (the mortgage being an intermediate lien) agreed that the proceeds of the sale should be applied to these liens in the order of their date, and it was so announced at the sale; such application was consented to, all parties being present, and an order was obtained from the circuit judge at chambers so directing. *Held*, that the sheriff properly applied the proceeds of sale, after paying the senior execution, to the mortgage, and the balance being thereby rendered insufficient to satisfy the junior executions, that they were unsatisfied. *Trimmier v. Win-smith*, 23 S. C. 449.

It seems that money realized by the sheriff from a sale of defendant's property under an execution issued upon a judgment for the purchase-money should be applied to the oldest liens in the sheriff's office, although under them, by reason of the homestead laws, such property could not have been levied and sold. *Laurence v. Grambling*, 19 S. C. 461.

The principal text-books upon the subject of Executions, are *Herman on Executions*, *Freeman on Executions*, *Thompson on Homesteads and Exemptions*, and *Smyth on Homesteads and Exemptions*. *Freeman on Judgments*, *Freeman on Void Judicial Sales*, *Crocker on Sheriffs*, and *Murfree on Sheriffs*, may also be consulted.

1. Such statutes exist in Arkansas, Cali-

fornia, Colorado, Indiana, Iowa, Kentucky, Maine, Missouri, Minnesota, Nebraska, New Jersey, New York, Ohio, Oregon, South Carolina, and Wisconsin.

2. *Coates v. Wilkes*, 92 N. Car. 376; *Pacific Bank v. Robinson*, 57 Cal. 520; *Clark v. Berghenthal*, 52 Wis. 103; *Figg v. Snook*, 9 Ind. 202; *Smith v. Weeks*, 60 Wis. 94.

They are not exclusive. *Williams v. Sexton*, 19 Wis. 42. See also *Gates v. Young*, 17 Weekly Dig. (N. Y.) 551. *Compare Allen v. Fitch*, 5 Colo. 226. And see *Freeman on Executions*, § 394.

3. *Riddle & Bullard's Supplementary Proceedings* (3d ed.), 21. But see *Rev. St. Ind. 1881*, sects. 815, 816, 822; 2 *Work's Ind. Pl. & Pr.* § 1203. Under the present statute the proceeding would seem to be a summary one in Indiana.

4. *McCaskill v. Lancashire*, 83 N. Car. 393; *Kennesaw Mills Co. v. Walker*, 19 S. Car. 204; *Barker v. Dayton*, 28 Wis. 367; *Claffin v. McDermott*, 12 Fed. Rep. 375.

5. *Pounds v. Chatham*, 96 Ind. 342, 346; *Wait on Fraud. Convey.* § 61.

In *Indiana*, therefore, the proceeding may be commenced in a different court from that in which judgment was rendered or execution issued. *Cooke v. Ross*, 25 Ind. 157. See also, as to United States courts, *Ex parte Boyd*, 105 U. S. 647. *Compare Thompkins v. Purcell*, 12 Hun (N. Y.), 662. And see *Freeman on Executions*, § 397.

6. *Riddle & Bullard's Sup. Pro.* 35; *Freeman on Executions*, § 398. An attorney holding a lien may collect it in this way. *Russell v. Summerville*, 10 Abb. N. Cas. (N. Y.) 395; *Pulver v. Harris*, 52 N. Y. 73.

tribution.¹ The execution defendant is a necessary party in all cases.² A public corporation or body politic cannot be made a defendant to answer as to its indebtedness to the execution defendant;³ but, as a general rule, third persons, supposed to have assets of the debtor in their possession, may be made parties defendant with him, and required to answer as to such assets, or as to their indebtedness to him.⁴

3. *Pleading and Practice.* — Formal pleadings are not generally contemplated in such proceedings.⁵ "The procedure is usually by order, made upon proof of the return of an execution unsatisfied, requiring the debtor to appear in person in court to be examined concerning his property."⁶ Where property or assets of

1. *Butler v. Jaffrey*, 12 Ind. 504. *Compare Munds v. Cassidey* (N. Car.), 4 S. E. Rep. 353.

2. *Chandler v. Caldwell*, 17 Ind. 256; *Folsom v. Clark*, 48 Ind. 414. Not so in Colorado and New York. *Hextor v. Clifford*, 5 Colo. 168; *Gibson v. Haggerty*, 37 N. Y. 555.

3. *Wallace v. Lawyer*, 54 Ind. 501; s. c., 23 Am. Rep. 661. See also *Hightower v. Slaton*, 54 Ga. 108; s. c., 21 Am. Rep. 273; *McClellan v. Young*, 54 Ga. 399; s. c., 21 Am. Rep. 276; *City of Chicago v. Hasely*, 25 Ill. 595; *Roeller v. Ames*, 33 Minn. 132. *Compare Pendleton v. Perkins*, 49 Mo. 565; *City of Newark v. Funk*, 15 Ohio St. 462.

4. *Riddle & Bullard's Sup. Pro.* (3d ed.) 39, 47; *Freeman on Executions*, § 410.

5. *Wallace v. Lawyer*, 91 Ind. 28; *Dillman v. Dillman*, 90 Ind. 585.

6. *Wait on Fraud. Convey.* 92, § 61; *Bartlett v. McNeil*, 49 How. Pr. (N. Y.) 55; affirmed in 60 N. Y. 53. See also *Seyfort v. Edison*, 47 N. J. 428.

A return of *nulla bona* is generally held a sufficient basis for the proceedings. *Sherman v. Corville*, 73 Ind. 126; *Cushman v. Gephart*, 97 Ind. 46; *Flint v. Webb*, 25 Minn. 263; *Jones v. Porter*, 6 How. (N. Y.) 286.

But in Wisconsin it is held that the return must also affirmatively show that the officer made reasonable and diligent search. *In re Remington*, 7 Wis. 643. See also *State Bank of Ohio v. Oliver*, 1 Disney (Ohio), 159; *Hinsdale v. Sinclair*, 83 N. Car. 338.

Where proceedings are instituted before the return of execution, it must usually be shown that judgment has been recovered and execution issued, and that the debtor who resides in the county has property which he unjustly refuses to apply toward the satisfaction of the judgment. *Mason v. Weston*, 29 Ind. 561; *Banty v. Buckles*, 68 Ind. 49; *Riddle & Bullard's Sup. Pro.* (3d ed.) 106. See also *Menkin v. Pape*, 65 How. (N. Y.) 453; *First Nat. Bank v. Wilson*, 13 Hun (N. Y.), 232; *Hall v. Kellogg*, 12 N. Y. 331.

In *Indiana* these facts must be shown by affidavit. *Briscoe v. Askey*, 12 Ind. 666. The entire practice, however, depends upon the local statutes, which, it seems, should be strictly complied with. *Riddle & Bullard's Sup. Pro.* 105; *Hartman v. Olivia*, 5 Cal. 500. See also *Freeman on Executions*, §§ 400, 404.

The following authorities show the general nature of the proceeding, and something of the practice in a number of the States.

In *California*, proceedings supplementary to execution are intended to take the place of a creditor's bill, and in such proceedings it has been held proper to order the execution debtor to make an assignment to a receiver of his patent right to an invention. *Pacific Bank v. Robinson*, 57 Cal. 520; s. c., 40 Am. Rep. 120. See also generally *McCullough v. Clark*, 41 Cal. 298; *Hathaway v. Brady*, 26 Cal. 581.

In *Indiana* the practice under the present statute is not intricate. "The affidavit makes the plaintiff's case. The defendant has a general denial by force of the statute. The question to be determined is, whether the allegations of the affidavit are true or not, and this must be determined upon the oral examination and testimony of parties and witnesses." *Work's Ind. Pl. & Pr.* 257, § 1203. The sufficiency of the affidavit may, however, first be tested by demurrer, or motion to strike out or dismiss. *Rev. St. Ind.* 1881, § 822; *Pouder v. Tate*, 111 Ind. 148.

The proceeding is so far a "civil action" as to entitle a party to a change of venue or judge, in a proper case. *Burkett v. Holman*, 104 Ind. 6.

The right given by sect. 819, *Rev. St.* 1881, to require a third person who is indebted to the judgment debtor to appear and answer, while the execution remains in the hands of the officer, must be exercised in connection with sect. 816; and, as against the judgment debtor, the creditor must show in his affidavit or verified com-

the debtor are thus disclosed, "a receiver is appointed who, upon qualifying, becomes vested with the debtor's assets and equitable

plaint that the debtor unjustly refuses to apply the money sought to be reached to the satisfaction of the judgment. *Mitchell v. Bray*, 106 Ind. 265.

Where proceedings supplementary to execution are instituted by filing two separate affidavits stating causes therefor, and each closing with a separate prayer for relief, their sufficiency should be considered separately. *Abell v. Riddle*, 75 Ind. 345.

When, in proceedings supplementary, the complaint shows that upon the plaintiff's affidavit the clerk issued execution upon the transcript of a judgment rendered by a justice of the peace, it will be presumed that before the filing of the transcript an execution had been issued to a constable, and returned *nulla bona*. *Fowler v. Griffin*, 83 Ind. 297.

The judgment plaintiff, in a proceeding supplementary to execution, is not concluded by the testimony of the judgment debtor, given upon his examination; but he may examine other witnesses. *Bipus v. Deer*, 106 Ind. 135.

In *Michigan* a bill in aid of execution must be filed before the sale of the premises thereon. *Cranston v. Smith*, 47 Mich. 189.

Where a bill in aid of execution is filed to reach land which has been previously conveyed without fraudulent intent, the grantee's right must be determined by the original nature of the transactions, and cannot be made to depend on later dealings with other lands which are not involved in the litigation. *First Nat. Bank v. McAllister*, 46 Mich. 397.

In a supplementary proceeding under sects. 816, 819, Rev. St. 1881, the affidavit and proof must show, in order to reach funds of the debtor in the hands of another, that the debtor has property which he unjustly refuses to apply in satisfaction of the judgment. *Earl v. Skiles*, 93 Ind. 178.

A bill in aid of execution to set aside a deed as fraudulent as against the complainant, should show how it is so, and is too general if it merely alleges the fraud. But if the defendant does not object on the hearing, the defect is not open to objection on appeal. *Rhead v. Hounson*, 46 Mich. 243.

A bill in aid of execution was filed against land which had been sold in contemplation of the issue of the execution. The land included a homestead, and the purchaser redeemed it from a mortgage against the judgment debtor. *Held*, that the redemption raised an equity in the purchaser's favor; but, as it benefited the homestead as well as the rest, the amount of land

subject to sale on execution was what was left after setting apart the homestead parcel and so much besides as was found on appraisal of the whole to be worth that proportion of the redemption money which was paid to release the homestead. Interest on the mortgage was not allowed where it did not clearly appear that the purchaser had paid it, and it was shown that he had had the use of the land long enough to counterbalance his claim therefor. *Rhead v. Hounson*, 46 Mich. 243.

In *Missouri*, upon examination of an execution debtor, under Revised Statutes, sect. 2410 *et seq.*, to discover his assets, he can be required to disclose, not only that he has property, but where and in whose possession it is, and the terms upon which it is held. The debtor cannot discontinue such examination by disclosing only so much property as he deems sufficient to satisfy the judgment. And the provisions of the statute authorizing such examination of an execution debtor are not repugnant to the clause of the Constitution inhibiting imprisonment for debt. *State v. Barclay*, 86 Mo. 55.

In *North Carolina*, supplemental proceedings are substituted in the present system of procedure for the method of granting relief in equity in the former system, in favor of a judgment creditor, after the remedy at law by execution had been exhausted. They are incidental to the original action; and to accomplish their purpose of reaching the judgment debtor's property of every kind that cannot for any cause be reached by execution, injunctions may be granted, and receivers appointed in them as occasion may require. *Coates v. Wilkes*, 92 N. C. 376.

Where, in proceeding supplementary to execution, it is alleged that a third person has property of the judgment debtor's, it is error to restrain such third person from disposing of such property until the receiver can bring an action for its recovery, unless such person has been made a party, in some way, to the proceeding. Proceedings supplementary to execution are in effect an equitable execution. So, where, after such proceedings had been instituted, the judgment became barred by the lapse of time, *held*, that this did not operate to bar the proceedings. *Coates v. Wilkes*, 94 N. C. 174.

The appointment of a receiver in these proceedings does not rest solely in the discretion of the judge, and his action in appointing or refusing to appoint is subject to review by the Supreme Court. It is not necessary, in order to warrant the ap-

interests, without conveyance or assignment,¹ though he does not get title to exempt property."²

pointment of a receiver in such proceedings, that it should appear with perfect certainty that the debtor has property which ought to be applied to the payment of the judgment. It is sufficient if there is reasonable ground to believe that he has such property. The general principles of law applicable to receivers apply to those appointed in supplemental proceedings. It is the duty of such receiver to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons. *Coates v. Wilkes*, 92 N. C. 376.

In supplemental proceedings the evidence should all be taken down in writing.

Where the judgment debtor is examined, the creditor does not make him his witness, but may cross-examine and contradict him. The provision in the Code, allowing the examination of parties to actions, takes the place of the bill for discovery in the former system of procedure. *Coates v. Wilkes*, 92 N. C. 376.

In *South Carolina*, a circuit judge at his chambers in a county other than that in which the judgment debtor resides, may pass the final order in supplementary proceedings, the examination of the defendant having been had in his own county before a referee appointed for that purpose. An order in supplementary proceedings for the surrender of a sum of money ascertained to be in the defendant's hands, and for imprisonment in case of refusal, is not a "punishment without trial by jury," nor "imprisonment for debt," within the meaning of those terms as used in the Constitution. But in an order for the delivery of money by the judgment debtor to the receiver, it is error to incorporate a direction for imprisonment in case of refusal: the application for attachment should be made after the time fixed for the execution of the order, and on rule to show cause.

The order to pay over should direct a payment of so much only as is necessary to satisfy the debts proven, and the costs of the proceeding. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104.

A judgment recovered against an administrator on final settlement of the estate of his intestate, is a judgment against him individually, and upon such judgment supplementary proceedings may be had. *Rhodes v. Casey*, 20 S. C. 491.

Where a judgment is rendered against an administrator in favor of several distributees, two of whom institute supplementary proceedings against him, it would

seem that the property thus reached should go to the moving creditors alone; but this is a matter of no interest to the debtor. *Rhodes v. Casey*, 20 S. C. 491.

In supplementary proceedings separately taken by two judgment creditors against the same defendant, an order was passed in each case, referring it to a referee to take the examination, the referee in both cases being the same person. *Held*, that the two cases might be heard together. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104.

In *Wisconsin*, proceedings supplementary to execution are a substitute for a creditor's bill in equity; and an order under sect. 3031 R. S. must require the debtor to answer concerning the specific property which he unjustly refuses to apply, etc., and cannot require a general discovery. *Smith v. Weeks*, 60 Wis. 94.

The order and scope of the examination of a judgment debtor in a proceeding supplementary to execution are largely in the discretion of the judge or commissioner before whom such examination is being taken; and the Supreme Court will not interfere and limit such examination unless it clearly appears that there has been an abuse of discretion in requiring the debtor to answer improper interrogatories. *Heilbronner v. Levy*, 64 Wis. 636.

Arrest.—In some of the States the debtor may also be arrested where it is shown, by affidavit or otherwise, that he is leaving the State, or concealing himself, and that he has property which he unjustly refuses to apply on the judgment, with intent to defraud his creditors, or the like. *Rev. St. Ind.* 1881, § 817; 2 *Work's Ind. Pl. & Pr.* § 1206; *Nebraska Code*, § 535; *Maxwell's Pl. & Pr.* 620. And the order may often be enforced by arrest as for contempt in failing to obey it. *Freeman on Executions*, § 421.

1. *Porter v. Williams*, 9 N. Y. 142; *Cooney v. Cooney*, 65 Barb. (N. Y.) 524; *Bostwick v. Menck*, 40 N. Y. 383.

2. *Wait on Fraud. Convey.* 92, § 61; citing *Cooney v. Cooney*, 65 Barb. (N. Y.) 525; *Hudson v. Plets*, 11 Paige (N. Y.), 180; *Andrews v. Rowan*, 28 How. Pr. (N. Y.) 126. See also *Tillotson v. Wolcott*, 48 N. Y. 190; *Hancock v. Sears*, 93 N. Y. 79.

Where a receiver is appointed in a proceeding supplemental to execution, he becomes the legal assignee of the property specified in the order, subject to the direction of the court in which the judgment was rendered, and the judgment debtor is forbidden to interfere in any manner with

4. *What may be reached.* — Supplementary proceedings are intended to reach all property that ought, in justice, to be applied in satisfaction of the execution; and it may be stated as a general rule, that in those States where such proceedings are provided for, "any species of property, not exempt by law, can be reached thereby, either by a summary order, or through a receiver."¹

its collection or control. *Turner v. Holden*, 94 N. C. 70.

If the supplementary proceeding against a judgment debtor after execution returned unsatisfied, which is provided by statute as a substitute for the creditor's bill (R. S. sects. 3030, *et seq.*), is commenced before a county judge or court commissioner, the latter has power, in a proper case, to appoint a receiver; and the circuit court in which the judgment was rendered cannot by order transfer the supplementary proceeding pending before such officer, or the papers therein, to that court, and proceed thereupon to appoint a receiver; but its power is limited to a review of the orders of the inferior officer. *Clark v. Bergenthal*, 52 Wis. 103.

On the hearing of the referee's report in supplementary proceedings, the judge may appoint a receiver without specific notice having been given that such appointment would then be applied for; and a receiver having been appointed, this court will assume, in the absence of all testimony upon the point, that the circuit judge did his duty, and ascertained that no other supplementary proceedings were then pending against this defendant. *Dilling v. Foster*, 21 S. Car. 334.

The court has no power, without personal notice to the judgment debtor, to make an order directing a receiver appointed in supplementary proceedings to apply any portion of the funds coming to his hands in payment of judgments other than that under which he was appointed, or those to which his receivership has been extended, as prescribed by the Code of Civil Procedure (§§ 2464, *et seq.*). It is his duty to restore to the judgment debtor any surplus after the satisfaction of these judgments, and such an order made without notice to the debtor is not binding upon him, and would be no protection to the receiver. *Goddard v. Stiles*, 90 N. Y. 199.

Judgment was obtained against two defendants, one of whom resided in another county. Upon execution returned unsatisfied in the county of the judgment, the judge granted an order in supplementary proceedings for the appearance in that court of the absent debtor, who appeared without objection and was examined, and an order was then passed appointing a receiver. *Held*, that such debtor had thereby waived his right to an examination in his

own county, nor could he afterwards object to the appointment of the receiver upon the ground that no execution had there issued. And in action by this receiver to recover from a third person property belonging to the judgment debtor, such defendant cannot interpose these irregularities as an objection to the appointment of the receiver. Although the application for the appointment of receiver was made under subdivision 1 of section 312 of the Code, the order might be granted under subdivision 2 of that section, if the facts appearing justified it, and under subdivision 2 the issue of execution is not a prerequisite to such appointment. *Green v. Bookhart*, 19 S. Car. 466.

After paying the debts, the receiver should return to the debtor all property remaining in his hands, but it was not error of law to omit such a direction from the order appointing the receiver. A receiver should not be authorized to sell choses in action, unless they represent "desperate debts." Rule 70 of the Circuit Court. *Dilling v. Foster*, 21 S. Car. 334.

As to when a Receiver should be appointed, see, generally, *Dickinson v. Onderdonk*, 18 Hun (N. Y.), 479; *Rodman v. Henry*, 17 N. Y. 482; *Ormes v. Baker*, 17 N. Y. Weekly Dig. 104; *Todd v. Crooke*, 4 Sandf. S. Ct. (N. Y.) 694; *De Bemer v. Drew*, 57 Barb. (N. Y.) 438; *Colton v. Bigelow*, 12 Vr. (41 N. J. L.) 266; *Flint v. Webb*, 25 Minn. 263.

When not, see *Bunn v. Daly*, 24 Hun (N. Y.), 526; *Second Ward Bank v. Upmann*, 12 Wis. 499.

A receiver appointed under the act respecting executions (Rev. p. 393) filed a bill to set aside as fraudulent certain assignments of mortgages made by the execution debtor to his son and daughter after he had incurred complainant's debt, but before the judgment and execution thereon had been obtained. The bill also prayed a discovery as to the debtor's property, and as to his insolvency. *Held*, that the receiver could maintain the suit to set aside the assignments, if fraudulent, and to discover the debtor's property which is concealed, and that the inquiry as to his insolvency is pertinent to the question of fraud in his conduct. *Bergen v. Littell*, 41 N. J. Eq. 18.

1. *Riddle & Bullard's Sup. Pro.* 281; *In re Melburn*, 59 Wis. 24; *Drought v. Cur-*

EXECUTIVE DEPARTMENTS, EXECUTORS, ETC.

5. *Lien*. — A lien attaches in favor of the plaintiff upon the property of the judgment debtor sought to be reached at the time of the service of the first order of the court commencing the proceedings, and requiring the defendant to appear and answer.¹

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tiss, 8 How. (N. Y.) 56; *Baker v. State*, 109 Ind. 47. What is subject to execution in ordinary cases, and what is exempt therefrom, has already been shown. See *ante*, under "Property Subject to Execution," and "Property exempt from Execution." But the following cases may also be consulted as showing the far-reaching power of supplementary proceedings.

Where the judgment debtor is a widow, her right of dower may be reached, even before it is admeasured or assigned. *Payue v. Becker*, 83 N. Y. 153; *Tompkins v. Fonda*, 4 Paige (N. Y.), 448. Money in the hands of a commissioner in partition, arising from the sale of the real estate. *Sherman v. Carvill*, 73 Ind. 123.

A legacy in the hands of an executor. *Bacon v. Bonham*, 27 N. J. 209.

The interest of the judgment debtor in a contract for the purchase of real estate. *Figg v. Snook*, 9 Ind. 202; *Ellsworth v. Cuyler*, 9 Paige (N. Y.), 418.

The interest of the debtor in an estate as next of kin. — *McArthur v. Hoysradt*, 11 Paige (N. Y.), 495, — or his distributive share in the hands of an administrator. *Rand v. Rand*, 78 N. Car. 12.

Choses in action of many kinds. *Butler v. Jaffray*, 12 Ind. 504; *Gillet v. Fairchild*, 4 Denio (N. Y.), 80; *Crouch v. Gridley*, 6 Hill (N. Y.), 250; *McKee v. Judd*, 12 N. Y. 622; *Fowler v. Griffin*, 83 Ind. 297.

For other illustrations, see *Stevenson v. Stevenson*, 34 Hun (N. Y.), 157; *Crosby v. Stephan*, 32 Hun (N. Y.), 478; *Manning v. Monaghan*, 23 N. Y. 539; *Powell v. Waldron*, 89 N. Y. 328; *Gillett v. Bates*, 86 N. Y. 87; *Barker v. Dayton*, 28 Wis. 367.

1. *Cooke v. Ross*, 22 Ind. 157; *Hoadley v. Caywood*, 40 Ind. 239; *Lynch v. Johnson*, 48 N. Y. 27; *Edmonston v. McCloud*, 16 N. Y. 545; *Brown v. Nichols*, 42 N. Y. 26. See also *Coleman v. Roff*, 45 N. J. L. 7; *Union Bank v. Union Bank*, 6 Ohio St. 254.

But the rights of *bona fide* purchasers without notice, either actual or constructive, will be protected. *Riddle & Bullard's Sup. Pro.* 420; *Lynch v. Johnson*, 46 Barb. (N. Y.) 56; *Hoadley v. Caywood*, 40 Ind. 239.

Priorities are the reward of diligence, and usually attend upon liens in order of time; so that he who first commences proceedings, and prosecutes them with due diligence, usually has priority of lien. *Riddle & Bul. Sup. Pro.* 434; *Edmeston v. Lyde*, 1 Paige (N. Y.), 637; *Myrick v. Selden*, 36 Barb. (N. Y.) 15; *Hall v. Kellogg*, 12 N. Y. 332. But he may lose his priority by laches. *Bridgman v. McKissick*, 15 Iowa, 260; *Edmeston v. Lyde*, 1 Paige (N. Y.), 637.

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I. Definition.—An executor is he to whom another man commits by will the execution of his last will and testament. His power is founded upon the special confidence and actual appointment of the deceased. An administrator is an officer of the court of probate, appointed in accordance with the governing statute, to administer intestate estates, and such testate estates as have no competent executor designated by the testator. Whether the estate is testate or intestate, the title of the administrator rests solely upon the grant of letters of administration.¹

II. Origin of Office.—The office of executor is coeval with the right of devise, and appears to have existed and continued from the earliest period of the common law. The right to administer upon the goods of intestates originally belonged to the king by prerogative as *parens patriæ*, was subsequently delegated to the lord of the fee, and ultimately passed to the bishop or ordinary of the diocese upon trust to distribute the residue, after deducting the *partas rationabiles*, in charitable or pious uses. The ecclesiastics being accountable only to their spiritual superiors, took to themselves the whole residue, without paying the deceased's debts or other charges.² Hence were enacted (1) the Statute of Westm.

1. 2 Bl. Com. 494, 503, 504, 506; Schoul. Exrs. and Admrs. § 2.

Formerly it was said that the naming or appointment of an executor was the "foundation, the substance, the head, and indeed the true formal cause of the testament, without which a will is no proper testament, and by which only the will was made a testament." Swinb. pt. 1, § 3, pl. 19; Godolphin, pl. 1, c. 1, § 2; Plowd. 185; Coms. Exrs. (7th Eng. ed.) 7.

At the present time, however, it is well settled that while there can be no executor without a will, a will properly executed may be perfectly valid without naming an executor at all, or notwithstanding the executor named is disqualified from acting. In all such cases the probate court will appoint an administrator with the will annexed. The duties of an administrator *cum testamento annexo durante absentia*, or *minore sitate*, differ little from those of an executor. Schoul. Exrs. and Admrs. § 3.

Assimilation of Functions.—The modern tendency, both in England and the United States, is to assimilate the functions of these two classes of legal representatives, and to recognize the departure of their functions only so far as the distinction between settling testate and intestate estates fairly produces it, to require both executors and administrators to take out letters and qualify in the same special court, rendering their accounts upon a like plan, and subject to a like supervision; and to rule that an executor by the appointment of the testator obtains a marked

advantage in securing the judicial appointment in preference to others, and, in many instances, in not being required to furnish security, but not so as to override or dispense with the judicial discretion altogether. Schoul. Exrs. and Admrs., § 2.

2. Wms. Exrs. 1, 7.

Although from the time of the Norman conquest until the passing of the statute of wills (32-34 Hen. 8), an English subject had no testamentary power over land, yet the power of making a will of personal property appears to have existed and continued from the earliest period of the common law. Wms. Exrs. (7th Eng. ed.) 1.

"The English law of devise was imported into this country by our ancestors, and incorporated into our colonial jurisprudence, under such modifications in some instances as were deemed expedient. Lands may be devised by will in all the United States, and statute regulations on the subject are substantially the same, and they have been taken from the English statutes of 32 Hen. 8 and 29 Charles 2." 4 Kent. 504, 505.

For history of the law of devise see 4 Kent. 501-503. See also "Wills," Am. & Eng. Encyclo. of Law. As to Louisiana, see 4 Kent. 505, note (a) 519, 520.

Pars Rationabilis.—"By the common law as it stood according to Glanvil, in the reign of Henry II., a man's goods were to be divided into three equal parts: one of which went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without

II. (declaratory of the common law), which required the ordinary to pay the debts of the intestate to the extent that assets had come to his hands; (2) the statute 31 Edw. III. c. 2 which obliged the ordinary to delegate the administration to the nearest and most lawful friends of the deceased, instead of administering, as before, in person and without accountabilities.¹ The temporal administrator thus appointed paid the debts as required by the Statute of Westm. II., but not unfrequently retained the surplus for his own benefit, instead of making distribution among the next of kin. This abuse was corrected by the Statute of Distributions, 22 and 23 Cas. II. c. 10, which enacted that the administrator of an intestate estate should no longer administer for his personal benefit.²

• **III. Necessity of Grant of Letters Testamentary or of Administration. — In what Cases Letters may be dispensed with.** — See PROBATE and LETTERS OF ADMINISTRATION.

IV. Who is capable of becoming Executor or Administrator. — Rule as to Married Women, Non-Residents, Infants, Criminals, Dissolute Persons, Insolvents, Corporations, Co-partnership, Cestuis que Trustent. —

1. *Who is capable of becoming Executor.* — All persons are capable of being made executors who are capable of making wills, — the king,³

a wife he might then dispose of one moiety, and the other moiety went to his children; and so *et converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue the whole was at his own disposal. The shares of the wife and children were called reasonable parts, and the writ *de rationabili parte bonorum* was given to recover them." There has been much controversy whether this was the general law of the land, or only such as obtained in particular places by custom. Wms. Exrs. (7th Am. ed.) 2, 3.

1. Schoul. Exrs. and Admr., § 7; 2 Bl. Com. 495, 496; Wms. Exrs. (6th Am. ed.) 466; Snelling's Case, 5 Rep. 82 b.

2. Wms. Exrs. (7th Eng. ed.) 1484.

Distinction between Administrator or Executor and the Hæres of the Roman Law. —

From the two preceding sections it is evident that the present conception of the office of administrator is due to the Statutes of Westm. II., 31 Edw. III., c. 2, 22, 23, Car. II. c. 10; and that under those acts the functions of the office are assimilated to those of an executor. Both executors and administrators are trustees, with special functions; differing from other trustees in that their office looks to the winding up of the estate and speedy determination of the trust; differing from one another only in so far as the course of administration is affected by the provisions of the will, and the personal confidence presumed to be reposed in the executor by the testator. In the ab-

sence of special circumstances hereafter to be considered, neither executors nor administrators can be held liable to creditors or legatees out of their own estate. The Roman *hæres*, on the other hand, was not a trustee; his title was absolute, and upon him devolved the personal duty of discharging legal debts and encumbrances of the deceased, whether the property obtained from the estate proved sufficient or not. Moreover, if the deceased left a will, he was bound to satisfy the special testamentary provisions in addition, so far as the property descending to him might suffice. While the liability of the heir was greatly modified by the changes introduced by Justinian, who allowed the heir to avoid his personal liability by filing an inventory, it must be borne in mind that "administration" and "administrators" are terms not used either by the ancient or modern civilians, and that "title by succession" is a very different thing from that representative or trust title to personality which one takes as executor or administrator. This fact is of importance in estimating the value of Louisiana cases. Schoul. Exrs. and Admr. § 6; citing Hunter's Roman Law, 567, 568, 574-576; Colquhoun's Rom. Civ. Law, § 1413.

3. Wms. Exrs. (7th Eng. ed.) 228; 2 Bl. Com. 503.

It has also been said that every person may be executor, saving such as are expressly forbidden. Swinb. pt. 5, sect. 1, pl. 1.

a corporation sole,¹ an alien,² or non-resident.³ Whether or not a corporation aggregate can be executor has long been doubted.⁴ Modern English practice, however, recognizes the right of a corporation so named to appoint persons styled "syndics" to receive administration with the will annexed, who are sworn like other administrators.⁵ A co-partnership may be executor in the sense that the individual members composing it, and not the firm collectively, are entitled to the trust.⁶ A married woman may be executrix with her husband's consent:⁷ he cannot compel her to accept the trust;⁸ yet, if without his privity she actually

1. Wms. Exrs. (7th Eng. ed.) 228.

2. Caroon's Case, Cro. Cas. 8; 2 Wms. Exrs. 229-231 n; Co. Litt. 129 b.

The statute of New York, which provides that an executor shall not be an alien non-resident of the State, excludes only those who are both not citizens of the United States and non-residents of New York. *McGregor v. McGregor*, 3 Abb. (N. Y.) App. Dec. 86.

The law differs somewhat in the several States, and most of the cases relate to the right of non-residents to letters of administration. See 2.

3. "In the United States, the right of non-residents to become executors or administrators is regulated by local legislation not by any means uniform; but the better policy favors such rights, provided that adequate security be furnished for protecting the interests of parties dwelling within the State, so that, at all events, the non-resident may designate the party resident who is to represent him; while as between citizens merely of different States a rigid rule of exclusion seems especially harsh." Schoul. Exrs. and Admrs. § 32. See *Hammond v. Wood* (R. I.), 10 Atl. Rep. 623; 4 New Eng. Rep. 913; *Martin v. Duke*, 5 Redf. (N. Y.) 597.

As to refusing to take the oath of allegiance, see *Vogel v. Vogel*, 20 La. Ann. 181.

In Louisiana, non-resident executors are qualified by giving the bond alone; the oath need not be repeated. *Bodenheimer's Succession*, 35 La. Ann. 1034.

4. 1 Wms. Exrs. (7th Eng. ed.) 228, 229. The principal objections to their accepting the trust are, that they cannot prove a will, or take the oath for the due execution of the office; that they cannot be feoffees in trust to others' use; that they are a body framed for a special purpose. 1 Bl. Com. 447; Com. Dig. Admrs. B. 2; Wentw. Off. Ex. c. 1, p. 39 (4th ed.).

There are, however, authorities in favor of the capability. Swinb. pt. 5, sect. 9; Godolph. pt. 2, c. 1, sect. 1; 1 Roll. Abr. tit. Executors T. 7. Citing 12 E. 4, 9 b.

The general tendency of authority in

the United States is to exclude corporations unless the right to act as executors or administrators has been expressly conferred by the charter. *Georgetown College v. Browne*, 34 Md. 450; *Thompson's Est.* 33 Barb. (N. Y.) 334; *Porter v. Trall*, 30 N. J. Eq. 106.

5. Wms. Exrs. (6th Am. ed.) 269.

The grant will not be made until the appointment of syndics is before the court. *Goods of Dork*, 1 Sev. & Tr. (Eng.) 516.

6. *In re Fernie*, 6 Notes of Cas. (Eng.) 657; 1 Wms. Exrs. (7th Eng. ed.) 229.

7. Wms. Exrs. (6th Am. ed.) 272; *Stewart's App.* 56 Me. 300; *English v. McNair*, 34 Ala. 40; *Taylor v. Allen*, 2 Ark. (Eng.) 212.

The canon law, like the civil, made no distinction between women married and unmarried, and hence permitted a wife to take upon her the probate without the consent of her husband. But by the common law, the wife cannot take upon her the office without the consent of her husband. Wms. Exrs. (6th Am. ed.) 272.

Therefore, it seems that where a wife was cited in the spiritual court to take upon her the office of executrix, and the husband appeared and refused his consent, if afterwards they proceeded to compel her, a prohibition would be granted. Wms. Exrs. (6th Am. ed.) 272; 3 Bac. Abr. 9 (ed. by Gwillim), tit. Executors A; 8 Wentw. Off. Ex. 377, 14th ed. See also, *Foublanque's note* (h) to *Treat. on Eq. bk. 1, c. 2, sect. 6*.

It has been held that after the husband's objection, where the wife is named sole executrix, the grant may be made to her attorney. *Clarke v. Clarke*, L. R. 6 P. D. 103.

As to changes produced by modern legislation, see 2, notes.

8. Wms. Exrs. (6th Am. ed.) 273.

"But if the husband, though the will be not proved, administers as in the wife's right, though against her consent, she will thereby be so far bound and concluded, as that during his life she cannot decline or avoid the executorship; but after his death she may refuse, if she has never intermed-

administers, and an action subsequently be brought against them, they will be estopped from pleading that she was not executrix.¹ Infancy is no disqualification, even though the infant be *en ventre sa mère*; ² yet modern statutes disqualify an infant who has been appointed executor from exercising the functions of his office during minority; and letters *cum testamento annexo* are issued to some fit person until he attains his majority.³ In the absence of express legislation, the character of the person designated for the office by the testator is not before the court, and immorality is no ground for a refusal to qualify.⁴ Upon the same principle, poverty, or even insolvency, is no objection; and a peremptory *mandamus* lay to the judge of the prerogative court on refusal to issue letters.⁵ In consequence of these decisions, courts of equity

dled with the administration. A distinction is taken between the case of a woman made executrix during her coverture, and the case of a *femme sole* made executrix, who takes husband after the testator's death, before either proving or refusing to prove the will; for in the latter case, she marrying before her determination does upon the matter deliver it into her husband's hands; and if he administers, this is such an acceptance as will bind her, and she can never afterwards refuse." Wms. Exrs. (6th Am. ed.) 273, 274, and cases cited.

1. Wms. Exrs. (6th Am. ed.) 273; citing Godolph, pt. 2, c. 10, sect. 4; Wentw. Ex. 377, 378 (14th ed.); 3 Bac. Abr. 9 (edition by Gwillim), tit. Executors A. 8; Russell's Case, 5 Co. 27 b, n. B. Compare Wentw. Off. Ex. 378 (14th ed.); English v. McNair, 34 Ala. 40.

2. Wms. Exrs. (6th Am. ed.) 271; Piggett's Case, 5 Co. 29 a; 2 Bl. Com. 503.

3. 38 Geo. III. c. 87, § 6. Previous to this statute an infant seventeen years old might act as executor in England. Schoul. Exrs. and Admsrs. § 32, n. "This act only applies in case of an infant being sole executor; for if there are several executors, and one of them is of full age, no administration *durante minore aetate* ought to be granted, for he who is of full age may execute the will. It has been said that if it be a woman infant who is made executrix, and if her husband be of age and assent, it is as if she were of age, and her husband shall have execution of the will. And in Prince's Case (5 Co. 29 b), it was resolved by the justices of the common pleas, that if administration be committed during the minority of the executrix, and she takes husband of full age, then the administration shall cease. But this has since been doubted." Wms. Exrs. (7th Eng. ed.) 232. It has been the practice of the spiritual court to grant administration to the guardian whom that court has a right to appoint for the personal estate. In the

Goods of Weir, 2 Sw. & Tr. 451; Brotherhood v. Harris, 2 Cas. Temp. Lee, 131. See also "Special and Limited Administration." As to American statutes see Christopher Cox, 25 Miss. 162; Schoul. Dom. Rel. § 416.

4. Berry v. Hamilton, 12 B. Mon. (Ky.) 193. But compare Plaisance Est. Myrick (Cal.), 117.

The character of the appointee is solely within the discretion of the testator. Schoul. Exrs. Admsrs. § 33. In Kentucky an executor who offers solvent sureties can not be denied the right to qualify, unless he be legally or mentally incapable. Holbrook v. Head, 6 S. W. Rep. (Ky.) 592.

The mere fact that a testamentary trustee has been removed from office for irreconcilable hostility to co-trustees is no objection to his still exercising the functions of executor. Deraismes v. Dunham, 22 Hun (N. Y.), 86.

In N. Y. Code, § 2638, requiring "circumstances" of an executor to afford "adequate security to the creditors or persons interested in the estate, for the due administration of the estate," the word does not refer exclusively to pecuniary responsibility, but also to thrift, integrity, good repute, business capacity, and stability of character. Martin v. Duke, 5 Redf. (N. Y.) 597.

A will made in 1855, to which codicils were made in 1856 and 1875, named A. as executor. The testator died in 1883. It appeared that prior to 1880 A. had become addicted to the use of intoxicating liquors, and that after that time he indulged in prolonged sprees and wasted his property, having reduced himself to insolvency. Held, that letters should not be issued to him. Re Cady, 36 Hun (N. Y.), 122. See 2, notes as to statutory regulation.

5. Wms. Exrs. (5th Am. ed.) 275; Hathornwaite v. Russell, 2 Ark. 127; 3 P. Wms. 336, note to Slanning v. Style.

The court of Q. B. granted a *prohibition* in Hill v. Mills, 1 Salk. 36; s. c., Skin. 299,

assumed jurisdiction, and will now restrain an insolvent or bankrupt executor, and appoint a receiver, or compel him, like any other trustee, to give security.¹ Insane persons, whether idiots or lunatics, are incapable of becoming executors; and if, after having entered upon the duties of his office, the executor becomes insane, he may be removed by the court and administration committed to another.²

2. *Who may be Administrator.* — All persons incapable of being executors are also disqualified for the office of administrator.³ If the next of kin be a minor, administration should be granted to another during his minority.⁴ A married woman may administer, with the consent of her husband; and if he joins in the land, his consent is sufficiently shown.⁵ A *cestui que trust* should be

where, after probate of the will, the executor became bankrupt, and suit was commenced in the ecclesiastical court to revoke probate and grant administration to another. See also *Grubb v. Hamilton*, 2 Demarest (N. Y.), 414; *Ballard v. Charlesworth*, 1 Demarest (N. Y.), 501.

Where a will names the wife of the testator as his executrix, she will not be prevented from acting on the ground of her pecuniary circumstances, unless strong reasons are shown for disregarding the will of the testator in such particular. *Hovey v. McLean*, 1 Demarest (N. Y.), 396.

1. Wms. Exrs. (6th Am. ed.) 276; *Rex v. Simpson*, 1 W. Bl. 458; *Utterson v. Mair*, 2 Ves. Jr. 95; *Scott v. Beecher*, 346. *Ex parte Ellis*, 1 Ark. 101; *Elmendorf v. Lansing*, 4 John. Ch. 562.

So, too, where an executrix marries a man bankrupt or insolvent, who would otherwise have mismanaged the trust in her right. *Stairley v. Rabe*, 1 McMull. (S. C.) Ch. 22.

The court will not grant a receiver upon the single ground that the executor is in mean circumstances. *Hathornwaite v. Russell*, 2 Ark. 126. Nor will poverty alone be good ground to demand security. *Mandeville v. Mandeville*, 8 Paige (N. Y.), 475; *Bowman v. Wooton*, 8 B. Mon. (Ky.) 67; *Wilkins v. Harriss*, 1 Wins. Eq. (N. Car.) 41; *Holmes v. Cock*, 2 Barb. Ch. (N. Y.) 426; *Colegrove v. Horton*, 11 Paige (N. Y.), 261; *Fairbairn v. Fisher*, 4 Jones Eq. (N. Car.) 390.

Where it is shown that the decedent made his choice, knowing that the person in question was bankrupt or insolvent, the court will not interfere. It should not, however, be readily inferred that the testator expected the person to be bankrupt or insolvent when the time came to assume the functions of the office from the mere circumstances of execution. *Langley v. Hawkes*, 5 Madd. 46.

Under what circumstances courts of

equity will appoint receivers, see § XVI. When executor to give bonds, see § XI. 1.

2. Bac. Abr. Executors A. 5; 1 Salk. 36; 1 Wms. Exrs. 238; Schoul. Exrs. and Admsr. § 33; *Evans v. Tyler*, 2 Robertson, 128.

Outlaws, or persons attainted, may sue as executors because they sue *in autre droit*, and if after testator's death the executor was convicted of felony, the office being *in autre droit* was not forfeited by the conviction. Wms. Exrs. (6th Am. ed.) 275.

3. Wms. Exrs. (6th Am. ed.) 515.

By the common law attainder of treason or other lawful disability, outlawry, and bankruptcy were disqualifications for the office of administrator, though not for that of executor. For the statute (31 Edw. 3, c. 2) commands the ordinary to grant administration to the lawful friends of the deceased. Wms. Exrs. (6th Am. ed.) 515. It is no objection to the grant of letters of administration to the daughter of an intestate in Maryland that she is a nun in a convent in the District of Columbia. *Smith v. Young*, 5 Gill. (Md.) 197.

4. The appointment of an infant may be revoked by the probate judge by whom it was made; but such administrator will be compelled to account for moneys received by him after becoming of age. *Carow v. Mowatt*, 2 Edw. Ch. (N. Y.) 57. See also *Collins v. Spears*, 1 Miss. 310.

The incapacity of the infant remains, although there is no other next of kin capable of administering. *Rea v. Englesing*, 56 Miss. 463. That the minor is married does not qualify her. *Brisco v. Tarkington*, 5 La Ann. 692. As to appointment of a married infant executrix, see 1, n.

5. *Gyger's Est.*, 65 Pa. St. 311. See also *English v. McNair*, 34 Ala. 40.

1 Wms. Exrs. (6th Am. ed.) 517. Compare *Airhart v. Murphy*, 32 Tex. 131; *Cassidy v. Jackson*, 45 Miss. 397. In the absence of proof to the contrary, it has

appointed rather than his trustee.¹ Non-residence, while an objection to the appointment, is not an absolute disqualification; yet as between next of kin, some resident and others non-resident, residents, if otherwise suitable, are entitled to preference.² Aliens, unless excluded by statute, may accept the appointment.³ A

been said that administration taken by the wife during coverture must be presumed to have been with the consent of her husband. *Adair v. Shaw*, 1 Sch. & Lef. (Eng.) 266.

In England, New York, and Massachusetts, and some other States, married women may administer as if they were sole. New York Laws, 1867, c. 782, § 2; Mass. Stat. 1874, c. 184, § 4. As to Maryland law, see *Binnerman v. Weaver*, 8 Md. 517; *Stewart, in re*, 56 Me. 300; *Lindsay v. Lindsay*, 1 Desau, 150. As to character of these and analogous statutes in other States, see *Schoul. Hus. and Wife*, Appendix. See also *Re Curser*, 2 Hun (N. Y.), 579; s. c., 89 N. Y. 401.

Administration granted to a wife living apart from her husband under a deed of separation. *Goods of Hardinge*, 2 Curt. (Eng.) 640. See *Goods of Maychell*, 26 W. R. (Eng.) 439.

Effect of Marriage of Femme Sole Executrix. — While the property of the estate does not vest in the husband personally at common law, if the wife be executrix or administratrix, the husband may administer in her right. *Pistole v. Street*, 5 Port. (Ala.) 64; *Ferguson v. Collins*, 8 Ark. 241; *Keister v. Howe*, 3 Ind. 268; *Woodruffe v. Cox*, 2 Brad. (N. Y.) 153; *Dardier v. Chapman*, L. R. 11 Ch. D. 442; *Schoul. Hus. and Wife*, § 163.

He is said by the marriage to become co-administrator with her, and as such liable for any act of administration afterwards performed by her. *Dowty v. Hall*, 3 So. Rep. (Ala.) 315.

Some codes allow a woman appointed administratrix while sole to resign on marriage. *Rambo v. Wyatt*, 32 Ala. 363.

In some States letters *de bonis non* issue upon the marriage of a *femme sole executrix* precisely as on her death. Mass. Gen. Stat. c. 101, § 1.

In Nevada, although the marriage of an administratrix extinguishes her authority as such, it does not deprive her of the right to retain possession of the property until the appointment of her successor, or until otherwise ordered by the court. *Buckley v. Buckley*, 16 Nev. 180.

Death of Femme Covert Executrix or Administratrix. — If the wife be executrix or administratrix, and dies intestate, letters *de bonis non* issue and parties in interest have the right to be considered for the new appointment rather than the surviving husband. *Schoul. Exrs. and Admsrs.* § 106;

3 Salk. 21; Wms. Exrs. 416; *Goods of Ridson*, L. R. 1 P. & D. 637. See "Special and Limited Administration," Am. & Eng. Enc. of Law.

1. *Thompson's Est.* 33 Barb. (N. Y.) 334.

2. *Wickwire v. Chapman*, 15 Barb. (N. Y.) 302; *Pickering v. Pendexter*, 46 N. H. 69; *Chicago, etc., R. Co. v. Gould*, 64 Iowa, 343. Under ordinary circumstances it has been said that the court should prefer a resident who is not a distributee, to a non-resident who is. *Bridgeman v. Bridgeman*, 3 So. East. Rep. (W. Va.) 580. Where in fact several persons are of the same degree of kindred to the deceased, one living out of the State is not entitled to administer as of right; but in case those living in the State are unsuitable upon stronger grounds, the non-resident may, at the discretion of the court, be appointed upon the non-residence terms. *Pickering v. Pendexter*, 46 N. H. 69.

Some States permit the non-resident next of kin to serve upon duly qualifying with resident sureties. *Ex parte Barker*, 2 Leigh, 719; *Jones v. Jones*, 12 Rich. 623; *Robie's Est. Myrick* (Cal.), 226. In Massachusetts such an administrator must further appoint a resident attorney who shall accept service on his behalf, and in general represent him. 2 Mass. Pub. Stats. c. 32, § 8.

Often a resident nominee of a non-resident kinsman may be appointed where no suitable kinsman within the State desires to administer. *Smith v. Munroe*, 1 Ired. (N. Car.) 343.

The English practice recognizes the grant to attorney of next of kin residing abroad. Wms. Exrs. (7th Eng. ed.) 437; *Goods of Burck*, 2 Sw. & Tr. (Eng.) 139.

Cal. Code, § 1369, which declares incompetent as administrator one not a resident of the State, is still in force. *Beech's Est.* 63 Cal. 458.

The non-residence of a widow, however, does not affect her right to preference in nominating an administrator as against the public administrator. *Robie's Est. Myrick* (Cal.), 222. Compare *Colter's Est. Myrick* (Cal.), 179.

In Illinois, New York, and Pennsylvania a non-resident cannot be appointed administrator. *Child v. Gratiot*, 41 Ill. 357; *Radford v. Radford*, 5 Dana (Ky.), 156; *Sarkie's App.* 2 Pa. St. 157.

3. Wms. Exrs. (7th Eng. ed.) 449; N. Y. Rev. Stat. 75, § 32, exclude aliens.

corporation cannot lawfully be appointed, unless the power to administer has been expressly conferred by its charter.¹ Insane persons are incompetent to serve.²

1. Thompson's Est. 33 Barb. (N. Y.) 334. See 1, *ante*.

2. McGooch v. McGooch, 4 Mass. 348. See New York statute construed in McMahon v. Harrison, 6 N. Y. 443.

Illegitimacy. — The peculiar rules of distribution as defined by statute must be applied for determining the right to administer whether the case be one of an illegitimate decedent or of an illegitimate relationship to a decedent. Schoul. Exrs. and Admsrs. § 108; Wms. Exrs. 433; Schoul. Dorn. Rel. § 276; *Re Goodman*, L. R. 17 Ch. D. 266; *Ferrie v. Public Administrator*, 3 Bradf. (N. Y.) 249; *Public Administrator v. Hughes*, 11 Bradf. (N. Y.) 125; *Pico's Est.* 56 Cal. 513.

Special Statutory Disqualifications for the Office of Executor or Administrator. — Grounds for Removal. — In addition to incapacities for the office of executor or administrator, already considered, many States have special statutory disqualifications.

In New York "no letters of administration shall be granted to a person convicted of an infamous crime, nor to any one incapable by law of making a contract, nor to a person not a citizen of the United States, unless such person resides within the State, nor to any one who is under twenty-one years of age, nor to any person who shall be adjudged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence, or want of understanding." 2 R. S. 75, § 32. The corresponding clause, in reference to executors, reads, "by reason of drunkenness, dishonesty, improvidence, or want of understanding." 2 R. S. 69, § 3; 3 Throop's Rev. Stat. p. 289.

Under these acts it has been held that the conviction of an "infamous crime," which disqualifies one from being administrator, must be a conviction within the State; and hence one who has been convicted of larceny in another State is not disqualified, nor because of such conviction are letters to be refused upon the ground of "improvidence." *O'Brien's Est.* 3 Demarest (N. Y.), 156; 67 How. (N. Y.) Fr. 503.

The disqualification on the ground of "improvidence" refers to such habits of mind and body as render a man generally, and under all ordinary circumstances, unfit to serve. *Emerson v. Bowers*, 14 N. Y. 449; *Shilton's Case*, 1 Tuck. (N. Y.) 73; *Coope v. Lowerre*, 1 Barb. Ch. (N. Y.) 45.

No degree of legal or moral guilt or delinquency, unless followed by conviction of an infamous crime, is sufficient to exclude

a person from the administration; but where the surrogate has a discretion to select between two or more individuals of the same class, he may properly take into consideration moral fitness in making such selection. *Coope v. Lowerre*, 1 Barb. Ch. (N. Y.) 45. See also *Shilton's Case*, 1 Tuck. (N. Y.) 73. And compare *Berry v. Hamilton*, 12 B. Mon. (Ky.) 193. See also 1, n., *ante*.

A professional gambler is *prima facie* disqualified by reason of improvidence. *McMahon v. Harrison*, 6 N. Y. 443.

Old age and physical infirmity and ailments do not of themselves disqualify one from being appointed administrator. *Re Berrien*, 3 Demarest (N. Y.), 263.

Drunkenness to amount to a disqualification under the statute must be such as would warrant the overseers of the poor in designating the applicant as an habitual drunkard, under the Revised Statutes, or a jury in adjudging him so to be. *Elmer v. Kechele*, 1 Redf. (N. Y.) 472; *Kechele's Case*, 1 Tuck. (N. Y. Sur.) 73. Under the provisions of the Revised Statutes the surrogate has no discretion to exclude a person declared by the statute to be entitled to preference, or named by will executor, except for some of the causes specified in the statute. *Coope v. Lowerre*, 1 Barb. Ch. (N. Y.) 45; *McGregor v. McGregor*, 33 How. Pr. (N. Y.) 456.

In Pennsylvania a person duly declared by inquisition to be an habitual drunkard may be removed by the orphans' court on proper application under Act of 1832, § 26, P. D. 216, ed. of 1853, but unless so removed, he is not deprived of the office by the mere finding of the inquisition, and a power to sell is well executed. *Sill v. McKnight*, 7 Watts & Ser. (Pa.) 244. As to grounds of removal in Pennsylvania see *Webb v. Dietrich*, 7 Watts & S. (Pa.) 394, 402; *Cohen's App.* 175; *Taggart's Petition*, 1 Ashm. (Pa.) 321.

In Massachusetts the probate court has a discretionary power to remove executors or refuse to issue letters to persons insane or otherwise incapable of discharging the trust or "evidently unsuitable." Mass. Pub. Stats. c. 31, § 14.

Under this act one may be removed or refused letters as "evidently unsuitable," on the ground that his individual claims on the estate would conflict with his duties as executor. *Thayer v. Homer*, 11 Met. 104, 110. Under a similar statute in Wisconsin a feeling of hostility between executors and parties interested may justify removal. *Pike's Est.* 45 Wis. 391.

V. Appointment of Executors. — 1. *By what Words Executors may be appointed.* — *Appointment by Codicil.* — *Coadjutors and Overseers.*

— An executor must be appointed primarily by the will; mere institution by codicil is insufficient, though where the original will made the primary appointment, executors may be added or substituted by codicil.¹ The appointment may be either by express words or by necessary implication; but in either case it is essential that there should be some means indicated in the instrument of identifying the person designated.² The mere fact that the

An executor ought not to be removed after having once been appointed and qualified as "evidently unsuitable," simply on proof that he was unsuitable at the time of appointment, without proof that he continues to be so. *Drake v. Green*, 10 Allen (Mass.), 124; *Hussey v. Coffin*, 1 Allen (Mass.), 354.

Under the North Carolina statute a person who cannot write nor read writing, and has no experience in keeping accounts, or in settling estates, is *held* to be incompetent to act as administrator. *Stephenson v. Stephenson*, 4 Jones (N. Car.), 472.

In Pennsylvania illiteracy and poverty do not deprive a widow of her statutory right to letters of administration on her husband's estate. *Bower's App.* 100 Pa. St. 434; s. c., 45 Am. Rep. 387. Inability to read or write is no disqualification to the widow in Maryland. *Nusz v. Grove*, 27 Md. 391. See also *Gregg v. Wilson*, 24 Jud. 227; *Est. of Pacheco*, 23 Ala. 476.

Under Code Civil Proc. Cal. § 1365, the last clause providing that if the decedent was a member of a partnership at the time of his decease "the surviving partner must in no case be appointed administrator of his estate" one who had formerly been a partner, and between whom and the deceased there were unsettled partnership matters, is ineligible. *In re Garber's Est.* (Cal.) 16 Pac. Rep. 233.

Appointment of Probate Judge or Judge's Son. — Where a testator appoints the probate judge of his county executor, and the probate of the will is had in the adjoining county, and the probate judge of the latter county acquires jurisdiction to hear and determine all proceedings necessary for the administration of the estate. *Gregory v. Ellis*, 82 N. Car. 225. See *Ayres v. Weed*, 16 Conn. 291.

The judge of probate would be an unsuitable person to receive the appointment from his own hands, or in his own jurisdiction: probably such appointment would be void as against public policy. The decree of a judge of probate appointing a special administrator on the estate of a person deceased, in which such judge is interested, is void. *Sigourney v. Sibley*, 22 Pick. (Mass.) 507.

In Alabama, when the judge is a creditor of the estate, he becomes incompetent not only as to his own claim, but as to the entire administration, and jurisdiction is assumed by the register. *Thornton Admr. v. Moore*, 61 Ala. 348. The appointment of his own son by a judge of probate, while manifestly improper, is not void. *Plowman v. Henderson*, 59 Ala. 559.

1. Swinb. pt. 1, § 5, pl. 5; 1 Wms. Exrs. (7th Eng. ed.) 8. See *ante*, § I., n.

As to naming A. sole executor in the will, and B. sole executor in the codicil, see *Wetmore v. Parker*, 7 Lans. N. Y. 121; *Goods of Woods*, L. R. 1 P. & D. 556. See also "Codicils," Am. & Eng. Enc. of Laws, as to construction of will and codicil when inconsistent.

2. *Goods of Blackwell*, 25 W. R. (Eng.) 305; Wms. Exrs. (7th Eng. ed.) 239, 243; *Schoul. Exrs. and Adms.* §§ 38, 39. As to admissibility of extrinsic evidence to identify the person designated, see *Baylis v. Attorney General*, 2 Ark. (Eng.) 239; *Clayton v. Lord Nugent*, 13 M. & W. (Eq.) 207; *Goods of DeRosay*, 25 W. R. (Eng.) 352; *Wigram Evid.* (4th ed.) 98. As to admissibility to explain a *latent* ambiguity, *Goods of Brake*, 29 W. R. (Eng.) 744.

Appointment by Implication. — "An executor may be appointed by necessary implication; as where the testator says, 'I will that A. B. be my executor, if C. D. will not;' in this case C. D. may be admitted if he please to the executorship. (*Godolph. pt. 2. c. 5, § 3; Swinb. pt. 4, § 4, pl. 6*). So where the testator gave a legacy to A. B., and several legacies to other persons, among the rest to his daughter-in-law, C. D., immediately after which legacies followed these words, 'but should the within-named C. D. be not living, I do constitute and appoint A. B. my whole and sole executrix of this my last will and testament, and give her the residue,' probate was decreed to C. D. as executrix according to the tenor of the will (*Naylor v. Stainsby*, 2 Cas. temp. Lee, 54); or if the testator, supposing his child, his brother, or his kinsman to be dead, say in his will, 'Forasmuch as my child is dead, I make A. B. my executor' in this case, if the person whom the testator thought dead be

language of the appointment is that of request or suggestion, rather than mandate, does not affect its validity.¹ Care must be taken to distinguish the appointment of a coadjutor or overseer from that of an executor.²

2. *Executor according to the Tenor.*—*Testamentary Trustees.*—Although no executor be expressly nominated in the will by the word *executor*, yet if either expressly or by necessary implication the testator commit to any person or persons the rights, powers, and duties which collectively constitute the office of executor, the person or persons designated will thereby be as effectively appointed executors as though they had been expressly named as such. The executor so constituted is called executor *according to the tenor*, and his functions in no wise differ from those of an executor expressly appointed.³ Thus if the testator bequeaths his goods to A. B., to "pay his debts and otherwise to dispose of at his pleasure,"⁴ or commit his goods to the "administration,"⁵ or "disposition,"⁶ of A. B., or directs him to pay debts, funeral charges, probate expenses,⁷ or makes a gift to him of all his prop-

alive, he shall be executor (Godolph. pt. 2, c. 5, § 3; Swinb. pt. 4, § 4, pl. 6). So where a man made his last will, and did will thereby that none should have any dealings with his goods until his son came to the age of eighteen years, except J. S.; by this J. S. was held to be made executor during the minority of his son (Brightman v. Keighley, Cro. Eliz. 43)." Wms. Exrs. (7th Eng. ed. 243). See also Godolphin, pt. 3, c. 3, § 5.

But where the words of the will were, "I leave the sum of one sovereign each to the executor and witness of my will for their trouble to see that every thing is justly divided," and no executor was named; and beneath the signature, opposite the names of the attesting witnesses were the words "executors and witnesses," the court held that there was no appointment of executors. Goods of Woods, L. R. 1 P. & D. 556.

1. Goods of Brown, 25 W. R. (Eng.) 431.

2. Wms. Exrs. (7th Eng. ed.) 244; Schoul. Exrs. and Admrs. § 39.

Where the object of the testator is to appoint some one to assist the executor in his trust, conferring upon him like powers and liabilities, such person is usually by American practice qualified as executor. When the object of the testator appears to be merely to have some one to advise, oversee, or assist the executor in the performance of his duties, without conferring upon him the powers and subjecting him to the liabilities, the appointee is merely a coadjutor. Wms. Exrs. (6th Am. ed.) 284; Schoul. Exrs. and Admrs. § 39.

Thus "if A. be made executor and B.

a coadjutor without more, he is not by this made joint executor with A. But if A. be made executor, and the testator after in his will express that B. shall administer also with him, and in aid of him, here B. is executor as well as A., and may prove the will alone as executor if A. refuse. Where an infant was made an executor, and A. and B. *overseers*, with this condition, that they should have the rule and disposition of his goods, and payment and receipt of debts unto the full age of the infant, by this they were held to be executors in the mean time. Where the testator named his wife his executrix, and A. B. to assist her, it was held that A. B. might be executor according to the tenor." Wms. Exrs. (6th Am. ed.) 284 citing Bro. Executors, pl. 73; Went. Off. Ex. 21 (14th ed.); Godolph. pt. 2, c. 2, sect. 4; Powell v. Stratford, cited, 3 Phillim, 118.

The coadjutor has no power to intermeddle or administer otherwise than to counsel, persuade, and advise; if that fail to remedy negligence or abuse in executor, he may complain to the court, and his charges in so doing ought to be allowed out of the estate. Wms. Exrs. (6th Am. ed.) 284.

3. Schoul. Exrs. and Admrs. § 36; Wms. Exrs. (6th Am. ed.) 280.

4. Henfrey v. Henfrey, 4 Moore, P. C. C. (Eng.) 33.

5. Godolph. pt. 2, c. 5, sect. 3; Bro. Executors, pl. 73.

6. Pemberton v. Corey, Cro. Eliz. 164; Godolph. pt. 2, c. 5, sect. 3.

7. In the Goods of Fry, 1 Hagg. (Eng.) 80; In the Goods of Montgomery, 5 Notes of Cas. 02, 101. See In the Goods

erty, to apply the same, "after payment of debts," to the payment of legacies,¹ or merely says that he shall receive the property and pay the legacies.² Care must, however, be taken to distinguish the proper functions of executor from those of a testamentary trustee; and unless power to administer (a general power to receive and pay what is due to and from the estate, as distinguished from a mere power to manage the estate, and pay what is vested in the persons named as trustees to the *cestuis que trust*) be given the persons designated, such persons are constituted testamentary trustees and not executors.³ An executor, according

of Collett, Dea. & Sw. (Eng.) 274; in the Goods of Almosino, 2 Sw. & Tr. 508.

1. Goods of Bell, L. R. 4 P. & D. 85. *In re Manly*, L. R. 1 P. & D. 556. In *Grant v. Leslie*, 3 Phillim. (Eng.) 116. The words "I appoint my nephew residuary legatee, to discharge all lawful demands against my will," were held sufficient to constitute the nephew executor. Where one said on his death-bed to his wife that she should *pay all and take all*, by this she was executrix. *Brightman v. Keighley*, Cro. Eliz. 43. See also *Wentw. Off. Ex.* p. 20 (14th ed.).

2. Goods of Fry, 1 Hagg. 80; 2 Redf. Wills (2d ed.), 62; *Pickering v. Towers*, 2 Cas. temp. Lee, 401.

In such case the persons so named are executors according to the tenor, because they cannot receive and pay the legacies without collecting the effects, and no one can assent to a legacy but he that has the management of the estate, as legacies cannot be paid till after the debts; and he only who has the management of the estate knows whether the assets are sufficient. *Pickering v. Towers*, 2 Cas. temp. Lee (Eng.), 401. See further as to what expressions will constitute one executor according to the tenor. *Hartnett v. Wandell*, 60 N. Y. 346; 350; *Carpenter v. Cameron*, 7 Watts (Pa.) 51; *Grant v. Spanes*, 34 Miss. 494; *Nunn v. Owens*, 2 Strobb. (S. Car.) 101; *Watson v. Mayrant*, 1 Rich. Eq. (S. Car.) 449; *State v. Watson*, 2 Spears (S. Car.), 97; *State v. Rogers*, 1 Houst. (Del.) 569; *Myers v. Daviess*, 10 B. Mon. (Ky.) 394; *Carter v. Carter*, 10 B. Mon. (Ky.) 327; *Wood v. Nelson*, 9 B. Mon. (Ky.) 600. *Ex parte M'Donnell*, 2 Bradf. (N. Y.) 32; In the Goods of Manley, 3 Sw. & Tr. (Eng.) 56; In the Goods of Fraser, L. R. 2 P. & D. 183.

Appointment of Universal Legatee.—Upon a similar course of reasoning it was held, that if the testator said, "I make A. B. lord of all my goods," or "I make my wife lady of all my goods," or "I leave all my goods to A. B.," or "I leave A. B. legatary of all my goods," or "I leave the residue of all my goods to A. B." the

persons designated were thereby constituted executors according to the tenor. Wms. Exrs. (6th Am. ed.) 281, citing *Godolph. pt. 2, c. 5, sect. 3*; *Swinb. pt. 4, sect. 4, pl. 3*. See also *Foxwith v. Tremaine*, Ventr. (Eng.) 102; In the Goods of Adamson, L. R. 3 P. & D. 253; *Androvin v. Poilblanc*, 3 Ark. (Eng.) 301.

It has, however, been held more recently that the proper practice is to grant administration with the will annexed to a universal legatee, but not to decree probate to him according to the tenor. In the Goods of Oliphant, 1 Sw. & Tr. 525.

3. In the Goods of Punchard, L. R. 2 P. & D. 369; *Boddicott v. Dalziel*, 3 Cas. temp. Lee, 294.

So where the whole personal estate was left to a trustee in trust for a special purpose, and no executor was named in the will, it was held that such executor was not entitled to probate according to the tenor. In the Goods of Jones, 2 Sw. & Tr. 155. See also *Ex parte M'Donnell*, 2 Bradf. (N. Y.) 32.

The offices, executor and trustee, are distinct, and the mere fact that they are united in the same person does not destroy the distinction. *Moss v. Bardwell*, 3 Sw. & Tr. 187; *Wheatly v. Badger*, 7 Pa. St. 459.

The administrator *de bonis non cum testamento annexo* of a deceased executor who was also trustee under the will, does not succeed to the rights and duties of the trust. *Knight v. Loomis*, 30 Me. 204. See also *Simpson v. Cook*, 24 Minn. 180.

If, however, the rights and duties imposed upon the persons designated are those of executors, they will be so considered, although called *trustees* by the testator. *Myers v. Daviess*, 10 B. Mon. (Ky.) 394; *Hunter v. Bryson*, 5 Gill & J. (Md.) 483.

Where the duties imposed by the will upon the trustees are inconsistent with those imposed by law upon the administrator with the will annexed, the clause in the will imposing such duties is inoperative and void. *Drury v. Natick*, 10 Allen (Mass.), 174.

"If a testator were to appoint no ex-

to the tenor, may be admitted to probate jointly with an executor expressly named.¹

3. *Delegation of Power to name an Executor.* — The English ecclesiastical courts have frequently granted letters testamentary as executors to persons named by those having a nominating power conferred upon them under the will.² Under the English wills act the practice is still continued,³ and in some parts of the United States has been recognized.⁴

4. *Qualified, Limited, Conditional, and Substitutional Appointments.* — The appointment of the executor may be limited either as to the time when the person appointed shall begin, or when he shall cease, to be executor;⁵ or as to the place within which the office

executor, or direct that the estate should go immediately into the hands of legatees, or of one or more trustees, for particular purposes, such direction would be nugatory and void; and it being a will in which no executor is appointed, it would be the duty of the judge of probate to appoint an administrator with the will annexed, who would have all the powers of an executor, and in whom all the personal property would vest." Shaw, C. J., in *Newcomb v. Williams*, 9 Met. (Mass.) 525; *Goods of Toomy*, 3 Sw. & Tr. (Eng.) 562.

1. Wms. Exrs. (6th Am. ed.) 285; *Grant v. Leslie*, 3 Phillim. (Eng.) 116; Bro. Exrs. pl. 98; *Lynch v. Bellew*, 3 Phillim. (Eng.) 424.

2. Wms. Exrs. (7th Eng. ed.) 245; *Goods of Cringan*, 1 Hagg. 548.

3. 2 Rec. of Wills, 63; Wms. Exrs. (7th Eng. ed.) 245, 247; *Jackson v. Paulett*, 2 Robert (Eng.), 344.

In this case it was objected, that, under the Wills Act probate could only be decreed to a person named in a duly executed testamentary paper. But the court said that the case was not like one where a testator in his will reserves to himself a power to deal hereafter with his will by writings not duly executed.

Such power may be delegated either to legatees (In the *Goods of Cringan*, 1 Hagg. 548), or to an executor to name his co-executor (In the *Goods of Deichman*, 3 Curt. (Eng.) 123). See also *Jackson v. Paulett*, 2 Robert. (Eng.) 344.

In the *Goods of Ryder*, 2 Sw. & Tr. (Eng.) 127, the person to whom the power had been delegated nominated himself, and probate was granted him.

4. *State v. Rogers*, 1 Houst. (Del.) 569; *Allen, J.*, in *Hartnett v. Wandell*, 60 N. Y. 346, 352.

5. Wms. Exrs. (6th Am. ed.) 289.

Thus, if one appoint a man to be his executor at a certain time, as at the expiration of five years after his death, or at an uncertain time, as upon the death or marriage of his son, or appoints his son to be executor

when he shall come to full age, such qualified appointment is good, and until the time specified he has no executor. Again, the testator may appoint the executor of A. to be his executor; and then, if he dies before A., he has no executor till A. dies. So a man may make A. and B. his executors, and appoint that A. shall not intermeddle during the life of B., by which they shall be executors successively, and not jointly. Wms. Exrs. (6th Am. ed.) 289, 290; *Tolles*, 36; *Swinb. pt. 4*, sect. 17, pl. 1, 4; *Wentw. Off. Ex.* (14th ed.) 22, 23, 31; Bro. Exrs. 155; *Godolph. pt. 2*, c. 2, sect. 4; *Graysbrook v. Fox*, Plowd. (Eng.) 281; 3 Redf. Wills (2d ed.) 65. See also the remarks of Wayne, C. J., in *Hill v. Tucker*, 13 How. (U. S.) 458, 466.

The duration of the appointment may be limited by the testator to a particular period of time, — as during the minority of his son, or widowhood of his wife, or until the death or marriage of a son, or remarriage of the widow. Wms. Exrs. 251, citing *Swinb. pt. 4*, sect. 17, pl. 1, 4; *Wentw. Off. Ex.* (14th ed.) 29 *Godolph. pt. 2*, c. 2, sect. 3; *Carte v. Carte*, 3 Atk. (Eng.) 180; *Pemberton v. Corey*, Cro. Eliz. 164; *Bond v. Faikney*, 2 Cas. t. Lee, 371.

The only qualification of the testator's power to create such limitations is, that the limitation must not be inconsistent with the grant; hence, the testator cannot prohibit the executor from administering the estate, for this would be to deny him the essential functions of his office.

1 Wms. Exrs. 255; *Anon.*, Dyer, 3 b.

When the authority is so restricted, the nature of the grant should appear in the letters testamentary. *Goods of Barnes*, 7 Jur. N. S. 195; *Gibbons v. Riley*, 7 Gill. (Md.) 82.

In all such cases, if a vacancy in the office occurs at any time which the will itself does not supply, whether permanent or during the interval that must elapse between the ending of one executorship and the beginning of another, the probate court should

is to be exercised;¹ or as to the subject-matter of the trust.² The creation of the office may also be subject to a condition, either precedent or subsequent,³ or the testator may appoint several persons as executors in several degrees, as where he makes A. executor, and, if he will not or can not accept the appointment, then B., and if B. can not or will not accept, then C., and so on, in which case A. is said to be *instituted* executor in the first degree, B to be substituted in the second degree, and C to be substituted in the third degree.⁴ If A once accepts the office, the condition upon which the substitutional appointments were to take effect being thereby rendered impossible, the substitutes in what degree soever are all excluded.⁵

grant administration with the will annexed of such tenor as the emergency requires. Schoul. Exrs. and Admrs. § 42; 3 Redf. Wills (2d ed.) 65.

1. Wms. Exrs. (7th Eng. ed.) 251.

As where the testator commits the administration of the estate in England to one set of executors, and of that in America to another. *Hunter v. Bryson*, 5 Gill & J. (Md.) 483; *Mordecai v. Boylan*, 6 Jones Eq. (N. Car.), 365; *Despard v. Churchill*, 53 N. Y. 192.

Under the old law, the testator might commit the goods lying in different counties to different executors. Swinb. pt. 4, sect. 18, pl. 1, 4; Wentw. Off. Ex. 29 (14th ed.); Bro. Executors, 2, 155; Anon., 2 Sid. 114; *Spratt v. Harris*, 4 Hagg. 408, 409.

The fact that an English testator appoints a resident of Portugal to be his executor in that country does not entitle the Portuguese executor to letters in England. *Velho v. Leite*, 3 Sw. & Tr. 456.

So there may be general executors entitled to letters in England, and limited executors added for India. *Goods of Wallich*, 3 Sw. & Tr. 423; *Hunter v. Bryson*, 5 Gill & J. (Md.) 483.

2. Wms. Exrs. (7th Eng. ed.) § 252; Schoul. Exrs. and Admrs. § 42.

Thus the testator may make A. his executor for his plate and household stuff, B. for his sheep and cattle, C. for his leases and estates by extent, and D. for his debts due him. Wms. Exrs. (7th Eng. ed.) 252. See *Austre v. Audley*, 1 Roll. Abr. 914, pl. 4.

A person may be made executor for one particular thing only, as a statute or bond. Wentw. Off. Ex. 29 (14th ed.); *Davies v. Queen's Proctor*, 2 Robert. (Eng.) 413.

But in *Owen v. Owen*, 1 Atk. 495, Lord Hardwicke condemned such arrangements, on the ground that executors must act jointly, and each have authority as to the whole estate. Whatever may be the force of his criticism, this much is certain, that *quoad* creditors, they are all executors, and

may be sued as such. *Rose v. Bartlett*, Cro. Cas. 293; 3 Redf. Wills (2d ed.), 65. See *Wayne, J.*, in *Hill v. Tucker*, 13 How. (U. S.) 458, 466.

3. Wms. Exrs. (7th ed.) 253.

Thus the appointment may be conditional upon the executors giving security for paying debts and legacies. Godolph. pt. 2, c. 2, § 1; Schoul. Exrs. and Admrs. § 42. Or provided he prove the will within three calendar months after the testator's death. *Goods of Wilmot*, 1 Curt. 1. The day of the death was *held* to be excluded from the computation. See also *In the Goods of Lane*, 33 L. J. P. M. & A. 185; *In the Goods of Day*, 7 Notes of Cas. 553. Or after he has paid a particular debt. *Stapleton v. Truelock*, 3 Leon. 2, pl. 6. Or so long as he does not interfere with A.'s enjoyment of Blackacre. *France's Case*, Dyer, 4, pl. 8, in margin; s. c., by name of *Jennings v. Gower*, Cro. Eliz. 219; s. c., 1 Leon. 229; Wentw. Off. Ex. 28 (14th ed.).

4. Wms. Exrs. (7th Eng. ed.) 246; Swinb. pt. 4, sect. 19, pl. 1; Godolph. pt. 2, c. 4, sect. 1. See *In the Goods of Lane*, 33 L. J. P. M. & A. (Eng.) 185.

The substituted executor cannot propound the will till the person first named executor has been cited to accept or refuse the office. *Smith v. Crofts*, 2 Cas. temp. Lee, 557.

Exceptions have been made where the instituted executor died during the lifetime of the testatrix, or where he was absent on foreign service and likely to remain so for several years. *In the Goods of Wilmot*, 2 Robert. (Eng.) 579; *In the Goods of Langfred*, L. R. 1 P. & D. 458.

5. Wms. Exrs. (7th Eng. ed.) 246. Swinb. pt. 4, sect. 19, pl. 10; Godolph. pt. 2, c. 4, sect. 2.

But where a testator appoints an executor, and provides that *in case of his death* another should be substituted, on the death of the instituted executor, although he has proved the will, the substituted executor

VI. Appointment of Administrators who are entitled to administer — Construction of 31 Edw. III. c. 2, and Derivative and Analogous Statutes. — See PROBATE and LETTERS OF ADMINISTRATION.

VII. Officiating without Appointment. — I. *Executor de son Tort.* — *What Acts constitute one Executor de son Tort: Acts of Kindness and Charity — Acts under Color of Title — Intermeddling with Lands — Liabilities to Creditors, Legatees, and Rightful Executor or Administrator — How far protected by Acts which Rightful Executor could have done — Acts which bind the Estate. — Finding of Modern Legislation.* — If one who is neither executor nor administrator intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in law an executor of his own wrong, or, more usually, executor *de son tort*.¹ All acts which assume any particular control over the property, without legal right shown, will make a person executor in his own wrong as against creditors. Any act which evinces a legal control, by possession, direction, or otherwise, will, unexplained, make him liable.² Thus killing the cattle, using, giving away, or selling any of the goods, taking them to satisfy one's own debt, or legacy, entering upon a term of years, and claiming the particular estate, demanding or collecting the debts of the deceased, were sufficient to constitute one executor *de son tort*.³ If a man pays the debts of the deceased, or probate

may be admitted to the office, if it appear to have been the testator's intention that the substitution should take place on the death of the original executor, whether happening in the testator's lifetime or afterwards. In the Goods of Lighton, 1 Hagg. (Eng.) 235; In the Goods of Johnson, 1 Sw. & Tr. (Eng.) 17.

So he may be admitted if the intention is that the substituted executor shall be executor, if the original executor can not or will not act, and the latter dies in the testator's lifetime. In the Goods of Betts, 30 L. J. P. M. & A. (Eng.) 167. See, further, as to substitutes, executors, In Goods of Foster, L. R. 2 P. & D. (Eng.) 304.

1. Wms. Exrs. (6th Am. ed.) 296. See also Rayner v. Koehler, L. R. 14 Eq. 262; Wilbourn v. Wilbourn, 48 Miss. 38; Wilson v. Davis, 37 Ind. 141; Sturdivant v. Davis, 9 Ired. (N. Car.) 365; McMorine v. Storey, 4 Dev. & Bach. (N. C.) 189; Bailey v. Miller, 5 Ired. (N. Car.) 444; Johnson v. Duncan, 3 Litt. (Ky.) 163; Hubble v. Fogartie, 3 Rich. (S. Car.) 413; Givens v. Higgins, 4 McCord (S. Car.), 286; Howell v. Smith, 2 McCord (S. Car.), 516; Gentry v. Jones, 6 J. J. Marsh. (Ky.) 148; Brown v. Durkin, 5 J. J. Marsh. (Ky.) 170; Emery v. Berry, 28 N. H. 473; Lee v. Chase, 432 Appleton, C. J., p. 435; White v. Mann, 26 Me. 361; Barron v. Burney, 38 Ga. 264; Wiley v. Truett, 12 Ga. 588; Wilson v. Hudson, 4 Harr. (Del.) 168; Bennett v.

Ives, 30 Conn. 329; Bacon v. Parker, 12 Conn. 213; Crunkleton v. Wilson, 1 Browne (Pa.), 361.

The term applies alike to testate and intestate estates, and hence has been criticised as a misnomer.

Schoul. Exrs. and Comrs. § 184. The old books say, "He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the court to administer," is an executor *de son tort*. Swinb. pt. 4, § 23, pl. 1; Godolph. pt. 2, c. 8, § 1; Went. Off. Exrs., c. 14, p. 320 (14th ed.).

In Stokes v. Porter, Dyer (Eng.), 167 a, the term was applied to a lawful executor who maladministers. But this use is unusual, and the cases cited above show that it is, at least, not so confined. There cannot be an administrator *de son tort*. The law knows no such appellation. Godolph. pt. 2, c. 8, § 2.

2. Eastman, J., in Emery v. Berry, 28 N. H. 473, 482, 483. See Leach v. Prebster, 35 Ind. 415; Church, J., in Bacon v. Parker, 12 Conn. 212; Wilson v. Hudson, 4 Harr. (Del.) 168; Givens v. Higgins, 4 McCord (S. Car.) 286; Hubble v. Fogartie, 3 Rich. (S. Car.) 413; White v. Mann, 26 Me. 361; Lee v. Chase, 58 Me. 435; Campbell v. Tousey, 7 Cowen (N. Y.), 64.

3. Wms. Exrs. (7th Eng. ed.) 258, 259; Godolph. pt. 2, c. 1, sect. 1; c. 8, sect. 1, 4;

charges, out of the money of the estate,¹ or sues as executor, or if when an action is brought against him as executor he pleads in that character, it will be sufficient to make him executor *de son tort*.²

Read's Case, 5 Co. 33 b; Padget v. Priest, 2 T. R. 97; Swinb. pt. 4, sect. 23. As to giving the goods away, see *Gilchrist, 7*, in Leach v. Pillsbury, 15 N. H. 139. The mere fact that he gives them to the poor is no excuse. Dyer, 166 b, marg. As to entering upon a term, see Godolph. pt. 2, c. 8, § 5; 2 Prest. on Convey., p. 319 *et seq.*; Garth v. Taylor, 1 Freem. (Eng.) 261; Mayor of Norwich v. Johnson, 3 Lev. 35; 3 M. & D. 90. If the term be in reversion, being incapable of entry, there can be no executorship of this nature. Kenrick v. Burgess, Moore, 126. If the entry be general, the wrongdoer is *disseisor*, and not executor. Bac. Abr. Executors, B. 3, 1.

Taking even a dog, a bedstead, or a Bible, was held sufficient to constitute an executor *de son tort*. Robin's Case, Noy. 69; Toller 38.

If the widow milked the cows, or took more apparel than she was entitled to, she became executrix *de son tort*. Stokes v. Porter, Dyer, 166 b.

So if a widow continues in possession of her deceased husband's goods, and uses them as her own, she is liable as executrix *de son tort*. Hawkins v. Johnson, 4 Blackf. (Ind.) 21. See Chandler v. Davidson, 6 Blackf. (Ind.) 367; Madison v. Shockley, 41 Iowa, 451. But otherwise if, left in possession, she uses the goods to support herself and family, if at the time she is ignorant of his death. Brown v. Benight, 3 Blackf. (Ind.) 39. As to surviving husband, see Phaelon v. Houseal, 2 McCord (S. Car.), Ch. 423.

One who at the request of the widow sells the property of the deceased, and turns over the proceeds to her, becomes thereby executor *de son tort*. Bryant v. Hilton, 66 Ga. 477. *Contra* Magnier v. Ryan, 19 Mo. 196.

Liability of Agents of Executor de son Tort.—It has been held, that if a man's servant sells the goods of the deceased, as well after his death as before, by the directions of the deceased given in his lifetime, and pays the money arising therefrom into the hands of his master, this makes the master as well as the servant executor *de son tort*. Padget v. Priest, 2 T. R. (Eng.) 97. It seems also to be well established that the agent of an executor *de son tort* collecting the assets with a knowledge that they belong to the decedent's estate, and that his principal is not the legal representative, may himself be treated as executor *de son tort*. Sharland v. Mildon, 5 Hare (Eng.), 468; Ambler v. Findlay, L. R.

3 Ch. D. 198; Turner v. Child, 1 Dev. (N. Car.) 133.

Merely taking possession of property at the request of the widow of the deceased, for the purpose of taking care of it, does not make one liable as executor *de son tort*. Brown v. Sullivan, 22 Ind. 359.

In *Givens v. Higgins*, 4 McCord (S. Car.), 286, it was held that one acting as agent for the widow in regard to the funds of the estate, and not knowing what relation she held to them, would be considered as her agent merely, and not as exercising such control over the funds as to make himself liable. This is perfectly consistent with the English authorities. But in *Magner v. Ryan*, 19 Mo. 196, it was said that no one was liable as executor *de son tort* for acts in reference to the administration of the estate which he had done merely as the servant of another. See remarks of *Devens, 7*, in *Perkins v. Ladd*, 114 Mass. 420, 423, 424, on two last cases.

Creditors.—Creditors who participated in the wrong, collusively with the widow or kindred, have also been held liable. Mitchell v. Kirk, 3 Sneed. (Tenn.) 319.

1. Godolph. pt. 2, c. 8, sect. 1; Swinb. pt. 4, sect. 23. But not if he paid the debts and charges out of his own estate. Went. Off. Ex. (14th ed.) 326; Carter v. Robbins, 8 Rich. (S. Car.) 29. See *Crispin v. Winkelman*, 57 Iowa, 523.

Where one deposits money with another, to be paid over to the widow and creditors of the depositor after his death, such payment makes the payor an executor *de son tort*; otherwise, in case of a loan so paid over by the borrower. In such case facts bearing upon the question of fraud can be looked to only to determine the ownership of the money. *Alexander v. Kelso*, 57 Tenn.

5. Merely living in the house and carrying on the trade of the deceased (a victualler) has been held sufficient intermeddling to make the defendant executor *de son tort*, notwithstanding his wife (the daughter of the deceased) prove the will after the action was commenced, and she and her husband were acting together, and were in the house before the death of the testator. *Harper v. Summersett*, Wightw. (Eng.) 16.

2. Godolph. pt. 2, c. 8, sect. 1; Com. Dig. Admr. c. 1; Hill v. Henderson, 13 Sm. & M. (Miss.) 688; *Pleasants v. Glasscock*, 1 Sm. & M. Ch. (Miss.) 17; *Brown v. Durkin*, 5 J. J. Marsh. (Ky.) 170; *Brown v. Leavitt*, 26 N. H. 495; *Davis v. Connally*, 4 B. Mon. (Ky.) 136.

One who appropriates the property of the estate as donee¹ or legatee,² or receives a gift in fraud of creditors,³ may be sued as executor *de son tort*. A purchase in good faith from an executor *de son tort* will not charge the purchasee as executor *de son tort*.⁴ Acts "merely of kindness and charity," such as locking up the goods for preservation, directing the funeral, making an inventory, feeding the cattle, repairing the houses, or providing necessities for the children, cannot be considered officious intermeddling;⁵ and where one retains possession of the goods of the decedent

1. *Gleaton v. Lewis*, 24 Ga. 209, and look up.

In this case the deceased gave his property by deed of gift to the person in whose house he died, and it was held that the donee, by receiving and using the property, became an executor *de son tort*. But transfers, by way of security, which were made by the deceased during his lifetime, and are unimpeachable as in fraud of creditors, will not make the transferee executor *de son tort*. *O'Reilly v. Hendricks*, 2 Sm. & M. (Miss.) 388.

2. *Truett v. Cummons*, 6 Ill. App. 73.

3. *Schoul. Exrs. and Adms. § 186*. See 43 Eliz. c. 8, in *Wms. Exrs.* (7th Eng. ed.) 260, 261.

It would appear to be indifferent whether the donee retains possession of the property at the time the suit was brought, or has disposed of it after the death of the donor. *Wms. Exrs.* (6th Am. ed.), 300. See also *Edwards v. Harben*, 2 T. R. (Eng.) 587; *Simonton v. McLane*, 25 Ala. 353; *Densler v. Edwards*, 5 Ala. 31; *Warren v. Hall*, 6 Dana (Ky.), 450; *Clayton v. Tucker*, 20 Ga. 452; *Allen v. Kimball*, 15 Me. 116; *Sturdivant v. Davis*, 9 Ired. (N. Car.) 365; *Dorsey v. Smithson*, 6 Har. & J. (Md.) 61; *Howland v. Dews R. M. Carlt.* (Ga.), 383; *Morrison v. Smith*, *Busbee* (N. Car.), L. 399; *McMorine v. Storey*, 4 Dev. & Bat. (N. Car.) 189; *Tucker v. Williams*, *Dudley* (S. Car.), 329; *Bailey v. Miller*, 5 Ired. Law (N. C.), 444; *Bayney v. Robertson*, 3 Dev. 439; *Hopkins v. Towns*, 4 B. Mon. 124.

But it has been held that the donee will not be so treated where he has sold the goods and chattels in the lifetime of the donor, although he may have retained the proceeds after his decease. *Morrill v. Morrill*, 13 Me. 415. This appears to be contrary to *Crunkleton v. Wilson*, 1 Browne (Pa.), 361.

The fact that the donee or holder of the property is administrator of the estate is no defence to an action against him as executor *de son tort*. *Norfleet v. Riddick*, 3 Dev. (N. Car.) 221.

Merely settling up a claim to the goods of the intestate, under a fraudulent conveyance, and thereby injuring the sale, does

not make one chargeable as such executor. *Barnard v. Gregory*, 3 Dev. (N. Car.) 223.

Fraudulent transfers by decedents are open to attack in due course of administration, and it is not necessary to charge the grantee or donee as executor *de son tort*. *Bowdoin v. Holland*, 10 Cush. (Mass.) 17; *Stevens v. Gaylord*, 11 Mass. 256, 263.

The creditor has also a remedy by bill in equity. *Garner v. Syles*, 35 Miss. 176; *O'Reilly v. Hendricks*, 2 Sm. & M. (Miss.) 388.

4. *Smith v. Porter*, 35 Me. 287. See *Johnson v. Gaither*, *Harper* (S. Car.), 6; *Nesbit v. Taylor*, 1 Rice (S. Car.), 296.

The intermeddler in such case shall be charged alone. *Paul v. Simpson*, 9 Q. B. 365.

5. *Wms. Exrs.* (7th Eng. ed.) 462; citing *Godolph. pt. 2, c. 8, sect. 6*; *Swinb. pt. 2, sect. 23*; *Brown v. Sullivan*, 23 Ind. 359; *Emery v. Barry*, 28 N. H. 473 (Eng.); *Serie v. Waterworth*, 4 M. & D. 9; *Nelson v. Serie*, 4 M. & W. (Eng.) 795; *Chandler v. Davidson*, 6 Blatchf. (Ind.) 367; *Graves v. Poage*, 17 Mo. 91.

The funeral must be suitable to the estate which is left (see, as to what is suitable, *Debts of Decedents*), and the expenses may be defrayed by the party himself, or out of the effects of the deceased. *Wms. Exrs.* (7th Eng. ed.) 262; *Harrison v. Rowley*, 4 Ves. 216; *Magner v. Ryan*, 19 Mo. 196; *Devens, J.*, in *Perkins v. Ladd*, 114 Mass. 420, 422, 423; *Bacon v. Parker*, 12 Conn. 212.

A party may receive a debt due the estate for the purpose of defraying funeral expenses, without becoming chargeable as executor *de son tort*, provided that the sum so received and expended is proper. *Canden v. Fletcher*, 4 Mees. & W. 378.

A man died leaving no property but his wearing apparel. His widow paid, out of her own means, the expenses of his last illness and of his burial, and gave to his brother a suit of clothes of less value than the amount thus paid out by her. Held, that she had not made herself liable to a creditor of her husband as executrix in her own wrong. *Taylor v. Moore*, 47 Conn. 278.

under color of title as bailee, or under a mistake of fact, supposing them to be his own,¹ or as agent of the rightful executor, his possession is sufficiently explained, and the presumption that he meant to assume official functions rebutted.²

No intermeddling with lands will charge a person as executor *de son tort*; such interference is a wrong done to the heir or devisee, but cannot be considered an assumption of the functions of executor.³

1. Coms. Exrs. (7th Eng. ed.) 263, 264; *Flemmings v. Jarrat*, 1 Esp. N. P. C. 336; *Godolph. pt. 2, c. 8, c. 3*; *Swinb. pt. 4, sect. 23*.

It is not necessary that one who claims a lien on the goods should be able to make out his title completely. *Wms. Exrs. (7th Eng. ed.) 263*. See also *Barnard v. Gregory*, 3 Dev. (N. Car.) 223; *Ward v. Beville*, 10 Ala. 197; *Clussen v. Lafrenz*, 4 Greene (Iowa), 224; *Smith v. Porter*, 35 Me. 287.

A surety may sell property conveyed to him as security with power of sale, to indemnify himself, without being considered an executor *de son tort*. *O'Reilly v. Hendricks*, 2 Smed. & M. (Miss.) 388. Nor is he liable as such because a surplus remains in his hands after discharging the claim, if there be no lawful representative of the deceased to pay it to. *O'Reilly v. Hendricks*, 2 Sm. & M. (Miss.) 388. See *Foster v. Nowlin*, 4 Mo. 18; *Chandler v. Davidson*, 6 Blackf. (Ind.) 367; *Hawkins v. Johnson*, 4 Blackf. (Ind.) 21.

On the same principle, where one happens to be left in charge of a dead man's goods (as in case the death occurred at his house), he may keep them until he can lawfully be discharged of them without incurring liabilities as executor *de son tort*. *Wms. Exrs. (7th Eng. ed.) 263*. See *Graves v. Poage*, 17 Mo. 91.

But it must be remembered, that to exempt the party so taking possession from liability, there must be at least colorable ground for his claim, and good faith in its assertion; and hence, where the party took possession of the goods of the decedent under an absolute bill of sale, — knowing all the time that the bill of sale was deposited with him by the decedent only as security, and that he was in reality only a mortgagee, — and mismanaged the property greatly to the detriment of the estate, and much to his own advantage, he was held liable to creditors as executor *de son tort*. *Baumgartner v. Haas*, 10 Cent. Rep. 133 (Md.), 11 Atl. Rep. 588.

2. *Wms. Exrs. (7th Eng. ed.) 264*; *Hall v. Elliott*, *Peake N. P. C. 87*; *Turner v. Child*, 1 Dev. (N. Car.) 25.

Although a person cannot be charged as executor *de son tort* while he acts under a power of attorney, made by one of several

executors who has proved the will, yet if he continues to act after the death of the executor by whom he was appointed he may be charged as executor *de son tort*, though he act under the advice of another of the executors, who has not proved or administered. *Wms. Exrs. (7th Eng. ed.) 264*; *Cottle v. Aldrich*, 4 M. & Sel. 175; *Ambler v. Lindsay*, L. R. 3 Ch. D. 198, 206; *Turner v. Child*, 1 Dev. (N. Car.) L. 133.

Administration of Executor of son Tort. — On the same principle the administrator of an executor *de son tort* does not himself become executor *de son tort* by merely taking possession of the property which rendered his intestate so chargeable. *Alfriend v. Daniel*, 48 Ga. 154.

As to executor *de son tort* of executor *de son tort*, see *Dawson v. Callaway*, 18 Ga. 573.

Death of Non-Resident. — Foreign Executor de son Tort. — A resident of one State, in whose house a resident of another State dies, does not become executor *de son tort* by paying over money found upon the person of the deceased to the home administrator. *Nesbit v. Stewart*, 2 Dev. & Bat. (N. Car.) 24. See *Graves v. Poage*, 17 Mo. 91.

In England, unless the person to be charged has taken possession of English assets, he cannot be held liable as executor *de son tort*; and the fact that he has obtained representation *pur et simple*, which, by the Belgian law, imposes upon him a personal obligation to pay all the debts irrespective of the amount of assets, does not affect the question. *Beavan v. Hastings*, 2 Kay. & J. 724. See *Eastman, J.*, in *Willard v. Hammond*, 21 N. H. 382, 385; *Emery v. Berry*, 28 N. H. 473.

An executor appointed in a neighboring State may be sued in New York as executor *de son tort*, and will be liable for all assets which he has not applied in due course of administration, whether they were received in New York, or originally received abroad and brought there. *Campbell v. Tousey*, 7 Cow. (N. Y.) 64. See *Hopkins v. Towns*, 4 B. Mon. (Ky.) 124; *Evans v. Tatem*, 9 S. & R. (Pa.) 258; *Campbell v. Sheldon*, 13 Pick. (Mass.) 8.

3. *Mitchell v. Lunt*, 4 Mass. 654; *King v. Lyman*, 1 Root (Conn.), 104; *Mass. v. Van Swearingen*, 7 S. & R. (Pa.) 144, 196.

One who has so acted as to become in law an executor *de son tort* thereby renders himself liable to be sued as executor, not only by the rightful executor or administrator, but also by a creditor or legatee.¹ This peculiar liability is essentially tortious, and founded on public policy; and hence an executor *de son tort* has all the liabilities and none of the privileges that belong to the character of executor.² In an action by a creditor he should

Whether Executor de son Tort, or not, is a Question of Law. — The question whether executor *de son tort* or not is a question of law, and not to be left to the jury; whether the party did certain acts is indeed a question of fact for the jury; but when these facts are established, the conclusion to be deduced from them is a question of law. Wms. Exrs. (7th Eng. ed.) 265; Padget v. Priest, 2 T. R., 99.

Administering under Void Letters. — A person acting under void letters of administration may be treated as executor *de son tort*. Bradley v. Commonwealth, 31 Pa. St. 522; Damouth v. Klock, 29 Mich. 290; 49 Ala. 137, 586.

A void administration fraudulently procured may render the administrator and his sureties liable. Williams v. Kiernan, 25 Hun (N. Y.), 355.

Upon the same principle it was held that if an administrator *ad colligendum* sell or dispose of any goods, even though otherwise subject to perishing, he becomes executor in his own wrong, even though by the letters *ad colligendum* he be warranted thereunto; for the judge himself may not do so. Wms. Exrs. (7th Eng. ed.) 259.

Nevertheless, doubts have been entertained as to whether such an administrator, under circumstances which impute to him no intentional wrong, occupies no better status than that of the common law executor *de son tort*. Schoul. Exrs. and Admsrs. § 192.

One who takes possession of the property of the estate under an oral agreement with the decedent by which he was appointed trustee stands in a similar position. In such case the oral agreement is void under the statute of wills; and the intermeddler, without being appointed administrator, has no right to pay claims out of the assets of the estate, and cannot escape liability without showing that the amounts paid were correct, and evidence merely of the amounts paid for services without showing the value of the services is not sufficient. Crispine v. Winkleman, 57 Iowa, 523.

Mere illegality in the appointment of an administrator, executrix, or under-tutor, will not vitiate the acts done under it by such officer. Webb v. Keller (La.), 1 So. Rep. 423.

1. Wms. Exrs. (7th Eng. ed.) 265; Swift v. Martin, 19 Mo. App. 488; Elder v. Little, 15 Iowa, 65; Hansford v. Elliott, 9 Leigh (Va.) 79.

An executor who unduly delays to take out probate may be sued as executor *de son tort*, and hence such delay will not avoid the bar of the statute of limitations. Webster v. Webster, 10 Ves. (Eng.) 93; see also Coote v. Whittington, L. R. 16 Eq. 534; Ambler v. Lindsay, L. R. 3 Ch. D. 198, 207. Compare Phaelon v. Horescal, 2 McCord Ch. (S. Car.) 423.

A bill in equity by distributees against an intermeddler should make the rightful personal representative a necessary party. Nease v. Capehart, 8 W. Va. 95.

Citing to Account. — An executor *de son tort*, although rendering himself liable to creditors and legatees, cannot be cited to account before the Probate Court. Powers Est., 14 Phila. (Pa.) 289; Peebles, App. 15 S. & R. (Pa.) c. 4; Stockton v. Wilson, 3 Pa. 129.

2. Carmichael v. Carmichael, 1 Phill. (Eng.) C. C. 103; McIntire v. Carson, 2 Hawks (N. Car.), 544.

"The liability of an executor *de son tort* is in its nature essentially distinct from that of an executor duly appointed. It is governed by different rules and subject to different principles. The one is founded on consent and contract, while the other, whatever its form of action, is in substance founded on tort." Bell, J., in Brown v. Leavitt, 26 N. H. 494, 495.

An executor *de son tort* cannot plead the statute of *non-claim* against a creditor, nor is it any defence that the claim has never been presented. A plea that the defendant did not promise within six years of the commencement of the suit is bad; for the running of the statute is stopped by death, and the creditor has the statutory period within which to present his claim or bring action thereon. But a plea that the deceased did not promise at any time within six years before his death is good; for the executor *de son tort* can only be held liable to actual creditors, and a barred claim is no claim. Brown v. Leavitt, 26 N. H. 498, 499.

He is not entitled to an action. Francis v. Welch, 11 Ired. (N. Car.) 215.

Having neither the means nor the right

be named executor generally,¹ and should plead both *re unques executor* and *plene administrant*.² If he plead the former alone, the issue, on proof of such acts by the defendant as constitute in law an executorship *de son tort*, would be found against him, and judgment for the debt and costs would issue against him to be levied out of the assets of the testator, if the defendant have so much, but if not, then out of the defendant's own goods.³ Under

to reduce assets, he is not chargeable for not reducing and administering them. *Kinard v. Young*, 2 Rich. Eq. (S. Car. 247).

Where a trust is imposed upon an executor in the settlement of the estate by the will of the deceased, it cannot be enforced against an executor *de son tort*. *Campbell v. Sheldon*, 13 Pick. (Mass.) 8. See *Bennett v. Ives*, 30 Conn. 329; *Marcy v. Marcy*, 32 Conn. 308.

The liability thus growing out of a tort which affects all interested in the estate, reasons of public policy, and convenience demand that creditors and legatees shall have an immediate action against the wrong-doer, and not be compelled to await the appointment of an administrator or the probate of the will by the rightful executor. For the possession and occupation, or meddling with the goods, is that which gives notice to the creditors whom they are to sue as executor, and from such acts strangers may well infer that the meddler has a will of the deceased in which he is appointed executor; but has not yet proved it; moreover many instances might arise in which the assets would be disposed of by the wrong-doer, and permanently lost, before an administrator could be appointed or the executor prove the will. 2 Bl. Com. 507, 508. Went. Off. Exrs. c. 14 (14th ed.) p. 322.

For a case in which assets might well have been lost before probate, see *Webster v. Webster*, 10 Ves. (Eng.) 93.

As to how far recent legislation, by removing the possible delays in obtaining probate or letters of administration, has removed the necessity for the continuance of this peculiar liability to legatees, see *post*. See also PROBATE and LETTERS OF ADMINISTRATION, Am. & Eng. Enc. of Law.

1. *Coulter's Case*, 5 Co. (Eng.) 31 a; *Prince v. Rowson*, 1 Mod. (Eng.) 208 Godolph. pt. 2 c. 8 § 2. 1 Saund. (Eng.) n. 2; *Osborne v. Williams*. See also *Meyrick v. Anderson*, 142. B. 719; *Lee v. Chase*, 58 Me. 435; *Gregory v. Forrester*, 1 Mc. Cord ch. (S. Car.) 318; *Stockton v. Wilson*, 3 Pa. St. 129; *Pleasants v. Glasscock*, 1 Sm. & M. ch. (Miss.) 17; *Brown v. Leavits*, 26 N. H. 495; *Buckminster v. Ingham*, *Brayh* (Vt.) 116; *Brown v. Durvin*, 5 J. J. Marsh. (Ky.) 170.

Under 2 Ind. Rev. Stat. 1876, p. 495, § 15, it is essential that the creditor show by his complaint that the property taken possession of was such as an administrator would be entitled to take possession of and control. *Goff v. Cook*, 73 Ind. 351; *Kahn v. Tinder*, 77 Ind. 147.

No action can be maintained by a partnership creditor against an executor *de son tort* of a deceased partner, until the partnership assets have been exhausted. *Palmer v. Maxwell*, 11 Neb. 598.

If a man be sued as the executor of an executor for a debt of the original testator, it is no answer to the action that he is only executor *de son tort* to the original, rightful executor. *Meyrick v. Anderson*, 14 Q. B. 719.

An executor *de son tort* and a rightful executor may be joined in a suit, or sued severally, but a lawful administrator must be sued severally. Wms. Exrs. (7th Eng. ed.) § 266; Went. Off. Ex. (14th ed.) 328; *Howland v. Dews*, R. M. Charl. (Ga.) 383; *Stevens v. Barnett*, 7 Dana (Ky.), 257.

A suit by creditors of an estate to order an executor *de son tort* to account and bring the proceeds into court for distribution among them, postponing such executor's claims to theirs, is not a suit to enforce a penalty, against which equity may relieve, but simply to enforce a just debt; and at law the executor is required to pay the assets to other creditors, though nothing would be left to pay his own claim. *Baumgartner v. Haas* (Md.), 11 Atl. Rep. 588; *Stevens v. Barnett*, 7 Dana (Ky.) 257.

2. *Hooper v. Summersett*, Wight. 20. If on the former issue he should be unsuccessful, he may have a verdict on the latter; and the difficulty of determining beforehand whether any given state of facts will be sufficient to constitute one executor *de son tort*, renders it unsafe to rely entirely upon the plea *re unques executor*.

3. Wms. Exrs. (7th Eng. ed.) § 266; *Bull v. Wheeler*, Cro. Jac. 648; 1 Saund. 336 b, n (10) to *Hancock v. Prowd*; *Peters v. Breckenridge*, 2 Cranch (C. C.), 518; *Parson, C. J.*, in *Mitchel v. Lunt*, 4 Mass. 654, 658; *Campbell v. Tousey*, 7 Cow. (N. Y.) 64; *Hubble v. Fogartie*, 1 Hill (S. Car.), 167; *Stevens v. Barnett*, 7 Dana (Ky.), 257; *Howland v. Dews*, R.

the latter plea, he is protected in all acts not for his own benefit, which a rightful executor could do, and is chargeable only with assets which actually came to his hands,¹ and may relieve himself by showing proper payments to other creditors of equal or superior degree,² or by delivery of the assets to the rightful executor or administrator before action brought.³ In an action by the rightful

M. Charl. (Ga.) 383; Morrison v. Smith, Busb. (N. Car.) 399; Bailey v. Miller, 5 Ired. (N. Car.) 444; Riddle v. Hill, 51 Ala. 224.

The creditor of an intestate who has recovered judgment against an executor *de son tort* cannot levy his execution, issued on such judgment, upon the real estate left by the intestate. Mitchel v. Lunt, 4 Mass. 658.

In Robinson v. Bell, 2 Vern. (Eng.) 147, it was intimated that in cases of gross disproportion between the levy and the property meddled with, equity will grant relief. Modern precedents sustaining this view are wanting. Wms. Exrs. (7th Eng. ed.) 266. As to tendency of legislation on the subject, see *post*.

1. Wms. Exrs. (7th Eng. ed.) § 267; 1 Saund. ii. (2), to Osborne v. Rogers; Yardley v. Arnold, Carr. & M. (Eng.) 434; Glenn v. Smith, 2 Gill & J. (Md.) 493; Bellows v. Goodall, 32 N. H. 99; Nass v. Van Swearingen, 7 S. & R. (Pa.) 144; Stockton v. Wilson, 3 Pa. St. 129; Weeks v. Gibbs, 9 Mass. 77; Palmer v. Maxwell, 11 Neb. 598; McKenzie v. Pendleton, 1 Bush (Ky.), 164; Hill v. Henderson, 13 Sm. & M. (Miss.) 688; Cook v. Sanders, 15 Rich. Eq. (S. Car.) 63; Leach v. House, 1 Bailey (S. Car.) 42.

2. Whitehall v. Squire, Carth. 104, by Lord Holt; Dorsett v. Frith, 25 Ga. 537; Winn v. Slaughter, 5 Heisk. (Tenn.) 191; Weeks v. Gibbs, 9 Mass. 74.

Even after action brought he might apply the assets in his hands to the payment of a debt of superior degree, and plead such payment in bar. Wms. Exrs. (7th Eng. ed.) 267; Oxenham v. Clapp, 2 B. & Ald. 309.

3. Wms. Exrs. (7th Eng. ed.) 268; Padget v. Priest, 2 T. R. 97; Curtis v. Vernon, 3 T. R. (Eng.) 590. Compare Carmichael v. Carmichael, 2 Phill. C. C. (Eng.) 101; Hill v. Curtis, L. R. 1 Eq. 90.

A mere averment by the executor *de son tort*, however, that an administrator has been appointed, unaccompanied by an averment that the executor *de son tort* has delivered the assets into his hands, is no defence. McMeekin v. Hynes, 80 Ky. 343.

But payment made *after action brought* is no defence, either at law or in equity. Curtis v. Vernon, 3 T. R. 587; s. c., 2 H. Bl. 18; Layfield v. Layfield, 7 Sim. 172.

The reason seems to be, that the creditor

would thereby be put in a worse position by the conduct of the executor *de son tort*. He would have to bring another action against the rightful executor. Oxenham v. Clapp, 2 B. & Ald. 315.

An agent of an executor *de son tort*, who has by collecting the assets made himself also liable as executor *de son tort*, cannot discharge himself by showing that he has duly accounted for his receipts to his principal; for the rule that the receipt of the agent is the receipt of the principal does not apply to a wrong-doer. Sharland v. Mildon, 5 Hare, 469.

In Bryant v. Helton, 66 Ga. 477, it is said that debts voluntarily paid by an executor *de son tort* cannot be set off by him against an action by a distributor for her share.

But where a widow appropriated a bond without accounting to the executor of her husband's estate, and applied it to the payment of a note given by her husband, she was held not liable to the legatees for it. McConnell v. McConnell, 94 Ill. 295.

Retainer for own Debt.—An executor *de son tort* cannot give in evidence a retainer for his own debt. Wms. Exrs. (7th Eng. ed.) § 269; Partee v. Caughran, 9 Verg. (Tenn.) 460; Kinard v. Young, 2 Rich. Eq. (S. Car.) 247; Glenn v. Smith, 5 Gill & J. (Md.) 493; Brown v. Leavitt, 26 N. H. 493, 495; Turner v. Child, 1 Dev. (N. Car.) 133; Shields v. Anderson, 3 Leigh (Va.), 729; Chapman, C. J., in Carey v. Guillow, 105 Mass. 18, 21.

The rule is grounded upon public policy; and it makes no difference that the debt is of a superior degree to that for which the action is brought, nor that the rightful executor has given his assent. Coulter's Case, 5 Co. 30 a, Cro. Eliz. 630; Curtis v. Vernon, 2 T. R. 587; Alexander v. Lane, Yelv. 137.

But if the executor *de son tort*, afterwards *pendente lite* obtains administration, he may retain; for it has a retrospective operation, and legalizes those acts which were tortious at the time. And if, subsequently to the replication that he is executor *de son tort*, he obtains administration, he may rejoin that fact by a plea *puis darreign continuance*, for it is consistent with the retainer in the plea. Wms. Exrs. (7th Eng. ed.) § 270; Colt, J., in Hatch v. Proctor, 102 Mass. 351, 354; Andrew v. Gallison, 15 Mass. 325 note; Shillaber v. Wyman, 15

executor or administrator, he may show, in mitigation of damages, such payments as the latter would have been bound to make,¹ provided the assets are sufficient to satisfy all the debts;² but although the payments so made equal the full value of the goods sought to be recovered, the rightful executor will nevertheless be entitled to a verdict for nominal damages.³

All proper and lawful acts done by an executor *de son tort* are binding upon the estate, if the rightful executor or administrator would have been bound to do likewise in due course of administration.⁴ A fair sale of goods or payment of money out of the assets, in order to discharge debts, binding to their full extent upon the estate, cannot be disturbed.⁵ At the same time payments

Mass. 322; *Wagner v. Ryan*, 19 Mo. 196; *Rattoon v. Overacker*, 8 Johns. (N. Y.) 126; *Clements v. Swain*, 2 N. H. 476. See *Whitehead v. Sampson*, 1 Freem. 265. Compare *Laury v. Aldred*, 2 Brownlow (Eng.), 185; *Partee v. Caughran*, 9 Yerg. (Tenn.) 460; *Green v. Dewit*, 1 Root (Conn.), 183.

1. Wms. Exrs. § 311; 2 Bl. Com. 508; *Padget v. Priest*, 2 T. R. 100; *Fyson v. Chambers*, 9 M. & W. 468; *Tobey v. Miller*, 54 Me. 480; *Reagan v. Long*, 21 Ind. 264; *Saam v. Saam*, 4 Watts (Pa.), 432; *Glenn v. Smith*, 2 Gill & J. (Md.) 493; *Olmsted v. Clark*, 30 Conn. 108; *Carey v. Guillow*, 105 Mass. 18, 21; *Dorset v. Frith*, 25 Ga. 537; *Weeks v. Gibbs*, 9 Mass. 74. The application of assets to debts should be in due order of preference. *Gay v. Lemlé*, 32 Miss. 309.

The administrator is a "person interested" within the language of a statute giving a right of action to "any creditor or other person interested in the estate." *Collier v. Jones*, 86 Ind. 342.

Whether, when sued in trover by the rightful executor or administrator, the executor *de son tort* can show payment of debts to the value of the goods not sold but still in his custody, see *Bull. N. P.* 48; *Hardy v. Thomas*, 23 Miss. 544.

Under the statutes of Massachusetts an executor *de son tort* is not "allowed to retain or deduct any part of the goods or effects, except for such funeral expenses or debts of the deceased, or other charges actually paid by him as the rightful executor or administrator might have been compelled to pay." Mass. Gen. Stats. c. 94, § 15.

In Alabama it has been held, that where one has received and used assets of an intestate, under circumstances constituting him an executor *de son tort*, he may show, when called to account in equity by the rightful representative, that there are no out-standing debts, and that he has applied the assets for the use and benefit of the distributees as they must have been applied

in due course of administration. *Brown v. Walter*, 58 Ala. 310.

2. *Mountford v. Gibson*, 4 East. 453; *Elworthy v. Sandford*, 3 H. & C. 330; *Neal v. Baker*, 2 N. H. 477; *Tobey v. Miller*, 54 Me. 483.

The ground for the limitation is said to be, that otherwise the rightful executor's rights of preference and retainer would be rendered nugatory. Wms. Exrs. (7th Eng. ed.) 271.

Quare, does the limitation exist in those States in which the rights of retainer and preference have been abolished? The only other ground for its existence is, that by allowing evidence of payments when the estate is insolvent, the legal priorities of creditors might be affected; if, therefore, the executor *de son tort* can show that the payment was proper in reference to the insolvent condition of the estate and the claims of all the creditors, — i.e., that the payment sought to be given in evidence is the exact sum to which the creditor would be entitled to receive from the rightful executor upon final settlement, — there seems to be no reason why the offer should not be received.

3. Wms. Exrs. (7th Eng. ed.) 271; *Mountford v. Gibson*, 4 East. 447; *Roscoe on Evidence* (7th ed.) 617; *Rattoon v. Overacker*, 8 Johns. (N. Y.) 126.

A plea in bar that he has made payments to the value of the assets is bad. *Whitehall v. Squire*, Carth. 104, by Lord Holt; *Glenn v. Smith*, 2 Gill & J. (Md.) 493.

As to waiving the tort and suing in assumpsit, see *Apchurch v. Norsworthy*, 15 Ala. 705; *Sellers v. Licht*, 21 Pa. St. 98; *Rose v. Newman*, 26 Tex. 131.

4. Wms. Exrs. (7th Eng. ed.) 314; *Schoul. Exrs. and Admsrs.* § 193; *Coulter's Case*, 5 Co. 30 b; *Buckley v. Barber*, 6 Exch. 164; *Gay v. Lemlé*, 32 Miss. 309; *Giles v. Churchill*, 5 N. H. 341; *Pickering v. Coleman*, 12 N. H. 148, 151, 152.

5. *Graysbrook v. Fox*, Plowd. 282; *Parker v. Kelt*, 1 Ld. Raym. 661.

to an executor *de son tort* of money due the estate will not exempt the debtor from liability to the rightful executor.¹

Such was the peculiar *status* of an executor *de son tort* at common. The tendency of modern legislation is to make the intermeddler's liability to the estate dependent not upon the assumption of official functions, but upon whether his interference has been for its benefit or detriment, and has been induced by selfish or disinterested motives, taking into consideration the condition of the property at the time.² In some States the title executor *de son tort* is not recognized;³ in others the intermeddler is compelled to account with the rightful representative only,⁴ or, if liable to creditors and persons aggrieved, his liability is limited to the value of the property taken and the actual damage sustained, or to some definite penal sum based upon the amount of the estate taken by him.⁵ Creditors cannot be considered aggrieved

A solitary act of wrong-doing is not sufficient to constitute one executor *de son tort*; the rule is not that as against the true representative every payment from the assets of the deceased shall be valid if made by one who has so intermeddled with the property of the deceased as to render himself liable to be sued as executor *de son tort*, but that where the executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor, and shall alter the property. Thomson *v.* Harding, 2 El. & Bl. 630. See Mountford *v.* Gibson, 4 East, 441; Peters *v.* Leader, 47 L. J. Q. B. 573.

It is a good defence to an action against the purchaser for the price, by an executor *de son tort*, that he has paid part to the rightful administrator on demand, and has given his note for the balance. Rockwell *v.* Young, 60 Md. 563.

In Alabama, with the exception of negotiable instruments sold *bona fide* for valuable consideration, a purchase from the executor *de son tort* confers no better title than the vendor. Carpenter *v.* Going, 20 Ala. 587. See also Woolfork *v.* Sullivan, 23 Ala. 548.

1. Hunter *v.* Wallace, 13 Upper Can. Q. B. 385; Lee *v.* Chase, 58 Me. 434, 435.

As to payments made to a rightful executor before probate, see (b) Wankford *v.* Wankford, 1 Salk. 306, 307.

2. Schoul. Exrs. and Admsrs., § 188. See Baumgartner *v.* Haas (Md.), 11 Atl. Rep. 588; Portman *v.* Klemish, 54 Iowa, 198.

3. Schoul. Exrs. and Admsrs., § 184; Field *v.* Gibson, 20 Hun (N. Y.), 274; Redfield, L. & P. of Surr. Courts, 220; Amsley *v.* Baker, 14 Tex. 607; Fox *v.* Van Norman, 11 Kan. 214; Barasieu *v.* Odum, 17 Ark. 122; Rust *v.* Witherington, 17 Ark.

129; Rutherford *v.* Thompson (Oregon), 12 Pac. Rep. 382; Bowden *v.* Pierce (Cal.), 14 Pac. Rep. 302.

4. Mass. Gen. Stats., c. 94, § 15; Root *v.* Geiger, 97 Mass. 178; 2 N. Y. Rev. St. 449, § 17; Muir *v.* Leake & Watt's Orphans' House, 3 Barb. Ch. (N. Y.) 479.

5. McKenzie *v.* Pendleton, 1 Bush (Ky.), 164; Stockton *v.* Wilson, 3 Pa. St. 130; Cook *v.* Sanders, 5 Rich. (S. Car.) 63; Elder *v.* Littans, 15 Iowa, 65.

In Mississippi, by statute, an executor *de son tort* is liable only to the extent of the assets in his hands, and judgment should be rendered against him in the ordinary form, although he may err in pleading. Hill *v.* Henderson, 13 Sm. & M. (Miss.), 688.

As to recognition of English principles of pleading where one is sued as executor *de son tort*, see Riddle *v.* Hill, 51 Ala. 224; Bailey *v.* Miller, 5 Ired. (N. Car.) 444; Morrison *v.* Smith, Busb. (N. Car.) 399; Hubbell *v.* Fogartie, 1 Hill (S. Car.), 167; Campbell *v.* Booth, 7 Cow. (N. Y.) 167.

In New Hampshire an executor *de son tort* is held liable to the actions of creditors and others aggrieved to double the amount of the estate intermeddled with. Bellows *v.* Goodall, 32 N. H. 97.

As to construction of similar Vermont statute see Spaulding *v.* Cook, 48 Vt. 145.

In a suit against an executor *de son tort* under 2 Ind. Rev. Sts. 1876, p. 495, § 15, the creditor is entitled to a judgment only that the defendant shall account to the court of probate jurisdiction for the full value of the property intermeddled with, and ten per cent thereon. Goff *v.* Cook, 73 Ind. 351.

Under this act it is held that a widow who has become chargeable as executrix *de son tort* is not personally liable upon a

without regard to the legal order of preference in the payment of their claims, nor legatees apart from the usual rule that the claims of creditors take precedence.¹

2. *Acts done by Rightful Executor or Administrator before Qualifying. — Relation.* — An executor before probate, by virtue of his appointment by the testator, may do all things incident to his office which do not require him to establish his title affirmatively.² Thus he may collect the assets, pay, receive, or release debts, sell or dispose of the goods and chattels, pay legacies, distrain for rent due the testator, or enter upon the testator's term for years.³ But he cannot maintain a suit, either in his representative capacity, or in his individual capacity, relying upon his *constructive* possession,

note upon which her husband was surety. *McCoy v. Pavne*, 68 Ind. 327.

In North Carolina the mere act of taking possession of the property of one deceased and converting it, may constitute the wrongdoer an executor *de son tort*, without subjecting him to the penalty prescribed by N. C. Code, § 1522, which is imposed on one entering on an administration without first obtaining letters. *Currie v. Currie*, 90 N. Car. 553.

1. *McConnell v. McConnell*, 94 Ill. 295.

Where one died leaving no property but his wearing apparel, and his widow paid out of her own means the expenses of his last sickness and burial, and gave to his brother a suit of clothes of less value than the amount thus paid out by her, it was held that she could not be held liable to a general creditor as executrix in her own wrong. *Taylor v. Moore*, 47 Conn. 278. See *Ferguson v. Barnes*, 58 Ind. 169; *Goff v. Cook*, 73 Ind. 351.

Under the Oregon Code, § 371, providing that no person shall be liable as executor in his own wrong, but shall be responsible to the administrators for the property taken, and for all injury caused by his interference with the property of the estate, in an action by the widow as administratrix by conversion of the property, the defendant may show that he acted under direction of the widow before her appointment, and used the proceeds of the property in payment of debts of the deceased. *Rutherford v. Thompson* (Oregon), 12 Pac. Rep. 382.

2. *Wms. Exrs.* (7th Eng. ed.) § 302-310; *Schoul. Exrs. and Admrs.* § 194.

His title is derived from the appointment, not from the probate; the probate is only evidence of the appointment, but since it is the only evidence admissible, it is impossible for him to establish his title without it. *Wms. Exrs.* (7th Eng. ed.) § 293, 629. See *Clapp v. Stoughton*, 10 Pick. (Mass.) 463; *Shirley v. Healds*, 34 N. H. 407; *Marcy v. Marcy*, 6 Met. (Mass.) 360; *Wig-*

gins v. Swett, 6 Met. (Mass.) 197; *Brown v. Gibson*, 1 Nott & McC. (S. Car.) 326; *Woolley v. Clark*, 5 B. & Ald. 745.

3. *Wms. Exrs.* (7th Eng. ed.) § 303; *Godolph. pt. 2, c. 20, § 1, 3*; *Went. Off. Ex.* 81 (14th ed.); *Middleton's Case*, 2 Co. 28 a; *Waukford v. Waukford*, 1 Salk. 306, 307; *Rex v. Stone*, 6 T. R. (Eng.) 298; *Whitehead v. Taylor*, 10 Ad. & L. 210; *Amber's Case*, 1 P. Wms. 768.

If before probate the day occur for payment upon a bond made by or to the testator, payment must be made to or by the executor, though the will be not proved, upon like penalty as though it were. *Godolph. pt. 2, c. 2, sect. 3*. Under Stat. 4 Ann. c. 16, sect. 13, the penalty is saved by bringing the principal, interest and costs into court.

Since an executor may release or assign any part of the personal estate before probate, it is no objection to the title of the assignee of a patent, that the assignors, the executors of the grantee, had omitted to register the probate until after the date of the assignment. *Elwood v. Christy*, 17 C. B. N. S. 754.

Although an executor can before probate make an assignment, and give a receipt for purchase money which will be binding, yet a purchaser is not compellable to pay the purchase-money till probate, because, till the evidence of title exists, the executor cannot give a complete indemnity. *Newton v. Met. R. Co.* 1 Dr. & Sm. 583.

Effect of Executor's Death before Probate. — The executor's death before proving the will determines the executorship, but does not avoid it; and acts incident to the office which the executor could properly perform before probate, stand firm and good. *Schoul. Exrs. and Admrs.* 194; *Went. Off. Ex.* (14th ed.) 82; *Rex v. Stone*, 6 T. R. 298; *Waukford v. Waukford*, 1 Salk. 309.

The validity of an executor's assent to a legacy is not affected by his death before probate. *Johnson v. Warwick*, 17 C. B. 516.

because he has no standing in court until he has established his title, of which the probate is the only evidence admissible; ¹ and for the same reason, if it becomes necessary for an assignee or legatee to support his title by deducing it from the executor's assignment or assent, the right to make the assignment, or give the assent, comes in question, and a subsequent probate must be shown. ² But while it is true that he cannot maintain an action before probate, he may begin suit and proceed in it to that point where the production of probate becomes necessary; and it will be sufficient if he obtains the probate in time for that exigency. ³ If, however, the executor himself has ever had actual possession, he may maintain trespass, trover, or replevin, when the property has come to the defendant's hands, or been converted by tort, and debt or assumpsit when defendant has acquired it by a contract with himself. ⁴

And all payments made to him are good, and shall not be defeated. *Waukford v. Waukford*, 1 Salk. 306, 307.

1. *Wms. Exrs.* (7th Eng. ed.) 305; *Webb v. Adkins*, 14 C. B. 401. See *Wiggin v. Swett*, 6 Met. (Mass.) 197; *Johns v. Johns*, 1 McCord (S. Car.), 132; *Dawes v. Boylston*, 9 Mass. 337; *Shirley v. Healds*, 34 N. H. 407; *Stockton v. Wilson*, 3 Pa. St. 130; *Brown v. Leavitt*, 26 N. H. 493.

In order to sue, letters of authority appropriate to the jurisdiction are generally needful. See *Dixon v. Ramsay*, 3 Cranch (C. C.), 319.

Where the suit is brought in his individual capacity in reliance upon his *constructive* possession, although he does not name himself as executor in the declaration, or make any profert, yet generally it will be necessary for him to prove himself executor at the trial, if his title to the property should be put in issue by the pleadings, in order to establish his constructive possession, and this he can do only by the probate. *Blainfield v. March*, 7 Mod. 141; s. c., 1 Salk. 285; *Wilbraham v. Snow*, 2 Saund. 47, 2; *Hunt v. Stevens*, 3 Taunt. 113.

2. *Johnson v. Warwick*, 17 C. B. § 16; *Pinney v. Pinney*, 3 B. & C. 335. See *Marcy v. Marcy*, 6 Met. (Mass.) 360; *Newton v. Met. R. Co.*, 1 Dr. & Sm. (Eng.) 583.

3. *Wms. Exrs.* (7th Eng. ed.) 308; *Easton v. Carter*, 5 Exch. Cas. 8, 14; *Wills v. Rich.*, 2 Atk. 285.

He may begin the action in a proper case by arrest. *Duncomb v. Walker*, Skin. 87.

Avow for rent arrear which has accrued since the death of the testator. *Waukford v. Waukford*, 1 Salk. 307; *Whitehead v. Taylor*, 10 Ad. & El. 210. But he must show his character for rent accruing in the testator's lifetime. 7 T. R. 358.

File a bill in equity, and the subsequent probate makes the bill good if obtained at

any time before hearing. *Humphreys v. Humphreys*, 3 P. Wms. 351.

Under what circumstances a plea that the executor has not obtained, probate will be allowed on the ground that the bill must be considered as having come on to be heard, see *Simons v. Milman*, 2 Sim. 241; *Jones v. Howells*, 2 Hare, 353; *Newton v. Metropolitan R. Co.*, 1 Dr. & Sm. 583; *Beardmore v. Gregory*, 34 L. J. Ch. 392.

Under what circumstances it will be necessary to allege in the bill that probate has already been obtained. *Humphreys v. Ingleson*, 1 P. Wms. 753; *Newton v. Metropolitan R. Co.*, 1 Dr. & Sm. 583.

A commission in bankruptcy may be taken out by an executor before probate. *Ex parte Paddy*, 3 Madd. 241; *Rogers v. James*, 7 Taunt. 147.

4. *Went. Off. Ex.* (14th ed.) 84; *Elliott v. Kemp*, 7 M. & W. (Eng.) 306, 312, 314.

The possessory title of the executor is clearly sufficient to maintain the action against a wrong-doer on the general principle of *Armorie v. Delamirie*, 1 Smith Ld. Cas. (8th Am. ed.) 679, and hence by allowing him to waive the tort and sue in contract, the doctrine was developed that he could maintain a suit "upon his own contract for his testator's goods, as, if the executor sell cattle or other goods of the testator before the will be proved," he may maintain an action for debt before probate. *Went. Off. Ex.* (14th ed.) 84. See *Oughton v. Seppings*, 1 B. & Ad. 241; *White v. Mullet*, 6 Exch. 713, 715; *Wallor v. Drakeford*, 1 El. & Bl. 749.

On this principle, where three out of four executors made a sale of the goods of their testator, it was held that the three might sue without naming themselves executors, and without joining the fourth executor, although the goods were sold as the goods of the testator. *Brassington v. Ault*, 2 Bing. 177.

At common law, an administrator, unlike an executor, derived his title not from the will, but from the appointment of the probate court, and the party entitled to administer could do nothing until letters were granted to him.¹ This distinction between executors and administrators is not of much importance at the present time in the United States, the general tendency of American legislation being to assimilate the two classes of officers by requiring executors to prove the will speedily, and qualify by giving bonds, thus deducing their appointment from the act of the court rather than the testator.² Hence in most States it may be said that a subsequent grant of letters testamentary or of administration relates back, and renders valid all acts which come

1. Wms. Exrs. § 404, 629, 630; Wankford v. Wankford, 1 Salk. 301; Wooley v. Clark, 5 B. & Ald. 745; Pratt v. Swaine, 8 B. & C. 285. Compare Dawes v. Boylston, 9 Mass. 337; Johns v. Johns, 1 McCord (S. C.), 132; Wiggin v. Swett, 6 Met. (Mass.) 197; Shirley v. Healds, 34 N. H. 407; Echols v. Barrett, 6 Ga. 343; Lane v. Thompson, 43 N. H. 320.

The legal status of a person entitled to administration before the grant of letters to him, differed from that of an executor before probate, in that he had no right of action before he had obtained them. Martin v. Fuller, 1 Salk. 303; Comberb. (Eng.) 371; Wooldridge v. Bishop, 7 B. & C. 406.

An administrator with the will annexed is in no better position in this respect than any other administrator. Phillips v. Hartley, 3 C. & P. 121.

In an action upon a bill of exchange or promissory note, the statute of limitations begins to run against an administrator from the grant of letters, not from the day of payment. Murray v. E. I. Company, 5 B. & Ald. 204; Carey v. Stephenson, 2 Salk. 421; Perry v. Jenkins, 1 My. & Cr. 118.

Similarly in an action of trover a plea that the defendant was not guilty of the premises within six years is bad on especial demurrer, on the ground that while it might be true that the defendant was not guilty within six years, yet the cause of action might have accrued to the plaintiff by the grant of letters of administration within that time. Pratt v. Swaine, 8 B. & C. 285; 1 Man. & Ry. 451. See Benjamin v. Degroot, 1 Denio (N. Y.), 151.

It has however been held, that like an executor he may file a bill in equity, and it will be sufficient to have the letters at the hearing. Fell v. Lusuridge, Barnard Chan. Cas. 320. See also Humphreys v. Humphreys, 3 P. Wms. 351; Bateman v. Margerison, 6 Hare, 496; McFadden v. Geddis, 17 Ser. & R. (Pa.) 41; Peebles App. 15, Ser. & R. (Pa.) 41. Compare Simons v.

Milman, 2 Sim. 241; Jones v. Howells, 2 Hare, 353; Newton v. Metropolitan R. Co., 1 Dr. & Sm. 583; Beardmore v. Gregory, 34 S. J. Ch. 392.

As to whether the bill must allege that letters have already been obtained. Humphreys v. Humphreys, 3 P. Wms. 351; Newton v. Met. R. Co., 1 Dr. & Sm. 583.

Assignments of terms of years and surrenders of leasehold interests cannot be made by next of kin before taking out letters of administration. Wms. Exrs. (7th Eng. ed.) 406. See Bacon v. Simpson, 3 M. & W. 87; Rex v. Great Glenn, 5 B. & Ald. 188.

The release of a debt, or a promise to pay a debt, valid by the statute of limitations, made before obtaining letters, has been held not binding the administrator after they had been obtained. Middleton's Case, 5 Co. 28 b; Whitehall v. Squire, 1 Salk. 45; Hazelden v. Whitesides, 2 Strobh. (S. Car.) 353.

With a few exceptions a contract in reference to the estate made with a man before he has obtained letters, does not bind him afterwards. Doe v. Glenn, 1 Ad. & El. 49; 3 N. & M. 839; Mathis v. Brown, 1 H. & C. 686. Compare Kenrick v. Burgess, Moore (Eng.), 126; Whitehall v. Squire, 1 Salk. 295. See post, n., Relation.

Notice to be given by an administrator is not effectually given before letters. Holland v. King, 6 C. B. 727.

2. Schoul. Exrs. & Admsr. § 194.

In such States executors have no authority to act until they are appointed by the Probate Court, and have given the bonds required. A refusal or neglect to prove the will, qualify, and give such bonds, will be considered a refusal of the trust. Mitchell v. Rice, 6 J. J. Marsh. (Ky.) 627; Munroe v. James, 4 Munf. (Va.) 194; Wood v. Sparks, 1 Dev. & B. (N. C.) L. 389, 396; Carter v. Carter, 10 B. Mon. (Ky.) 322; Martin v. Peck, 2 Yerger (Tenn.), 298; Robertson v. Gaines, 2 Humph. (Tenn.) 381; Gardner v. Gautt, 19 Ala. 666; Mc-

within the scope of a rightful executor's or administrator's authority, and which were in their nature beneficial to the estate, or at least such as their parties had no reason to complain of.¹ On the other

Keen v. Frost, 46 Me. 239, 248; Deering v. Adams, 37 Me. 264.

Of joint executors, none can act but, such as give bond under the statute. Trask v. Donoghue, 21 Aiken (Vt.) 370; Mitchell v. Rice, 6 J. J. Marsh. (Ky.) 625.

In Missouri and Massachusetts an executor has no authority until he has qualified, although if he intermeddles and subsequently qualifies, his letters will relate back and cover his former acts. Stagg v. Green, 47 Mo. 500; Hatch v. Proctor, 102 Mass. 351; Gay v. Minot, 3 Cush. (Mass.) 352; Rand v. Hubbard, 4 Met. (Mass.) 252, 257.

As to failure to give bond and qualify as required operating as a refusal of the trust, see the analogous cases of testamentary trustees. Johnson's App.; Simpson's App. 9 Pa. St. 416; Mahony v. Hunter's Exr., 30 Ind. 246; Knight v. Loomis, 30 Me. 204; Sawyer's App., 16 N. H. 459. See also Calloway v. Joyes, 1 Blackf. (Ind.) 382; Gaskill v. Gaskill, 7 I. R. 478; Hanson v. Worthington, 12 Md. 418.

The statutory requirement, that the executor shall give bonds before intermeddling with the estate, is not necessarily inconsistent with a vested title in the trust estate, sufficient to sustain an appeal from a decree refusing to admit the will to probate. He holds the estate until qualification as trustee for legatees, creditors, and parties interested under the will, and is its only legal representative. Shirley v. Healds, 34 N. H. 407, 412; Kittredge v. Folsom, 8 N. H. 98, 110. See also Clapp v. Stoughton, 10 Pick. (Mass.) 463; Wiggins v. Swett, 6 Met. (Mass.) 107; Brown v. Gibson, 1 Nott & McC. (S. Car.) 326.

2 N. Y. Rev. Stat. 71, § 16 changes the common law rule, and forbids an executor to transfer the assets until letters have been issued to him; and the statute applies, even though the will gave the widow "full power and control to lease or sell" the real or personal estate. Humbert v. Wurster, 22 Hun (N. Y.) 405.

Nevertheless, if before receiving letters the executor makes a sale which afterwards would be deemed for the best interests of the estate, his subsequent appointment will validate it by relation. Thomas v. New York Ins. Co., 51 N. Y. Super. Ct. 225.

In North Carolina no person shall presume, under statutory penalty, to enter upon the administration without letters testamentary; and the secretary shall not issue such letters until the executor shall have sworn to execute the will of the deceased.

Wood v. Sparks, 1 Dev. & B. (N. Car.) 389, 396.

In Connecticut the rightful executor, though without authority, may lawfully receive into his possession assets if voluntarily delivered to him, and may approve of payments in some instances. Selleck v. Russo, 46 Conn. 370.

In Pennsylvania bonds are not required, save under peculiar circumstances to be hereafter considered; and the office of executor is said to be very analogous to the corresponding office in England, but not identical. The title is regarded as derived rather from the law than from the will, the appointment by the testator being merely inchoate and provisional until approved by the court. By the appointment of the testator the executors are entitled to the office until they renounce it, unless legally incompetent to fill it. If incompetent their appointment avails to make them representatives of the estate so far as relates to acts in which they are merely passive. Hence, notice of the dishonor of a note sent to an executor before qualification is sufficient. Schoenberger Exrs. v. Lancaster Savings Institution, 28 Pa. St. 459. Compare § XII. 1.

1. Alvord v. Marsh, 12 Allen (Mass.) 603; Hatch v. Proctor, 102 Mass. 351, 354; Outlaw v. Farmer, 71 N. Car. 35; Bellinger v. Ford, 21 Barb. (N. Y.) 311; Thomas v. N. Y. Life Ins. Co., 50 N. Y. Super. Ct. 225; Denton v. Sanford, 103 N. Y. 607; Magner v. Ryan, 19 Mo. 196; Stagg v. Green, 47 Mo. 500; Rattoon v. Overacker, 8 Johns. (N. Y.) 126; Taylor v. Moore, 47 Conn. 278; Shillaber v. Wyman, 15 Mass. 322; Lawrence v. Wright, 23 Pick. (Mass.) 128; Jewett v. Smith, 12 Mass. 309, 310; McVaughers v. Elder, 2 Brev. (N. Car.) 307; Gilkey v. Hamilton, 22 Mich. 283; Miller v. Reigue, 2 Hill (S. Car.), 592; Poag v. Miller, Dudley (S. Car.), 11; Wells v. Miller, 45 Ill. 382; Bullock v. Rogers, 16 Vt. 294; Lane v. Thompson, 43 N. H. 320; Leber v. Kauffelt, 5 W. & S. (Pa.) 445; McDearmon v. Maxfield, 38 Ark. 631. See also Kenrick v. Burgess, Moore (Eng.), 126; Hill v. Curtis, L. R. 1 Eq. 90; Whitehall v. Squire, 1 Salk. 295; Vroom v. Van Horn, 10 Paige (N. Y.) 558; Walker v. May, 2 Hill Ch. (S. Car.) 23. Compare Parsons v. Maysden, 1 Freem. 152.

Relation.—While true, as a general principle, that the title of an administrator does not vest until letters have been granted to him, it is admitted, even by the ecclesiastical text-writers, that for particular purposes the letters relate back to the date of the

hand, it is to be observed that acts by an executor not in themselves justifiable in the prudent interest of the estate pending his

intestate's death. *Wms. Exrs.* 631; *Godolph. pt. 2, c. 20, sect. 6*; 2 *Roll. Abr.* 399 tit. *Relation A*, pt. 1; *Middleton's Case*, 5 *Co.* 28 b.

Thus trespass or trover may be maintained by an administrator for the goods of the intestate taken before letters granted to him, the apparent necessity of the thing overriding technical scruples. *Thorpe v. Stollwood*, 5 *M. & Gr.* 760; *Longe v. Hebb*, *Style*, 341; *Foster v. Bates*, 12 *M. & W.* 233; *Searson v. Robinson*, 2 *Fost. & F.* 351. See *Brckett v. Hoitt*, 20 *N. H.* 257; *Manwell v. Briggs*, 17 *Vt.* 176; *Hatch v. Proctor*, 102 *Mass.* 353.

On the other hand, detinue cannot be maintained against one who has taken possession of the goods of the estate since the intestate's death, but has ceased to hold them prior to the grant of administration. *Crossfield v. Such*, 8 *Exch.* 825.

On the same ground of necessity, it appears to have been held that wherever any one acting on behalf of the intestate's estate, and not on his own account, makes a contract with another before any grant of administration, the administration will have relation back, in order not to lose the benefit of the contract, so that the administrator may sue upon it as made to himself. *Wms. Exrs.* 632, citing *Blodgett v. Arch*, 10 *Exch.* 333.

Thus the administrator might ratify a sale of the effects of the deceased, and recover the price. *Foster v. Bates*, 12 *M. & W.* 226; *Brown v. Lewis*, 9 *R. I.* 497.

A promissory note given for money of an estate loaned by the administratrix prior to issue to her of letters of administration, and payable to her order, will, at her election, after such issue, inure to the benefit of the estate; and an action for its conversion brought by her as administratrix is sufficient evidence of her election. *Kalckhoff v. Zaehrlaut*, 40 *Wis.* 427.

A person to whose order money belonging to an estate was paid, before an administrator was appointed, is accountable therefor to the administrator when appointed, although the money or its avails never came to his actual use. *Clark v. Pishon*, 31 *Me.* 503.

Furthermore, it has been held, on the doctrine of relation, that an administrator entitled to bring trover for a conversion between the death of the intestate and the grant of administration, might waive the act, and sue on the contract as for money had and received for his use as administrator. *Welchman v. Sturgis*, 13 *Q. B.* 552; *Potter v. Van Vranken*, 36 *N. Y.* 619.

Leasehold property vests in the adminis-

tration by relation so as to enable him to bring actions in respect to all matters affecting it subsequent to the death of the intestate, and render him liable for the rents and profits during that period. *Wms. Exrs.* § 633; *Rex v. Horsley*, 8 *East*, 410; *Patten v. Patten*, T. 3, *W.* 4, 1 *Alcock & Napier*, 493. Compare *Bacon v. Simpson*, 3 *M. & W.* 87; *Rex v. Great Glenn*, 5 *B. & Ad.* 188.

As to whether the doctrine of relation applies where the deceased had only a special property in the goods, see *Fryson v. Chambers*, 9 *M. & W.* 460.

It is clear, however, that the doctrine has no application where the deceased had no personal interest in the goods, but merely held them as administrator of another. In such case it would be a good defence to an action of trover by his personal representative against a wrong-doer, that the title had devolved upon the administrator *de bonis non* of the original intestate. *Elliott v. Kemp*, 7 *M. & W.* 306; *Reeves v. Matthews*, 17 *Ga.* 449.

It must be borne in mind, however, that the doctrine of relation will never be applied where its effect would be to divest a right legally vested in another between the death of the intestate and the grant of letters. *Wms. Exrs.* (7th Eng. ed.) § 634; *Waring v. Dewbury*, *Gilb. Eq.* 223; *Rex v. Horsely*, 8 *East*, 405; *Rex v. Widworthy*, 2 *Bott.* 461.

It exists only where the act to be validated is for the benefit of the estate. *Morgan v. Thomas*, 8 *Exch.* 302; *Leber v. Kauffelt*, 5 *Watts & S. (Pa.)* 445; *Gilkey v. Hamilton*, 22 *Mich.* 283, 286, 287; *Crump v. Williams*, 56 *Ga.* 590.

Relation as affecting Status of Executor de son Tort.—When a man has intermeddled with the estate so as to render himself liable as executor *de son tort*, and subsequently takes out letters of administration, it is often difficult to determine how far he is bound in his character as rightful administrator by his own acts done as executor *de son tort*. "Certain," it is, "that he can ratify and make valid by relation all those acts which would have been valid had he been the rightful administrator." *Outlaw v. Farmer*, 71 *N. Car.* 35; *Alvord v. Marsh*, 12 *Allen (Mass.)*, 603; *Walker v. May*, 2 *Hill Ch. (S. Car.)* 28; *Hatch v. Proctor*, 102 *Mass.* 351; *Kenrick v. Burgess*, *Moore*, 126; *Vroom v. Van Horn*, 10 *Paige (N. Y.)*, 549, 558; *Walker v. May*, 2 *Hill Ch. (S. Car.)* 23.

His promise to pay a debt of the deceased will not prevent the bar of the statute to a suit brought against him afterwards as the

qualification, are not as likely to be upheld in this country as in England; and officious and imprudent dealings with the property may subject him to personal liability, rather than bind the estate which he assumes to represent.¹

3. *Whether a Suitable Person who has intermeddled can be compelled to take out Letters.*—If an executor has once administered under the English practice he is considered to have accepted the executorship, and cannot refuse to prove the will, and accept the office.² Neither in England nor America can a widow, next of kin, or other person, who has intermeddled with the effects, and made himself liable as an executor *de son tort*, be compelled by the court to take out letters of administration.³

4. *Intermeddling by Third Persons after Grant of Letters.*—After letters testamentary or of administration have once been

rightful administrator. *Hazelden v. Whitesides*, 2 Strobb. (S. C.) 353; *Hansford v. Elliott*, 9 Leigh (Va.) 79.

Where a widow takes possession of her deceased husband's estate, and delivers personal property of the estate to a creditor of her husband in payment of his debt, she is not thereby estopped, after obtaining letters of administration, from recovering back the property or its value from the creditor. *Gouldsmith v. Coleman*, 57 Ga. 425. Compare *Roundfoot v. McAlarney*, 82 Pa. St. 193.

Even acts technically tortious might be ratified by a subsequent grant of letters: thus an executor *de son tort* who had even *pendente lite* obtained letters of administration might plead a retainer of his own debt. *Curtis v. Vernon*, 3 T. R. 590; *Williamson v. Norwich*, Style, 337; *Pyne v. Woolland*, 2 Vent. 180; *Vaughan v. Brown*, 2 Stra. 1106; *Alvord v. Marsh*, 12 Allen, 603; *Hatch v. Proctor*, 102 Mass. 353, 354. See *Rattoon v. Overacker*, 8 Johns. (N. Y.) 126; *Clements v. Swain*, 2 N. H. 476; *Magner v. Ryan*, 19 Mo. 196.

To an action on a judgment obtained against an executor *de son tort*, the latter has been permitted to show his subsequent appointment as administrator, and a full settlement of the estate as insolvent. *Schoul. Exrs. & Admsrs.* § 195; *Olmsted v. Clark*, 30 Conn. 208.

But not *seem* to set up his own wrong so as to defeat the judgment. *Walker v. May*, 2 Hill Ch. (S. Car.) 22.

It is to be observed that the peculiar liability of an executor *de son tort* to creditors, legatees, or the rightful administrator, is not necessarily in question when the transaction itself calls for enforcement. *Schoul. Exrs. and Admsrs.* § 195; *Hatch v. Proctor*, 102 Mass. 351, 354.

1. *Schoul. Exrs. and Admsrs.* § 194. See *Taylor v. Moore*, 47 Conn. 278; *Tucker v.*

Whaley, 11 R. I. 543; *Luscomb v. Ballard*, 5 Gray (Mass.), 403. See "Liability."

For acts performed before his appointment as administrator, and for which, but for his appointment, he would be liable as executor *de son tort*, the administrator is chargeable only in that capacity. *McClure v. People*, 19 Ill. App. 105.

2. *Goods of Perry*, 2 Cent. Rep. 655; *Wms. Exrs.* (7th Eng. ed.) § 276.

As to what is a sufficient intermeddling to compel the executor to take probate, see *Wms. Exrs.* (7th Eng. ed.) § 276, 281. See § VIII. 2, *post*.

"This seems incompatible with the American doctrine, which refers the appointment rather to one's qualification by proving the will, furnishing bonds, and satisfying the court that he is suitable in fact for the office; from which aspect, indeed, one who had acted injuriously to the estate, before receiving letters, might be deemed to be most unsuitable." *Schoul. Exrs. and Admsrs.* § 196.

On the other hand, it is to be observed, that the fact that one is an executor *de son tort* of the estate is no objection to his appointment, save so far as his personal suitability for the trust is thereby affected. *Bingham v. Crenshaw*, 34 Ala. 683; *Carnochan v. Abrahams*, T. U. P. Charit. (Ga.) 196.

3. *Wms. Exrs.* (7th Eng. ed.) 439; *In the Goods of Fell*, 2 Sw. & Tr. 87; *Ackerly v. Parkinson*, 3 M. & Sel. 411; *Simonton v. McLane*, 25 Ala. 353; *Howland v. Dews*, R. M. Charit. (Ga.) 383; *Hopkins v. Towns*, 4 B. Mon. (Ky.) 124; *Chamberlayne v. Temple*, 2 Rand. (Va.) 384.

If the rightful executor is also a creditor of the estate, he may sue the executor *de son tort*, and recover his debt. *Dorsey v. Smithson*, 6 Har. & J. (Md.) 61; *Shields v. Anderson*, 3 Leigh (Va.), 729; *Osborne v. Moss*, 7 Johns. (N. Y.) 161.

issued, there is a legal custodian for the property of the deceased ; and whoever afterwards injudiciously intermeddles becomes liable as a trespasser, but cannot be strictly considered an executor *de son tort*.¹ If, however, his interference be actually under a claim of right as executor, because of his express claim, he may be charged as executor *de son tort*, although there were at the same time a rightful executor.²

VIII. Acceptance and Renunciation of Executors. — 1. *Executor's Right to accept or renounce* — *Right not to be exercised corruptly* — *Express Acceptance or Renunciation* — *Citation to Persons named*. — The office of executor being one of personal confidence, the person named by the testator may elect to accept or renounce the trust ;³ and a promise to accept, made to the testator in his lifetime, will not bind him, unless sustained by sufficient consideration.⁴ If, however, the executor is given a legacy as compensation for his services as executor, the legacy is forfeited by renunciation.⁵

As the office is one of personal confidence, it cannot be assigned ; and for the same reason an agreement made with parties in interest before a testator's death, and contrary to his expressed wishes, by one named as executor to renounce for a stated consideration, is contrary to public policy and void.⁶ If the executor accept the appointment, he should do so by proving the will, and taking out letters testamentary.⁷ If he elect to renounce, his renunciation

1. Wms. Exrs. (7th Eng. ed.) § 261 ; 1 Salk. 313, anonymous.

2. Read's Case, 5 Co. 34 a ; Ambler v. Lindsay, L. R. 3 Ch. D. (Eng.) 198 ; Carter v. Robbins, 8 Rich. (S. C.) L. 29 ; Foster v. Nowlin, 4 Mo. 18 ; Mitchell v. Kirk, 3 Sneed (Tenn.) 319 ; Howland v. Dews, R. M. Charl. (Ga.) 383.

That there may be both a rightful executor and an executor *de son tort* at the same time, see Dorsey v. Smithson, 6 Har. & J. (Md.) 61 ; McMorine v. Storey, 3 Dev. & B. (N. Car.) L. 87 ; Foster v. Wallace, 2 Mo. 231.

3. Wms. Exrs. (7th Eng. ed.) § 274 ; Douglas v. Forrest, 4 Bing. 704 ; Lowry v. Fulton, 9 Sim. 115 ; Lewin, Trusts, 161, 162 ; Dunning v. Ocean Nat. Bank, 6 Lans. (N. Y.) 296, 298.

An executor cannot renounce the office in part ; he must renounce entirely or not at all. 2 Roll. Rep. 132. See *post*, Thornton v. Winston, 4 Leigh (Va.) 152.

An executor can only be said to renounce when he refuses to act prior to appointments ; a refusal afterwards is more properly termed a resignation. *Re Suarez*, 3 Demarest (N. Y.), 164.

4. Doyle v. Blake, 2 Sch. & Lef. 239.

5. Stanley v. Whitney, L. R. 2 Eq. 418.

But every presumption is in favor of the postponement of a final decision until the

death of the testator ; and hence, as a rule, one may renounce a trust to which he has been nominated under the will without forfeiting a legacy left to him as an individual, upon the manifest requirement that he shall serve. Schoul. Exrs. and Admsrs. § 44 ; Pollexfen v. Moore, 3 Atk. (Eng.) 272 ; Stanley v. Whitney, L. R. 2 Eq. 418.

6. Bedell v. Constable, Vaugh. (Eng.) 182 ; Goods of Briggs, 26 W. R. (Eng.) 535 ; Wms. Exrs. (7th Eng. ed.) § 254, 274 ; Staunton v. Parker, 26 N. Y. Supr. 55 ; 19 Hun (N. Y.), 55 ; Ellicott v. Chamberlin, 38 N. J. Eq. 604 ; 48 Am. Rep. 377. The same principle has been applied to such a contract by one entitled to administer. *Bowers v. Bowers*, 26 Pa. St. 74.

The rightful executor cannot by mispleading or acquiescence in the unfounded claim of another asserting the right to administration under a void appointment, change the administration or confer upon another who is without right, rights and powers belonging only to the lawful executor ; nor can he thereby estop beneficiaries under the will from denying the authority of such claimant. *Nelson v. Boynton*, 54 Ala. 368.

7. Schoul. Exrs. and Admsrs. § 44 ; Lewin, Trusts, 167 ; 3 Redf. Wills (2d ed.), 529. See (*b*). *Worth v. M'Arden*, 1 Dev. & B. Eq. (N. Car.) 199.

should be filed of record.¹ Both in England and America, courts of probate have power to summon the person named, and compel him to elect, and punish him for contempt if he refuse to appear.²

2. *Constructive Acceptance or Renunciation*—*Right to renounce after an Act of Administration*—*Effect of Executor's Death pending Acceptance*.—Acts which amount to an administration determine the executor's election, and render him compellable to take probate at the discretion of the court.³ Two general rules may be laid down: (1) whatever the executor does with relation to the goods and effects of the testator which shows an intention to assume the executorship will regularly amount to an administration; (2) whatever will make a man liable as executor *de son tort* will be deemed an election of the executorship.⁴

1. Schoul. Exrs. and Admsrs. § 46.

A formal renunciation of the trust, signed by the executor named for it and filed of record, will suffice. Such a writing, or some judgment of record reciting why the formality was dispensed with, ought in sound probate practice to precede the granting of letters testamentary or of administration to another. Schoul. Exrs. and Admsrs. § 46; *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33; *Long v. Symmes*, 3 Hagg. 776; *Robertson v. McGeoch*, 11 Paige (N. Y.), 640; *Codding v. Newman*, 3 N. Y. Super. Ct. 364; *Newton v. Cocke*, 10 Ark. 169; *Muirhead v. Muirhead*, 6 Sm. & M. (Eng.) 451; *Casey v. Gardiner*, 4 Bradf. Surr. (N. Y.) 13.

In New York the writing should be attested by two witnesses, and acknowledged and otherwise proved, and filed. Redf. Surr. Pr. 141; 2 N. Y. R. S. § 370.

In Massachusetts, and some other States, the instrument is more like a simple letter to the judge. In England, and in most of the States, a seal is unnecessary. *Goods of Boyle*, 3 Sw. & Tr. 426; Schoul. Exrs. and Admsrs. § 46 n.

Renunciation should be over the party's own signature, except in extreme cases, or when out of the realm, when the writing should be executed by attorney. *Goods of Rosser*, 3 Sw. & Tr. 490.

Under the English practice, the person renouncing takes oath that he has not intermeddled with the effects of the deceased. The oath is not generally required in the United States. Wms. Exrs. (7th Eng. ed.) § 282; Schoul. Exrs. and Admsrs. § 46 n.

In Pennsylvania the form of renunciation is not important; it may be by letter filed in the proper office. *Comrs. v. Matter*, 16 S. & R. (Pa.) 416. See *Miller v. Meetch*, 8 Pa. St. 417.

Such a letter has also been held good in England. *Broker v. Charter*, Cro. Eliz. 92.

In Virginia, it has been held that the failure to put such renunciation upon record,

does not make a subsequent grant of administration with the will annexed absolutely void. *Thompsons v. Meek*, 7 Leigh (Va.), 419. See *Thornton v. Winston*, 4 Leigh (Va.), 152.

2. Wms. Exrs. (7th Eng. ed.) 274, 275; Stat. 21, Hen. 8, c. 5, sect. 8; 55 Geo. 3, c. 184, sect. 37. By Stats. 21 & 22 Vict. c. 95, sect. 16, if the person entitled to the executorship does not appear when cited, administration, without any further renunciation, devolves as if he had not been appointed. In the *Goods of Noddings*, 2 Sw. & Tr. (Eng.) 15.

This jurisdiction has been transferred to the court of probate erected by act of 1857, and is exercised generally by courts of similar jurisdiction in the United States. Schoul. Exrs. and Admsrs. §§ 11, 14.

3. Wms. Exrs. (7th Eng. ed.) 276; *Goods of Badenach*, 3 Sw. & Tr. (Eng.) 465.

It was once even held that the court has no jurisdiction to accept his renunciation, and grant administration with the will annexed to another; but this position was probably taken from jealousy of the ecclesiastical courts, and has since been abandoned. Wms. Exrs. (7th Eng. ed.) 277, 278.

If the executor has acted, and the court, not knowing it, commits administration to another, though the administration may be revoked, and the executor compelled to prove the will, yet the grant is valid until so revoked. Went. Off. Ex. (14th ed.) 91. See *Doyle v. Blake*, 2 Sch. & Lf. (Eng.) 237.

The subsequent grant of administration does not protect the executor; for if he has once administered, he will remain liable to be sued as executor, both at law and in equity, notwithstanding his renunciation, and the appointment of the administrator. *Rogers v. Frank*, 1 Y. & Jerv. (Eng.) 409; *Parsons v. Mayesden*, 1 Freem. (Eng.) 151.

4. Wms. Exrs. (7th Eng. ed.) 279. See also *Raynor v. Green*, 2 Cush. (Eng.) 248;

The person named as executor in such case is estopped from renouncing the trust in the interest of creditors and legatees, and is to be treated as executor only so far as may be necessary to hold him responsible to them and to the court for his injudicious and unauthorized acts. Unless his retention in the office is necessary for this purpose, a vacancy, whether by his renunciation, resignation, or removal, if desired by himself or desirable on other grounds, should be declared;¹ and local statutes now provide

Vickers v. Bell, 4 De G. J. & S. (Eng.) 274; Van Horne v. Fonda, 6 John. Ch. (N. Y.) 388.

Thus, if the executor takes possession of the testator's goods, or even the goods of a stranger, supposing them to belong to the testator, and converts them to his own use, or disposes of them to others, or collects debts, pays legacies, gives releases or acquittances, this amounts to an administration. Wms. Exrs. (7th Eng. ed.) 279, 280; Went. Off. Ex. c. 3, p. 93, 94 (14th ed.); 1 Roll. Ab. 917 pt. 12, 13.

Where a man named as one of several executors, in answer to an inquiry who were executors, wrote that he and others were executors, he was *held* to have accepted the executorship. Vickers v. Bell, 3 N. R. (Eng.) 624; 4 De G. J. & S. (Ed.) 274.

The insertion of an advertisement calling on persons to send in their accounts, and pay money due the estate to A. and B., "his executors in trust," was *held* sufficient to compel them to take probate, and subject them personally to the costs of resistance, the estate being small, and left for two years and a half without a representative. Long v. Symes, 3 Hagg. (Eng.) 771.

If, on the other hand, the executor seize the testator's goods, claiming property in them himself, though the claim is not afterwards sustained, his act is explained, and no inference can be drawn that he intended thereby to accept the executorship. Bac. Abr. tit. Executors, e. 10.

For the same reason, an executor who has not proved is not to be considered as acting, by assisting a co-executor, who has proved, in writing letters to collect debts, nor by writing directly to a debtor of the testator, and requiring payment. Orr v. Newton, 2 Cox (Eng.), 274. See Stacey v. Elph. 1 My. & K. (Eng.) 195. Compare Garrison v. Graham, 3 Hill's MSS. (Eng.) 239; 1 P. Wms. (Eng.) note (g) (6th ed.).

As to acts which make one liable as executor *de son tort*, see § VII. i.

Renunciation after qualifying. — In England, taking the oath as executor is not considered as such an intermeddling as precludes renunciation. 3 Hagg. (Eng.) 216; Jackson v. Whitehead, 3 Phillim (Eng.), 577. See also in the Goods of Wilkinson, 3 Phillim. (Eng.) 96; Long v. Symes,

3 Hagg. (Eng.) 774; Panchard v. Weger, 1 Phillim. (Eng.) 212; Meek v. Curtis, 1 Hagg. (Eng.) 129.

But he cannot renounce after he has taken probate. In the Goods of Veiga, 32 L. J. P. M. & A. (Eng.) 9; Graham v. Keble, 2 Daw. P. C. (Eng.) 17.

In Balchen v. Scott, 2 Ves. Jr. 678, it was *held* that a co-executor who had proved, but never acted, cannot be charged by reason of the mere receipt of a letter by post from a debtor of the estate, enclosing a bill of exchange on account of his debt, which bill the co-executor immediately sent to the acting executor, who became insolvent.

In North Carolina, the court may accept the renunciation of an executor at any time before he has intermeddled with the estate, even after he has proved the will. So of an executor of an executor as to the first will. Mitchell v. Adams, 1 Ired. (N. Car.) 298. See Sawyer v. Dozier, 5 Ired. (N. Car.) 97; Davis v. Inscoe, 84 N. C. 396.

But an executor who has entered upon the discharge of his trust cannot afterwards resign it. Washington v. Blunt, 8 Ired. (N. Car.) Eq. 253.

But in Worth v. McArden, 11 Dev. & Bab. (N. C.) Eq. 199, it was said, if he proved the will generally without qualification, he will be deemed to have accepted the trusts. It has been *held* in Massachusetts, that an executor, after probate of the will, accepting the trust, and giving bond for its faithful execution, cannot renounce the trust. Sears v. Dillingham, 12 Mass. 358.

The rule has been altered by Gen. Sts. c. 101, sect. 5. Thayer v. Homer, 11 Met. (Mass.) 104.

In Pennsylvania, an executor who has taken the oath, but not administered, may renounce; and, if there are several executors, the register will thereupon grant letters to the survivors. Miller v. Meetch, 8 Pa. St. 417.

In Louisiana, an executor who is at the same time universal legatee, cannot, by any act purely his own, cease to be executor, and relieve himself of the obligations and duties which he has judicially assumed. Webb v. Keller, 1 So. Rep. (La.) 423.

1. Schoul. Exrs. and Admsrs. § 46.

See, as to liability, Doyle v. Blake, 2

that executors may resign or be removed from office when, in the discretion of the court, it seems proper.¹

If, on the other hand, the executor delay for an unreasonable time to prove the will, take out letters, and fully qualify as prescribed by the governing statute, his conduct amounts to a constructive refusal of the trust. Any act radically inconsistent with the nature of the trust may amount to a constructive renunciation.² If one who has been nominated as executor and trustee under the will qualifies and acts in the latter capacity, but not in the former, it is a legitimate inference that he has accepted the one trust and declined the other, and *vice versa*.³ The death of the sole executor named in the will, before having either taken probate or renounced, leaves a vacancy, whether the death occurred during the testator's life, or later, which must be filled as in the case of a formal renunciation.⁴

3. *Renunciation of One of Several Co-executors.* — Co-executors are bound by the doctrines of constructive acceptance and renunciation;⁵ but on the renunciation of one or more co-executors the trust devolves upon the survivors, and is not properly committed to the administrator with the will annexed, until the death or

Sch. & Lef. (Eng.) 237; *Read v. Truelove*, Ambler (Eng.) 417; *Parsons v. Mayesden*, 1 Freeman (Eng.) 151.

1. Mass. Gen. Stats. c. 101, sect. 5. See *Russell v. Hoar*, 3 Met. (Mass.) 187; *Thayer v. Homer*, 11 Met. (Mass.) 104. So in New Hampshire, — *Morgan v. Dodge*, 44 N. H. 258, — and in Pennsylvania. See *Purdon's Dig.* 560, pl. 257. See also *Hargood v. Wells*, 1 Hill (S. C.), 59; *Mitchell v. Adams*, 1 Ired. (N. C.) 298; *Washington v. Blunt*, 8 Ired. (N. C.) Eq. 253; *Flinn v. Chase*, 4 Denio (N. Y.), 85; *Newton v. Cocke*, 10 Ark. 169; *Mussault's Case*, T. N. P. Charlt. (Ga.) 259.

Nor need the appointment of a successor await the settlement of the outgoing executor's accounts. *Harrison v. Henderson*, 7 Heisk. (Tenn.) 315.

2. Schoul. Exrs. and Admsrs. § 46; *Rex v. Raines*, 1 Lo. Raym. (Eng.) 363; *Bewardine v. Carter*, Moor (Eng.) 273. *In re Noddings*, 2 Sw. & Tr. (Eng.) 15; *Marr v. Peay*, 2 Murph. (N. C.) 85; *Ayres v. Weed*, 16 Conn. 291; *Uldrick v. Simpson*, 1 S. C. 289; *Solomon v. Wixom*, 27 Conn. 520; *Thornton v. Winston*, 4 Leigh (Va.), 152. See, as to effect of failure to give bonds, § VII. 2, n.

Refusal to act as executor may be implied without record evidence or express declaration. *Ayres v. Clinefelter*, 20 Ind. 465; *Solomon v. Wixom*, 27 Conn. 291; *Uldrick v. Simpson*, 1 S. C. 289.

A judge of probate named as one of the executors under a will, shows, by acting as judge in admitting the will to probate,

and qualifying the co-executors, that he declines to serve. *Ayres v. Weed*, 16 Conn. 291.

3. *Williams v. Cushing*, 34 Me. 370; *Groton v. Ruggles*, 17 Me. 137; *Deering v. Adams*, 37 Me. 264.

The same is true, whether the executor is appointed trustee directly, or is constituted such by construction of the will. *Deering v. Adams*, 37 Me. 264, 265. See *Wheatley v. Badger*, 7 Pa. St. 459; *Knight v. Loomis*, 30 Me. 204; *Hanson v. Worthington*, 12 Md. 418; *Judson v. Gibbons*, 5 Wend. (N. Y.) 226; *De Peyster v. Clendinning*, 8 Paige (N. Y.), 295.

4. Schoul. Exrs. and Admsrs. § 45.

The executor of the executor cannot fill the office, as the law usually stands at this day. See § X.

5. *Vickers v. Bell*, 3 N. R. (Eng.) 624; *DeG. J. & S.* (Eng.) 274; *Long v. Symes*, 3 Hagg. (Eng.) 771; *Bac. Abr. tit. Executors*, c. 10.

If one of several co-executors after intermeddling with the effects, renounces, his renunciation is invalid, and the record of it on the probate granted to his co-executors ought to be cancelled. *Wms. Exrs.* (7th Eng. ed.) 278; *In the Goods of Badenach*, 3 Sw. & Tr. 465. But a co-executor who renounces without having intermeddled or proved the will, being a creditor of the estate, may bring an action against the other executor. *Rawlinson v. Shaw*, 37 R. (Eng.) 557; *Dorchester v. Webb*, Jones (Eng.), 345; *Hunter v. Hunter*, 19 Barb. (N. Y.) 631.

renunciation of the last survivor.¹ A co-executor who has renounced may retract his renunciation so as to succeed to a vacancy should one occur.²

4. *Whether an Executor renouncing may execute a Power.* — The better opinion is, that a power annexed to the office of executor dies with the office; but if the power is vested in the executor, not *virtute officii*, but in his individual capacity as testamentary trustee, it may be exercised after renunciation.³

5. *Liability of Executor. — Renouncing after an Act of Administration.* — An executor who has administered a part of the assets will be charged with what actually came to his hands, although he has renounced, and paid the money over to a co-executor who

1. *Miller v. Meetch*, 8 Pa. St. 417; *Matter of Maxwell*, 3 N. J. Eq. 611; *Toller*, 44; *Schoul. Exrs. and Admsrs.* § 51. See "Joint Executors and Administrators," Am. and Eng. Enc. of Law; *Jackson v. Jeffries*, 1 Marsh. (Ky.) 88. See *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33.

If a power has been conferred on a party to a deed, his executors, administrators, and assigns, and he dies, having appointed several executors, one of whom renounces, the others who act may well exercise the power.

2. *Granville v. McNeill*, 7 Hare (Eng.), 156; *Bunner v. Storm*, 1 Sandf. (N. Y.) 357.

3. *Wms. Exrs.* (7th Eng. ed.) 287.

Schoul. Exrs. and Admsrs. § 49.

Contra, 1 *Sugden on Powers* (6th ed.), 138; 2 *Prest. on Abstr.* 264. Compare § X. n., XII. 3. c, n.

See § XII. 2. c, distinction between executor's and testamentary trustees.

"If a man will that A. and B., his executors, shall sell, etc., and they refuse before the ordinary, yet it seems they may sell, because they are certainly named, so that it appears the will of the testator is that they shall sell whether they refuse or not." *Perkins*, No. 548.

A power given to "my said executors and trustees" cannot be exercised after renunciation. *Yates v. Compton*, 2 P. Wms. (Eng.) 309. See *Keates v. Burton*, 14 Ves. (Eng.) 434; *Ford v. Ruxton*, 1 Coll. (Eng.) 407.

In *Tainter v. Clark*, 13 Met. (Mass.) 220, 226, A. was appointed by the will sole executor, and authorized to sell and convey such of his property as in A.'s judgment would best promote the interest of all concerned. A. renounced, and the question arose whether the power to sell devolved upon the administrator with the will annexed. *Held*, that it did not. "He (A.) has, it is true, declined the office of executor, but the power of selling real estate is no part of the business of an executor or administrator; unless he obtains license

under the statute, he has no interest in the land, and no authority to sell it, except the authority which may be derived from the statute. The executor in this case was the donee of a trust-power which was distinct from the office of executor, and the trust might exist for years after the duties of the office of executor had been fully performed. This trust-power has never been renounced, and consequently has never been transmitted to the administrator." *Wilde*, 7, p. 227. See *Clark v. Tainter*, 7 Cush. (Mass.) 567; *Treadwell v. Cordis*, 5 Gray (Mass.), 341, 359; *Dunning v. The Ocean Nat. Bank*, 6 Lans. (N. Y.) 296.

The question has given rise to much discussion in Pennsylvania, the conclusion arrived at being, that a power to sell land for the payment of debts or distribution is to be deemed annexed to the office of executor, and will pass to the administrator with the will annexed, but not a power to sell for general purposes of investment. *Ross v. Barclay*, 6 Harris (Pa.), 179; *Water v. Margerson*, 10 P. F. S. (Pa.) 39; *Evans v. Chew*, 21 P. F. S. (Pa. St.) 47.

It is immaterial whether there is an absolute direction to sell so as to work an immediate conversion, or the power is discretionary, and it is equally clear that it makes no difference whether the distribution is to be immediate or upon the expiration of a certain period of time, or upon the uncertain contingency of a life or lives, and that in the mean time the proceeds of the sale are to be invested, and the interest paid to the beneficiaries, provided always that the investment is subordinate to the ultimate distribution. *Lantz v. Boyer*, 31 P. F. S. (Pa.) 325; *Jackman v. Delafield*, 4 Norris (Pa.), 381; *Doff's App.*; *Hunt's Est.*, 4 W. N. C. (Pa.) 335.

If land which has been made subject to the executor's discretionary power of sale for distribution, be sold under adverse process, the executor or administrator *de bonis non cum testamento annexo* may claim surplus. 16 *Sickles*, 497.

proved the will.¹ For, since renunciation must be entire, an executor who has partially accepted the office can only be discharged by completely administering the assets, or by placing the administration in the hands of a court of equity.²

6. *Retraction after Renunciation.* — An executor who has renounced may, at any time before the appointment of an administrator with the will annexed, retract his renunciation;³ but if an administrator with the will annexed has once been appointed, his renunciation is thenceforth irrevocable.⁴ If there are several

1. *Read v. Truelove*, Ambl. (Eng.) 417; *Doyle v. Blake*, 2 Sch. & Lif. (Eng.) 231; *Underwood v. Stevens*, 1 Meriv. (Eng.) 712; *Rogers v. Frank*, 1 Y. & Jerv. (Eng.) 409.

See as to assisting a co-executor in writing letters, to collect debts, or as to accepting an agency after renunciation, *Orr v. Newton*, 2 Cox (Eng.), 274; *Dove v. Everard*, 1 Russ. & My. (Eng.) 231; *Lowry v. Fulton*, 9 Sim. (Eng.) 104; *Stacey v. Elph. & My. & K.* (Eng.) 195; *Harrison v. Graham*, 3 Hill's M.S.S. (Eng.) 239; 1 P. Wms. (Eng.) 241, n. 7 (6th ed.).

See as to what is an act of administration, *ante*. Wms. Exrs. (7th Eng. ed.) 279-281, 1830-1833.

One of several administrators removed from office is not liable for acts done after his removal. *Marsh v. People*, 15 Ill. 284.

2. 2 Schef. & Lif. (Eng.) 345. See *Horton v. Brocklehurst*, 29 Beav. (Eng.) 504; *Riky v. Kemmis*, 1 Lloyd & Goold (Eng.) 101.

3. Wms. Exrs. (7th Eng. ed.) § 284; *McDonnell v. Prendergast*, 3 Hagg. (Eng.) 212; *Harrison v. Harrison*, 4 Notes of Cas. (Eng.) 455, 456; 1 Robert (Eng.) 419; *Dempsey's Will*, 1 Tuck. Sur. (N. Y.) 51; *Genl. Sts. Mass.* c. 93, § 6; *Robertson v. McGeoch*, 11 Paige (N. Y.), 640.

Any intermeddling with the estate before qualifying is evidence of such retraction, and his subsequent qualification validates by relation contracts made by him on behalf of the estate. *Davis v. Incoe*, 84 N. C. 396.

At common law an executor who has renounced in order to become a witness in a suit commenced touching the validity of the will might, at the termination of the suit, with the consent of all parties interested, retract, and take probate of the will. *Thompson v. Dixon*, 3 Add. (Eng.) 272; *McDonnell v. Prendergast*, 3 Hagg. (Eng.) 212, 216.

4. *Robinson v. Pett*, 3 P. Wms. (Eng.) 251; *Hensloe's Case*, 8 Co. 37 a; *Went. Off. Ex.* 95 (14th ed.); *Touchst.* 466; *Goods of Thornton*, Add. (Eng.) 273; *Throw v. Shannon*, 59 How. Pr. (N. Y.) 214; *Thornton v. Winston*, 4 Leigh (Va.), 152.

It was formerly said that the renunciation remained irrevocable only during the life of the administrator so appointed.

Toller, 42; 2 *Roberts on Wills*, 171. But this view was rejected upon grounds of public policy. Wms. Exrs. § 284; In the *Goods of Thornton*, Add. (Eng.) 273; *Thornton v. Winston*, 4 Leigh (Va.), 152.

Under the old English practice an executor who had neither actually nor constructively renounced his appointment, but had merely, when cited to appear and prove the will, disregarded the citation, might at any time in the future have the administration revoked, and letters testamentary issued to him on proving the will. *Godolph. pt. 2*, c. 31, § 3. Under 21 and 22 Vict. c. 95, § 16, failure to appear to the citation works a forfeiture of the executorship.

While undoubtedly true, that one who is named in the will as sole executor and sole legatee cannot on that account retract his renunciation after the appointment of an administrator with the will annexed, the tendency of modern practice is to appoint such sole executor, administrator *de bonis non* on the death of the administrator, with the will annexed, insolvent and intestate. *Goods of Wheelright*, L. R. 3 P. D. (Eng.) 71; *Thornton v. Winston*, 4 Leigh (Va.), 152; *Schoul. Exrs. & Admsr.* § 50.

An executor whose appointment is avoided by his being an attesting witness, may be appointed administrator with the will annexed. *Murphy v. Murphy*, 24 Mo. 526. See *Briscoe v. Wickliffe*, 6 Dana (Ky.) 157; *Sawyer v. Dezier*, 5 Ired. (N. C.) 97; *Miller v. Meetch*, 8 Pa. St. 417. As to English practice, see Wms. Exrs. (7th Eng. ed.) 286.

If, on the other hand, the letters of administration were issued upon some misapprehension or error deserving correction, or for some temporary purpose not inconsistent with probate, and before the executor can fairly be said to have renounced the trust, in such case the executor may have the administration revoked and letters testamentary issued to him. Thus, if a party named as executor in a will is appointed administrator before probate, and acts as such, he may after probate of the will take upon himself the executorship; the acceptance of the administration before the probate of the will not being deemed a renunciation. *Taylor v. Tibbotts*, 13 B.

executors, and one or more renounce, and the others prove the will, those who have renounced may retract on a subsequent vacancy, at any time before administration has been granted, and obtain letters testamentary.¹ Within such limits retraction is a matter of right.²

IX. Renunciation or Non-appearance of those entitled by Preference to administer. — Citation. — It is an established rule of probate practice, that, wherever a party has a prior right to administer, he shall be cited or waive his right before administration can be granted to another.³ To dispense with the citation, the persons entitled

Mon. (Ky.) 177; Schoul. Exrs. and Admrs. § 50.

1. Went. Off. Ex. 96 (14th ed.); Godolph. pt. 2, c. 19, § 4; Hensloe's Case, 9 Co. 37 a; Middleton's Case, 5 Co. 28 a; Creswick v. Woodhead, 4 M. Gr. (Eng.) 814; Davis v. Inscoe, 84 N. C. 396; matter of Maxwell, 3 N. J. Eq. 611; Perry v. DeWolf, 2 R. I. 103; Codding v. Newman, 63 N. Y. 639; 3 Thomp. & C. (N. Y.) 364; Taggart's Petition, 1 Ashm. (Pa.) 321; Judson v. Gibbons, 5 Wend. (N. Y.) 224; Bodle v. Hulse, 5 Wend. (N. Y.) 313.

According to the older practice of the civil law, an executor who had renounced would not assume the office after the death of his co-executor. Went. Off. Ex. 96, 14th ed.; Godolph. pt. 2, c. 7, § 4.

But at common law whether the vacancy be caused by death, removal or resignation, and although the renouncing executors never acted during the lives of their co-executors, they may retract and administer. Pawlet v. Freak, Hardr. (Eng.) 111; Wms. Exrs. 285; Wankford v. Wankford, 1 Salk. (Eng.) 307; Rex v. Simpson, 3 Burr. 1463; 1 W. Bl. 456; House v. Petre, 1 Salk. (Eng.) 311; Perry v. DeWolf, 2 R. I. 103; Judson v. Gibbons, 5 Wend. (N. Y.) 224; *In re* Deichman, 3 Curt. (Eng.) 124; Codding v. Newman, 3 Thomp. & C. (N. Y.) 364; Taggart's Petition, 1 Ashm. (Pa.) 321.

As to whether an executor can, without a formal retraction, come in and administer without a vacancy having been previously created. Swin. pt. 6, § 3, pl. 22; Godolph. pt. 2, c. 19, § 4; Went. Off. Ex. c. 3, p. 96; Brooks v. Stroud, 1 Salk. (Eng.) 3; Robinson v. Pett, 3 P. Wms. (Eng.) 251; Creswick v. Woodhead, 4 Man. & Gr. (Eng.) 811. But see Schoul. Exrs. and Admrs. §§ 50, 51.

In Judson v. Gibbons, 5 Wend. (N. Y.) 225, it was said that an executor is not bound to take out letters when his co-executors do: afterwards he may come in and do so at any time. The mere fact that letters testamentary were granted to one or more co-executors does not preclude the subsequent administration by the others. Matter of Maxwell, 3 N. J. Eq. 611, 614.

It was formerly thought, that if an administrator with the will annexed were appointed on the death of surviving executor, who had accepted the executorship, without citing such of the renouncing executors as should survive, the administration would be void; but later and sounder authorities hold that the renouncing executor must retract his renunciation, and ask to be appointed before administration *de bonis non* passes the seals, if he would supply the vacancy. Wms. Exrs. (7th Eng. ed.) 285; Venables v. East India Company, 2 Ex. (Eng.) 633. Under 20 and 21 Vict. c. 77, § 79 (Wms. Exrs. § 286), renunciation once made destroys all right to the office.

2. Casey v. Gardiner, 4 Bradf. (N. Y.) 13.

3. Wms. Exrs. (7th Eng. ed.) 440, 448; Torrance v. McDougald, 12 Ga. 526; Goods of Barker, 1 Curt. (Eng.) 592; Goods of Currey, 5 Notes of Cas. (Eng.) 54; Bean v. Bumpus, 22 Me. 549.

Under the English practice, when the next of kin is of unsound mind, his next of kin must also be cited, in order that they may take administration for his use and benefit, if they think proper. Windeatt v. Sharland, L. R. 2 P. & D. 217. See *In re* Grierson, 7 L. R. Ir. 589.

It has been held that the rule will not be relaxed, although the party entitled to preference has no interest in the estate. Goods of Barker, 1 Curt. (Eng.) 542; Goods of Currey, 5 Notes of Cas. (Eng.) 54.

Where the preference rests in the discretion of the court, as between several of the same class, citation may be dispensed with. Cobb v. Beardsley, 37 Barb. (N. Y.) 193; Peters v. Public Administrator, 1 Bradf. Sur. (N. Y.) 200; Goods of Southmeat, 3 Curt. (Eng.) 28; Goods of Widger, 3 Curt. (Eng.) 55; Goods of Hardinge, 2 Curt. (Eng.) 640.

In Maine, notice is not required prior to grant of administration "to the widow, husband, next of kin, or husband of the daughter of the deceased, or to two or more of them." Bean v. Bumpus, 22 Me. 549.

"The citation is sometimes by personal service; but frequently, in modern practice,

should renounce their claim, or signify their assent to the grant of administration by indorsement upon the petition; and the renunciation should appear of record.¹ The English practice allows such renunciation to be retracted at any time before administration has passed the seal.²

X. Whether an Executorship passes to the Executor's Representative.

— At common law, upon the death of an executor, the executorship devolved upon his executor; and upon the death of one or more joint executors, it devolved upon the survivors, and passed ultimately, upon the death of the last survivor, to his executor. Upon the death of the executor of an executor, the executorship passed to his executor, and, so long as the chain of representation remained unbroken by any intestacy, the ultimate executor represented every preceding testator.³ But if the first or any succeeding executor died intestate, an administrator *de bonis non* must be appointed by the court of probate; for since an administrator derives his title from the law, and not from the decedent, there can be no privity between the administrator of an executor and

by posters, or a simple newspaper publication, the method being fixed by statute or rule of court, and the citation issuing from the register's office when the petition to administer is presented, the course being similar to that pursued in obtaining letters testamentary, and as preliminary to the final hearing." Schoul. Exrs. and Admsrs. § 112. See "Probate and Letters of Administration," Am. and Eng. Enc. of Law.

In South Carolina a citation has sometimes been published by being read in church by the officiating clergyman. Sargent v. Fox, 2 McCord (S. C.) 309.

As to affidavit that citation has been made, see Gillett v. Needham, 37 Mich. 143.

In conclusion, it is to be observed that the court obtains jurisdiction, not by citation, but by the residence of the intestate within the country. Hence, the want of citation cannot be pleaded in defence to an action by the administrator. To allow such a plea would be to attack the letters collaterally. James v. Adams, 22 How. Pr. (N. Y.) 409. See "Probate and Letters of Administration," Am. & Eng. Enc. of Law.

1. Torrance v. McDougald, 12 Ga. 526; Succession of Talbert, 16 La. Ann. 230; Arnold v. Sabin, 1 Cush. (Mass.) 525; Cobb v. Newcomb, 19 Pick. (Mass.) 336; Schoul. Exrs. & Admsrs. § 112.

Some codes expressly insist that the renunciation shall be in writing. Barber v. Converse, 1 Redf. (N. Y.) 330.

The language of the renunciation is not to be strained beyond its obvious meaning. Arnold v. Sabin, 1 Cush. (Mass.) 525.

Thus, where all the next of kin consent that A. shall serve, if he can find security, A., when unable to find security, is not

authorized to nominate a stranger. Rinehart v. Rinehart, 27 N. J. Eq. 475; 1 McLellan's App. 16 Pa. St. 110.

A contract to relinquish the right to administer for consideration is against public policy, and void. Bowers v. Bowers, 26 Pa. St. 74. See Brown v. Stewart, 4 Md. Ch. 368; Bassett v. Miller, 8 Md. Ch. 548.

2. West v. Willy, 3 Phillim. (Eng.) 379.

Such appears to be the rule in New York. Casey v. Gardiner, 4 Bradf. (N. Y.) 13.

Probably, under some American codes, this would not be allowed, unless at least good reason for the retraction could be shown. Carpenter v. Jones, 44 Md. 625; Kirtland's Estate, 16 Cal. 161.

For fuller discussion, see "Probate and Letters of Administration."

3. Wms. Exrs. *254-256, *284; Wankford v. Wankford, 1 Salk. (Eng.) 308; Went. Off. Ex. (14th ed.) 215, 461; Goods of Smith, 3 Curt. (Eng.) 31; Grafton v. Beal, 1 Ga. 322.

The executor of an executor cannot fill the office where the will expressly provides a different mode for filling vacancies. Navigation Co. v. Green, 3 Dev. L. (N. C.) 434. See Edwards's Est. 12 Phila. (Pa.) 85.

He may, however, prove the will, and accept the office of executor of his own testator, and renounce the executorship of the will of the first testator. Worth v. M'Arden, 1 Dev. & B. (N. C.) Eq. 199.

If the first executor should die without having proved the will, the executorship is not transmissible to his executor, but is wholly determined, and an administrator

the first testator.¹ In most of the United States the rule has been altered by statute, and, upon the death of an executor, the

with the will annexed must be appointed. *Day v. Chatfield*, 1 Vern. (Eng.) 200; *Wankford v. Wankford*, 1 Salk. (Eng.) 308; Wms. Exrs. (7th Eng. ed.) 255. See *In re Drayton*, 4 McCord (S. C.), 46.

In the Goods of Bayard, 1 Robert. (Eng.) 769; 7 Notes of Cas. 117, it was held that, if letters *cum testamento annexo* were issued to another, under the executor's letter of attorney, for his use and benefit, it would be the same thing as if he had proved the will himself. See In the Goods of Beer, 2 Robert. (Eng.) 349.

But a limited probate will not continue the chain of representation. In the Goods of Bayne, 1 Sw. & Tr. (Eng.) 132.

If the person appointed executor dies before the testator, there must be administration *cum testamento annexo*. *Brown v. Poyns*, Sty. (Eng.) 147; *Pullen v. Sergeant*, 2 Chan. Rep. (Eng.) 300.

A married woman, being executrix, may continue the chain of representation by making her own executrix, although at common law she could not make a testament without the license of her husband. *Birkett v. Vandercorn*, 3 Hagg. (Eng.) 750; *Barr v. Carter*, 2 Cox (Eng.), 429; Wms. Exrs. (7th Eng. ed.) 53, 54.

Power of an Executor of an Executor. — "In all cases, except of special trust and authority, without the office of executorship, the executor of an executor, how far soever in degree remote, stands, as to the points both of being, having, and doing, in the same state and plight as the first and immediate executor." Wms. Exrs. (7th Eng. ed.) 959; Wentw. Off. Ex. c. 20, p. 462 (14th ed.). See *Burch v. Burch*, 19 Ga. 174; *Dean v. Dean*, 7 T. B. Mon. (Ky.) 304.

The executor of a sole executor may retain, out of any funds of the first testator coming into his hands, the amount of a claim of the second estate against the first. *Lay v. Lay*, 10 S. Car. 208.

Whether Executor of Executor can execute a Power. — "Where, by a will, a special trust is recommended to an executor, as to sell land, this, not performed in his lifetime, shall not be performable by his executor; contrariwise of an interest, as to take the profits of lands for certain years towards payment of debts and legacies." Wentw. Off. Ex. c. 20, p. 462 (14th ed.). Compare § VIII. 4, n.

See the distinction between a bare power or authority and an authority coupled with an interest. *Style v. Tomson*, Dyer (Eng.), 210 a; *Co. Litt.* 113 a (n) 2; *Townsend v. Wilson*, 1 B. & Ald. (Eng.) 608; 3 Madd. 261.

Disapproved in *Hall v. Dewes*, Jacob

(Eng.), 189, but acted upon in *Bradford v. Belfield*, 2 Sim. (Eng.) 271, and in *Cooke v. Crawford*, 13 Sim. (Eng.) 91, 98. *Smith v. Moore* (Eng.), 214; *Jones v. Price*, 11 Sim. (Eng.) 557. See § XII. 3.

In *Cole v. Wade*, 16 Ves. (Eng.) 27, it was said that wherever a power is of a kind that indicates a personal confidence, it must *prima facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others, to whom, by legal transmission, the same character may happen to belong. This view was approved by Lord Eldon in *Walter v. Maunde*, 19 Ves. 425. See *Hall v. May*, 3 Kay & J. (Eng.) 590; *Saloway v. Strawbridge*, 1 Kay & J. (Eng.) 371; *Forbes v. Forbes*, 18 Beav. (Eng.) 552. *In re Burt*, 1 Drew (Eng.), 319; *McDonald v. Walker*, 14 Beav. (Eng.) 556; *Mortimer v. Ireland*, 6 Hare (Eng.), 196; *Cook v. Crawford*, 13 Sim. (Eng.) 91; *Dunn v. Worrall*, 1 My. & K. (Eng.) 561; *Titley v. Wolstenholme*, 7 Beav. (Eng.) 425, 433; *Wilson v. Bennett*, 5 De G. & Sm. (Eng.) 475; 1 Sugd. Pow. (6th ed.) 148.

A power in a will to sell or mortgage without naming a donee, will, unless a contrary intention appear, vest in the executor, if the fund is to be distributable by him; and in such case, the executor of the executor may sell, the intent being that the power shall be executed by him to whose hands the money is to come. Wms. Exrs. (7th Eng. ed.) 655, 961; 1 Sugd. Pow. (6th ed.) 134, 238; 1 Pow. Dev. 243 *Jarman's ed.* See also *Tylden v. Hyde*, 2 Sim. & Stu. (Eng.) 238.

A power annexed to an interest in the donee, and originally authorized to be executed by the donee and his assigns, will pass to the executor, or the executor of the executor, as an assign. 1 Sugd. Pow. (6th ed.) 223; *How v. White Bank*, 1 Freem. (Eng.) 476; 1 Ventr. (Eng.) 338, 339; *T. Jones* (Eng.), 110; 2 Show. (Eng.) 57; Wms. Exrs. (7th Eng. ed.) 961.

1. 2 Bl. Com. 506. The power of an executor being founded upon the special confidence of the testator, he is allowed to transmit that power to another in whom he has equal confidence. But the administrator of the executor is merely the officer of the court, and has no privity or relation to the original testator, being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wms. Exrs. (7th Eng. ed.) 255; *O'Driscoll v. Fishburne*, 1 Nott & M. (S. Car.) 77; *Navigation Company v. Green*, 3 Dev. (N. Car.) L. 434; *Carroll v. Connett*, 2 J. J. Marsh. (Ky.) 195.

executorship devolves upon an administrator with the will annexed of the original testator, whose appointment is made by the court upon considerations favorable to those interested in the estate.¹

The executor of an administrator cannot be charged as the representative of the original intestate. *Arline v. Miller*, 22 Ga. 330. See *Scott v. Fox*, 14 Md. 388.

An administrator of an administrator is not the administrator of the first intestate, and has no right to administer his estate, but he is bound to make a settlement with the probate court of what was done by his intestate, the first administrator. *Foster v. Wilber*, 1 Paige (N. Y.), 537; *Trescott v. Trescott*, 1 McCord (S. Car.), Ch. 417; *Smith v. Moore*, 4 N. J. Eq. 485; 5 N. J. Eq. 649; *Steen v. Steen*, 25 Miss. 513; *Henderson v. Winchester*, 31 Miss. 290; *Davis v. Yerby*, 1 Sm. & M. Ch. (Miss.) 508; *Ray v. Doughty*, 4 Blackf. 115.

If an executor dies pending proceedings on his final account, it is his administrator's duty to obtain the decree of approval and allowance of his final account as executor. *Jarnagin v. Frank*, 59 Miss. 393.

But it must be remembered that an administrator *durante minore etate* of an executor of an executor is the representative of the first testator: he stands *loco executoris*. *Anon.*, 1 Freem. (Eng.) 287. *Contra*, *Limmer v. Every*, Cro. Eliz. 211, cited by C. B. Gilbert, in *Bac. Abr. Executors*, B. 8. See *Goods of Grant*, 24 W. R. (Eng.) 929. See under what circumstances a special administrator holds *loco executoris*, "Special and Limited Administration," *Am. & Eng. Enc. of Law*.

When the administrator of an executor takes out, jointly with another, letters of administration *de bonis non*, on the estate of the testator, he does not exclusively represent both estates, and there can be no transfer by operation of law of the property in his hands, as administrator, to him as administrator *de bonis non*. *Thomas v. Wood*, 1 Md. Ch. Dec. 296.

1. Schoul. Exrs. & Admrs. § 43. See *Mass. Gen. Stats. c. 93, § 9*; *Purd. Dig. (Pa.)* (11th ed.) 509. See also *Waters v. Stickney*, 12 Allen (Mass.), 1; *Farwell v. Jacobs*, 4 Mass. 634; *Prescott v. Morse*, 64 Me. 422; s. c., 62 Me. 447; *Foster v. Wilber*, 1 Paige (N. Y.), 537; *Kilburn v. See*, 1 Demarest (N. Y.), 353.

Under Cal. Code, § 1353, that no executor of an executor shall be authorized as such to administer on the estate of the first testator, the probate court has no jurisdiction to receive or act upon an account presented by an executor of an executor against the estate of the testator of the deceased executor. *Wetzler v. Fitch*, 52 Cal. 638.

In New York there is no provision of law which authorizes the representatives of a deceased executor or administrator to initiate and conduct a proceeding for the accounting of their decedent in the estate whereof he was himself executor. Such a proceeding is not within purview of Code Civ. Pro. § 2606. *Ranney's Estate*, 66 How. (N. Y.) Pr. 291; s. c., *Bunnell v. Ranney*, 2 Demarest (N. Y.), 327. See *Popham v. Spencer*, 4 Redf. (N. Y.) 399.

Nor can the executor of an executor be compelled to account in the same proceeding for the property of his own testator, and for that held by his own testator in his representative capacity. *Murray v. Vanderpoel*, 2 Demarest (N. Y.), 311.

In these States it is the duty of the executor of an executor to deliver the assets of the estate of the first testator to the administrator with the will annexed; and it is no defence that the deceased executor had a claim against the estate regarding which a special proceeding is pending. *Stewart v. O'Donnell*, 2 Demarest (N. Y.), 17.

N. Y. Code Civ. Pro. § 2606 provides for an accounting by an executor of an executor for such assets of the first testator as have come into his own hands. *Ranney's Est.* 66 How. Pr. 291.

But if an executor lends money of the estate in his individual capacity, and takes a bond and mortgage payable to himself individually, and dies, his personal representative only can enforce the securities. *Caulkins v. Bolton*, 98 N. Y. 511. See the analogous case of *Slaymaker v. Farmers' Bank*, 103 Pa. St. 616.

In some States the old rule appears to be in force. *Carroll v. Connett*, 2 J. J. Marsh. (Ky.) 195; *Lay v. Lay*, 10 S. C. 208; *Navigation Co. v. Green*, 3 Dev. (N. C.) L. 434; *O'Driscoll v. Fishburne*, 1 Nott & M. (S. C.) 46; *Hart v. Smith*, 20 Fla. 58.

As to Maryland, see *Scott v. Fox*, 14 Md. 388; *Thomas v. Wood*, 1 Md. Ch. 296.

An action for a legacy under the will of the first testator cannot, in Pennsylvania, be maintained against the executor of an executor. *Gilliland v. Bredin*, 63 Pa. St. 393.

In Georgia the executor of the executor is liable to the legatee if sufficient assets come to his hands from the estate of the first testator, or from the estate of the first executor. *Windsor v. Bell*, 61 Ga. 671.

XI. Bonds of Executors and Administrators.—1. *When Executors required to give Bonds.*—Under the English practice, the spiritual court could not require an executor to give security; hence chancery assumed jurisdiction, and it became a rule that an insolvent or bankrupt executor could not only be restrained by the appointment of a receiver, but compelled in equity, like any other trustee, to give security before entering upon the trust.¹ In most of the United States the English rule has been altered by statute, and qualification by bond is a prerequisite to receiving letters testamentary.² In some States the executor is exempted from furnishing a surety or sureties, when the testator expressly requests such exemption, or when all persons interested certify their consent, or, when cited, offer no objection.³ Even in such case,

1. Wms. Exrs. (7th ed.) 237; Slanning v. Style, 3 P. Wms. (Eng.) 336. Compare § IV. 1, n.

2. Smith's Prob. Pract. (Mass.) 60-64; Mass. Gen. Stats. c. 93; Moore v. Ridgeway, 1 B. Mon. (Ky.) 234; Bankhead v. Hubbard, 14 Ark. 298; Pettingill v. Pettingill, 60 Me. 411; Holbrook v. Bentley, 32 Conn. 502; Fairfax v. Fairfax, 7 Gratt. (Va.) 36; Hall v. Cushing, 9 Pick. (Mass.) 395; Echols v. Barrett, 6 Ga. 443; Gardner v. Gantt, 19 Ala. 666; Hall v. Cushing, 9 Pick. (Mass.) 395; Baldwin v. Standish, 7 Cush. (Mass.) 207, 208; Gen. Stats. N. H. c. 176, §§ 1, 12; Judge of Probate, 49 N. H. 150, 152; Cleveland v. Chandler, 3 Stew. (Ala.) 489.

In general the conditions of an executor's bond may be said to be to return an inventory to the probate court within the time fixed by statute, to administer according to law and the will of the testator, all the personal estate,—and in some, the proceeds of all real estate sold for the payment of debts and legacies,—and to render upon oath a just and true account of the administration within a specified time, or when required by the court. Smith, Prob. Pract. Mass. 60-64.

Refusal, or unreasonable delay in qualifying by giving the statutory bond, is equivalent to renunciation. § VIII. 2, n.

In such States, the power to act as executor is suspended until the bond is given. The appointment cannot be adjudged absolutely void because the bond is not given, but a failure to give the bond would furnish good ground for revocation. A removal of the executor, however, it is said, would not be justified unless the circumstances indicated intentional wrong or gross neglect. Bell, C. J., in Morgan v. Dodge, 44 N. H. 255, 262; Wingate v. Wooton, 5 Sm. & M. (Miss.) 245; Parker, C. J., in Picquet, Appellant, 5 Pick. (Mass.) 76; Baldwin v. Standish, 7 Cush. (Mass.) 207; Abercrombie v. Sheldon, 8 Allen (Mass.), 532, 534.

535; Moore v. Ridgeway, 1 B. Mon. (Ky.) 234.

The claims of creditors are not barred by neglect to present them, or commence suit during such suspension. Morgan v. Dodge, 44 N. H. 255.

A bond without surety, although approved by the probate judge, does not come up to the requirements of the Massachusetts statute, and the statute of limitations, in favor of executors, will not begin to run from the filing of such a bond. Abercrombie v. Sheldon, 8 Allen (Mass.), 532.

Such bond is not vacated, but only suspended in its operation during the pendency of an appeal from the probate of the will. Dunham v. Dunham, 16 Gray (Mass.), 577.

Cal. Code, § 1401, allowing powers of an executor to be suspended on application for order to give bond, does not conflict with § 1396, giving general power to require bond. White's Estate, 53 Cal. 19.

Where the testator appoints two persons as executors of his will, and only one of them qualifies, that one has all the authority under the will which both would have had if both had qualified. Bodley v. McKinney, 17 Miss. 339; Phillips v. Stewart, 59 Mo. 491.

3. Gen. Sts. Mass. c. 93, § 5; Ames v. Armstrong, 106 Mass. 15; Abercrombie v. Sheldon, 8 Allen (Mass.), 532; Wells v. Child, 12 Allen (Mass.), 333; Bowman v. Wooton, 8 B. Mon. (Ky.) 67; Wilson v. Whitefield, 38 Ga. 269.

In Massachusetts, only persons of full age and legal capacity need certify their assent: as to creditors and the guardian of any minor interested, a published citation, after the usual form, incorporating notice of the request to be exempted from furnishing sureties with that of the pending probate, and application for letters testamentary, will suffice. Wells v. Child, 12 Allen (Mass.), 333.

The request is understood to be merely

however, the court may, for cause, either before or after granting letters, require a bond with sufficient surety or sureties.¹ In others, the court cannot dispense with security, even at the testator's request;² while in a few the English equity rule, enlarged and modified by legislative enactment, has been incorporated into the probate practice of the State.³

an expression of personal confidence, and becomes inoperative on the failure or refusal of such person to accept the trust, and has no application to other executors or administrators. *Langley v. Harris*, 23 Tex. 564; *Fairfax v. Fairfax*, 7 Gratt. (Va.) 36.

It should also be remembered that the liability of an executor to the administrator *de bonis non* who succeeds him exists independently of any bond, and he held responsible by such administrator for property of the estate unaccounted for, notwithstanding there is no bond to sue upon, and he was expressly exempted by the testator from giving any. *Dwyer v. Kaltayer* (Tex.), 5 S. W. Rep. 75.

1. Mass. Gen. Stats. c. 129; *Smith v. Phillips*, 54 Ala. 8; *Clark v. Niles*, 42 Miss. 460; *Atwell v. Helm*, 7 Bush. (Ky.), 504; *Grigsby v. Cocke's Exrs.* (Ky.), 3 S. W. Rep. 418.

Under the Kentucky statute, evidence of bad faith is not necessary to authorize the court to require the bond. *Grigsby v. Cocke's Exrs.* (Ky.), 3 S. W. Rep. 418.

A surviving partner appointed executor by the will of his deceased partner, which by its terms expressly relieves him from the obligation of giving bonds, and who has not qualified as administrator of the partnership in his capacity as surviving partner, is not relieved from giving the additional undertaking required by Civil Code Or. § 1073, to be given by the executor or administrator, where the duty of administering the partnership property of the deceased devolves upon him by the failure of the surviving partner to qualify as provided by § 1070. *Palicio v. Bigue*, 13 (Or.) Pac. Rep. 765.

In Arkansas a bond given by a surviving partner as administrator of the partnership effects is without consideration, in violation of his rights, as surviving partner and owner of the property, and void. *Tate v. Tate*, 35 Ark. 289.

Where there are infants concerned, the court must look carefully to their interests. *Johns v. Johns*, 23 Ga. 31.

In New York, executors pecuniarily irresponsible may be required to give bond, although expressly exempted by the testator knowing of such irresponsibility. *Freeman v. Kellogg*, 4 Redf. (N. Y.) 218.

This goes much beyond the English equity rule under which an executor could

not be restrained if the testator knew of his insolvency at the time of the appointment. Wms. Exrs. (7th Eng. ed.) 276. See § IV. 1, n. *ante*.

But where adult beneficiaries under a will, and the guardian of those under age, with knowledge of the executor's insolvency, consent to his appointment and acting without security, he will be required to give security only for the shares of the infants, their guardian being without power to waive their rights. *Freeman v. Kellogg*, 4 Redf. (N. Y.) 218.

In Alabama a creditor may require an executor to give bond, notwithstanding express exemption by the testator. *Smith v. Phillips*, 54 Ala. 8.

Whether his claim be such as he can sue on in his own name, or in the name of another, is immaterial: provided he can maintain a suit, receive payment, and discharge the debt, he is interested, and may maintain the application in his own name. *Phillips v. Smith*, 62 Ala. 575.

2. *Bankhead v. Hubbard*, 14 Ark. 298.

3. *Fairbairn v. Fisher*, 4 Jones (N. Car.), Eq. 390; *Wilkins v. Harris*, 1 Wins. (N. Car.) Eq. 41; *Powell v. Thompson*, 4 Desaus. 162; *Bird v. Wiggins*, 35 N. J. Eq. 111. As to English Equity Rule, see § IV. 1, n. *ante*.

In New York, bonds may be required where the surrogate finds that the circumstances of the executor are "precarious," or that he has removed, or is about to remove, from the State. *Redfield L. & P. of Surrogate's Courts*, 145. As to what circumstances will be deemed "precarious," see *Holmes v. Cock*, 2 Barb. (N. Y.) 426; *Colegrove v. Horton*, 11 Paige (N. Y.), 261; *Mandeville v. Mandeville*, 8 Paige (N. Y.), 475; *Wood v. Wood*, 4 Paige (N. Y.), 299.

Of course, where the will itself directs that he shall give bonds, he will be required to do so, irrespective of other considerations. But in such case the bond should run to the legatees, not to the people of the State. *Sullivan's Est.* 1 Tuck. (N. Y.) Sur. 94.

As to form of bond required of an executor in New York, *Matter of Hart*, 2 Redf. (N. Y.) 156; *Senior v. Ackerman*, 2 Redf. (N. Y.) 302.

In Pennsylvania the Orphans' Court, for causes mentioned in the Acts of March 29, 1832, § 22-24, and May 1, 1861 (Purd. Dig. § 560 Pl. 257), may compel an executor to

2. *Bonds of Residuary Legatees.* — In some States an executor or administrator, with the will annexed, who is also a residuary legatee, may, at his option, instead of giving the usual administration bond, give a bond with condition merely to pay all debts and legacies and statute allowances to the widow and minors.¹ By giving this bond he conclusively admits assets sufficient to pay debts, legacies, and allowances, and binds himself and sureties absolutely in the penal sum to pay accordingly, even though the estate should prove insolvent.²

give security, or remove him from the rust. Harberger's App. 98 Pa. St. 29. See also Johnson's App. 12 Serg. & R. (Pa.) 317. *Re Wilson's Est.* 2 Pa. St. 325; *Commonwealth v. Rogers*, 53 Pa. St. 470.

If found mismanaging the estate, the executor may be required to give bonds, though entirely solvent. McKennan's App. 27 Pa. St. 325.

Security may be required for causes mentioned in the statutes at the discretion of the Orphans' Court, and its action will not be reversed unless there has been a clear abuse. Sharp's App. (Pa.) 9 Atl. Rep. 860.

But it is only after letters have been committed to an executor that such court obtains jurisdiction, under Pa. Act of March 29, 1832, §§ 22-24, and under that of May 1, 1861, to discharge him, or compel him to give security. Harberger's Appeal, 98 Pa. St. 29.

In New Jersey, residuary legatees may require an executor to give security because he neglects to have a mortgage registered which came into his hands as part of the estate, and because he claims credit for payments which seem to be false. Such a proceeding may be by order from the Orphans' Court, to show cause without petition. *Bird v. Wiggins*, 35 N. J. Eq. 111.

In many States, non-resident executors are required to give bonds. Harberger's Appeal, 98 Pa. St. 29; *Van Wyck v. Van Wyck*, 22 Hun (N. Y.), 9. See *ante*, § IV. 1, n.; *Smethurst v. Tomlin*, 2 Sw. & T. (Eng.) 143.

As to what is having one's "usual place of business within the State" within N. Y. Laws 1873, ch. 657, exempting non-resident executors from giving security in certain cases. *Van Wyck v. Van Wyck*, 22 Hun (N. Y.), 9.

In Pennsylvania the mere fact that an executor resides in another county does not authorize the Orphans' Court to require security. Harberger's App. 98 Pa. St. 29.

In Rhode Island a non-resident executor must give his personal bond, although expressly exempted from so doing by the will.

And as R. I. Pub. Stats. c. 166, § 4, do not enable a married woman to give such bond, she cannot, if non-resident, be executrix. *Hammond v. Wood* (R. I.), 10 Atl. Rep. 623.

In Louisiana a testamentary executor domiciled out of the State is not entitled to letters without giving such security as is required from dative testamentary executors. *Succession of Davis*, 12 La. Ann. 399; *Succession of Bobb*, 27 La. Ann. 344.

Under the ordinary practice of the State, an executor is required, on the expiration of his year, to give security, or on default thereof dismissed, and a dative executor appointed. *Peale v. White*, 7 La. Ann. 449.

In South Carolina, under the Act of 1839, a bond should be given by an executor for purchases made by him at his own sale of his testator's property. *State v. Baskin*, 1 Strobb. (S. C.) 35.

In Pennsylvania it was held that though such a purchase was eminently improper, and the sale void, it did furnish ground, under the Act of March 29, 1832, for either removal or requiring security. *Webb v. Dietrich*, 7 Watts & S. (Pa.) 401.

1. Genl. Stats. Mass. c. 93, § 3; Mass. St. 1870, c. 285; Wis. Rev. Stat. § 3795; *Holden v. Fletcher*, 6 Cush. (Mass.) 235, 237, 238; *Alger v. Colwell*, 2 Gray (Mass.), 404; *Conant v. Stratton*, 107 Mass. 474; *Morgan v. Dodge*, 44 N. H. 255.

In Louisiana one who has been recognized by the probate court as universal legatee and testamentary executor, and ordered to be put into possession, can be compelled by a creditor to give security if he has continued to act as executor; and he cannot, to prevent the execution of the order to give security, contest the merits of the petitioning creditor's claim, which, however, is not admitted by giving the security. *Frazier's Succession*, 33 La. An. 593.

The surviving widow is the legal usufructuary of the estate of her children inherited by them from their father, and as such cannot be compelled to give security. *Boisse v. Dickson*, 31 La. An. 741.

2. *Clarke v. Tufts*, 5 Pick (Mass.) 337;

3. *Bonds of Administrators.* — The practice of taking bonds from administrators as distinguished from executors is founded upon the statutes (21 Hen. VIII. c. 5, § 3, and 22 & 23 Car. II. c. 10), by the latter of which the ordinary was directed to take sufficient bonds with two or more able sureties, "with condition to return a true inventory to the court at or before a specified date, to administer the estate well and truly, to make a true and just account, to pay the residue as the judge should appoint, and to deliver the letters, should a will be found."¹ In most of the United States the form of the bond prescribed by the statute is modelled on that of 22 & 23 Car. II. c. 10.² For administrators with the will

Stebbins v. Smith, 4 Pick. (Mass.) 97; *Colwell v. Alger*, 5 Gray (Mass.), 67; *Duwall v. Snowden*, 7 Gill & J. (Md.) 430. See *McElroy v. Hatherway*, 44 Mich. 399.

By such a bond the whole estate passes to the residuary legatee, and administration is terminated. *Re Cole's Will*, 52 Wis. 591. See *Heydock v. Duncan*, 40 N. H. 115.

His position is that of an *heir* in Roman law; and he is personally liable for debts, allowances, and legacies. Schoul. Exrs. and Admsrs. § 6. As to risk of giving bond of this character, see *Bell, J.*, in *Morgan v. Dodge*, 44 N. H. 255. The only advantage of such a bond is that it saves the executor the labor and expense of an inventory, reduces the penal sum to the minimum of satisfying claimants, and reserves all evidence of assets to himself. Schoul. Exrs. and Admsrs. § 138.

Costs awarded out of the estate to the contestants of the will are a debt within the meaning of the bond. *Re Cole's Will*, 52 Wis. 591.

In an action to recover a legacy, the plaintiff need give no proof except the bond that the executor has assets sufficient in his hands. *Jones v. Richardson*, 5 Met. (Mass.) 247.

Nor could such bond be cancelled or surrendered by the executor, and the bond in common form substituted, long after it was time in the ordinary course to file an inventory. *Colwell v. Alger*, 2 Gray (Mass.), 404.

Giving such a bond does not, as a rule, work a discharge of the lien of the testator's debts upon his land. Mass. Gen. Stat. c. 93, § 4.

A bond given by an executrix who takes a life interest in the personal property administered upon is no continuing security to those entitled in remainder for their interest in the property; but on due settlement of the estate, accounting and distribution, the condition of the bond is satisfied. *Sarle v. Court of Probate*, 7 R. I. 270.

Where the statute expressly provided

that a bond of this character should be given by a residuary legatee who was also executrix, and the executrix gave the ordinary executor's bond, it was held that it could be sustained as a common-law bond, — so as to give effect to the appointment of the executrix, and afford security to all interested in the estate, — but that the obligors were not subject to the penal provisions of the statute, and could be held only for the actual damage resulting from a breach of the conditions of the bond. *Morris v. Morris*, 9 Heisk. (Tenn.) 814. As to the effect of a residuary legatee's bond not in proper conformity with the statute, see *Cleaves v. Dockway*, 67 Me. 118.

1. Wms. Exrs. (7th Eng. ed.) 529, 589; Schoul. Exrs. & Admsrs. § 139.

Under the new court of probate, Act 20 & 21 Viet. c. 77, every person to whom administration is granted must give bond to the probate judge, in a penal sum double the amount of the value of the estate, but the requirement of a surety or sureties may be dispensed with in the discretion of the court, the form of the bond modified, the penal sum reduced, and the responsibility of sureties divided. Schoul. Exrs. and Admsrs. § 139; Wms. Exrs. (7th Eng. ed.) 611. See *Choaly v. Gladdish*, 2 Sw. & Tr. (Eng.) 335. In the *Goods of De la Farque*, 2 Sw. & Tr. (Eng.) 631. The court has no power to dispense with the bond. In the *Goods of Powis*, 34 L. J. P. M. & A. (Eng.) 55.

By the custom of the prerogative court of Canterbury, a husband taking administration to his deceased wife entered into bond with one surety. *Goods of Noel*, 4 Hagg. (Eng.) 208.

Letters of administration will not issue to a creditor unless he enters into a bond to administer ratably. *Goods of Brackenbury*, 25 W. R. (Eng.) 698.

When the grant is made to a stranger, special security will be required. Wms. Exrs. (7th Eng. ed.) 446, 447.

2. Schoul. Exrs. & Admsrs. § 140; Mass. Gen. Stats. c. 94.

In Pennsylvania the condition of the

annexed, a similar form is prescribed, with due provisions for the payment of legacies.¹ Temporary, special, and limited administrations form no exception to the rule, and local statutes suggest various modifications of the bond appropriate to different kinds of administration.² In modern probate practice, a satisfactory bond,

bond is to administer all and singular the goods, chattels, and credits of the deceased; to make and file an inventory of the estate within thirty days; to administer according to law; to make a just and true account one year from date, or when required; to pay debts and make distribution as directed by the court; pay the collateral inheritance tax, and surrender the letters if a will be found. *Purd. Dig.* 510, pl. 22.

In Massachusetts "every administrator, before entering upon the execution of his trust," is required "to give bond with sufficient sureties in such sum as the judge of the probate court shall order, payable to such judge and his successors with conditions," substantially like those stated in the text, with the addition that the administrator shall inventory the real estate of the deceased, and administer the proceeds of all his real estate sold for the payment of debts, and render his administration account on oath. *Gen. Stats. c. 94, § 2*. See *Henshaw v. Blood*, 1 *Mass.* 35; *Bennett v. Overing*, 16 *Gray (Mass.)*, 267; *Picquet, Appellant*, 5 *Pick. (Mass.)* 65. See also *Judge of Probate v. Adams*, 49 *N. H.* 153; *Johnson v. Fuquay*, 1 *Dana*, 514; 2 *N. Y. R. S.* 71, § 42; *State v. Cox*, 2 *H. & Gill (Md.)*, 279.

In some States it is expressly provided by statute that the administrator may be exempted from giving bonds for the proceeds of real estate except when authorized to make such sales. *Mass. Gen. Stats. c. 94, § 6*; *Hughlett v. Hughlett*, 5 *Humph. (Tenn.)* 453. See *Salzer v. State*, 5 *Ind.* 202.

1. *Mass. Gen. Stats. c. 94*. See *Casoni v. Jerome*, 58 *N. Y.* 315; *Folkes v. Docminique*, 2 *Stra. (Eng.)* 1137; *Goods of Brackenbury*, 25 *W. R. (Eng.)* 698. Unless the bonds of such administrators conform to the peculiar conditions of the will, legatees may lose the right to sue upon it. *Frazier v. Frazier*, 2 *Leigh (Va.)*, 642; *Small v. Commonwealth*, 8 *Pa. St.* 101. But see *Judge of Probate v. Claggett*, 36 *N. H.* 381.

2. *Schoul. Exrs. & Admsrs. § 140*. See *Hartzell v. Commonwealth*, 42 *Pa. St.* 453; *Farley v. McConnell*, 7 *Lans. (N. Y.)* 428. Administrators *pendente lite* usually give bonds, and the legal validity of such bonds is beyond doubt. *Re Colvin*, 3 *Md. Ch.* 278; *Bloomfield v. Ash*, 4 *N. J. Eq.* 314.

In an administration *pendente lite*, limited

to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the court will not dispense with such administrators entering into a joint bond. *Stanley v. Barnes*, 1 *Hagg. (Eng.)* 221.

Where there has been an administration *pendente lite*, the minor on coming of age and taking upon himself the administration must give security to the same amount as the administrator in the first instance. *Abbott v. Abbott*, 2 *Phillim. (Eng.)* 578.

Under statute 20 & 21 *Vict. c. 77* rules of court provide for the framing of peculiar bonds appropriate to the grant *pendente lite* and other limited and special administrations. *Wms. Exrs. (7th Eng. ed.)* 548.

In Pennsylvania, in every case of special administration, the form of the condition of the ordinary bond shall be modified to suit the circumstances of the case. *Purd. Dig. (Pa.)* 511 Pl. 22.

In Massachusetts a special administrator's bond is conditioned to return an inventory within the specified time; to account on oath whenever required for all the personal property of the deceased that shall be received by him in such capacity; and to deliver the same to whoever shall be appointed executor or administrator of the deceased, or to such other person as shall be lawfully entitled to receive the same. *Mass. Gen. Stats. c. 94, § 7*. See "Special and Limited Administration," *Am. & Eng. Enc. of Law*.

A special administrator who is appointed administrator with the will annexed, will be responsible for the estate in his hands, as such special administrator, until he has given the security required of him as administrator with the will annexed. *Re Fisher*, 15 *Wis.* 567.

Public Administrators.—In some States they have the option to furnish a separate bond for every estate under their charge, or a general official bond for faithful administration of all estates on which administration is granted to them. In either case the conditions are appropriate to the functions of the office. *Mass. Gen. Stats. c. 95, § 7*; *Buckley v. McGuire*, 58 *Ala.* 226; *State v. Purdy*, 67 *Mo.* 89.

In Alabama, when the administration of an estate is committed to the sheriff *ex officio*, he and his sureties become liable therefor on his official bond. *Payne v. Thompson*, 48 *Ala.* 535.

See for full discussion "Public Administrators," *Am. & Eng. Enc. of Law*.

approved by the register or probate judge, and filed in the registry as the local statute directs, is a prerequisite to the grant of administration.¹ In most States the bond must be furnished by

1. Schoul. Exrs. & Admsrs. §§ 118, 141; *McGehee v. Ragan*, 9 Ga. 135; *Feltz v. Clark*, 4 Humph. (Tenn.) 79; *O'Neal v. Tisdale*, 12 Tex. 40.

In some States the register attends to the qualification by bond; in others, the probate judge writes his approval at the foot of the bond in token that the administrator has fully qualified, letters being withheld meanwhile. *Mass. Gen. Stats. c. 101*; *Austin v. Austin*, 50 Me. 74.

In Missouri the approval of the court is not indispensable to the validity of an administration bond, nor need the approval be expressed in writing. *State v. Farmer*, 54 Mo. 439; *James v. Dixon*, 21 Mo. 538; *Brown v. Weatherby*, 71 Mo. 152.

In Massachusetts the written approval of the judge of probate under his official signature is essential to the sufficiency of the bond. *Gen. Stats. c. 101, § 12*. So in Maine, *Mathews v. Patterson*, 42 Me. 257; *Austin v. Austin*, 50 Me. 74.

The bond in some States runs to the State, in others to the judge of probate and his successors. *Johnson v. Fuquay*, 1 Dana, 514; *Vanhook v. Barnett*, 4 Dev L. 268; *Miltenerberger v. Commonwealth*, 14 Pa. St. 71; *Judge of Probate v. Adams*, 49 N. H. 150, 152; *State v. Cox*, 2 H. & Gill (Md.) 379; 2 N. Y. R. S. 71, § 42.

The office is not filled until the bond is given. *Feltz v. Clark*, 4 Humph. (Tenn.) 79; *O'Neal v. Tisdale*, 12 Tex. 40. Under Iowa Code, § 2362, requiring an administrator to give bond before entering on his duties, and § 2363, providing that he subscribe an oath of office, the oath may be taken and the bond made before appointment. *Morris v. Chicago, Rock Island, etc., Ry. Co.*, 65 Iowa, 727.

If the applicant does not qualify with sureties within a reasonable time, it is the duty of the court to appoint another. *Crozier v. Goodwin*, 1 Lea (Tenn.), 125.

It is the rule to date the decree, bond, and letters, all on the same day: hence, when the administrator has fully qualified by giving bond as required by statute, the decree of the court may be considered his sufficient appointment whether he receives his formal letters or not; and, if not actually delivered, they are to be considered ready for delivery. *State v. Price*, 21 Mo. 434.

Effect of Failure to give Bond. — Deviations from Statutory Requirements. — The failure of an administrator to give the required bond in the absence of express legislation, renders the grant of administration voidable only, but not absolutely

void. *Cameron v. Cameron*, 15 Wis. 1, *Ex parte Maxwell*, 37 Ala. 262; *Leatherwood v. Sullivan* (Ala.), 1 So. Rep. 718.

The omission of the proper number of sureties, or the acceptance of an insolvent surety, or even the entire absence of sureties altogether, will not, in the absence of legislation, make the grant of administration absolutely void. *Slagle v. Entrekkin* (Ohio), 10 N. E. Rep. 675; *Herriman v. Janney*, 31 La. Ann. 276; *Jones v. Gordon*, 2 Jones, Eq. (N. C.) 352. See also *Mumford v. Hall*, 25 Minn. 347; *Exp. Maxwell*, 37 Ala. 362.

Statutes prohibiting particular classes — as attorneys and counsel — from being sureties on administration bonds, are purely directory, and do not vitiate a bond, approved by the court upon which one of the prohibited class is placed, nor justify a party executing the bond in pleading the exemption. *Wright v. Schmidt*, 47 Iowa, 233; *Hicks v. Chowbean*, 12 Mo. 341.

In Pennsylvania the Act March 15, 1832, § 27 (Purd. Dig. 511), provides that letters of administration issued without bond and sureties shall be void, and the register granting them liable for all damages. Under the act, which requires two or more sureties, a bond in which there is but one surety is *ipso facto* void. *M'Williams v. Hopkins*, 3 Rawle (Pa.), 382. But see *Mears v. Commonwealth*, 8 Watts (Pa.) 225; *Bradley v. Commonwealth*, 31 Pa. St. 522.

In determining upon the sufficiency of sureties, the ordinary acts ministerially, and can be held liable for negligence to distributees. *McRae v. David*, 5 Rich. Eq. (S. C.) 475.

Similarly the insufficiency or absence of an executor's bond, when required by statute, does not invalidate a regular issuance to him of letters testamentary, but is only ground for removal. *Yates v. Clark*, 56 Miss. 212; *Mumford v. Hall*, 25 Minn. 347. See *Steele v. Tutwiler*, 68 Ala. 107.

As to the effect of deviations from the prescribed form of bond, see *Walker v. Crosland*, 3 Rich. Eq. (S. C.) 23; *Morrow v. Peyton*, 8 Leigh (Va.), 54; *Frazier v. Frazier*, 2 Leigh (Va.), 642; *Cowling v. Justices*, 6 Rand. (Va.) 349; *Carroll v. Connett*, 2 J. J. Marsh. (Ky.) 195; *The Ordinary v. Cooley*, 30 N. J. L. 179; *Cohea v. State*, 34 Miss. 179; *Luster v. Middlecoff*, 8 Gratt. (Pa.) 54; *Williamson v. Williamson*, 3 Sm. & M. (Miss.), 715; *Roberts v. Calvin*, 3 Gratt. (Pa.) 358; *Small v. Commonwealth*, 8 Pa. St. 101;

the administrator himself, with at least two sufficient sureties, in such penal sum as the court may direct, double the value of the estate serving as the usual basis for fixing the amount.¹ In some

Mears v. Commonwealth, 8 Watts (Pa.), 223.

Provided a regular execution was intended by both principal and sureties, mere informality and omissions will not, as a general rule, render the bond void. *Moore v. Chapman*, 2 Stew. (Ala.) 466; *Luster v. Middlecoff*, 8 Gratt. (Va.) 54.

Omissions are sometimes supplied in the blank by construing the decree of appointment and the bond together. *State v. Price*, 15 Mo. 375.

A blank bond executed by principal and sureties has been held sufficient to sustain the qualification and appointment of an administrator until the revocation of letters. *Spencer v. Cahoon*, 4 Dev. L. (N. C.) 225.

But judgment at law upon a blank bond has been refused. *Cowling v. Justices*, 6 Rand. (Va.) 349.

A bond is not void, unless made so by statute, merely because its condition varies from that required by the act, provided it prescribes no more than the law allows. *Ordinary v. Cooley*, 30 N. J. L. 179.

An administrator's bond has been held valid, although omitting to state in terms the conditions on which the obligation might be enforced, or which would render the bond void. *Rose v. Winn*, 51 Tex. 545.

In *Newton v. Cox*, 76 Mo. 352, the same principle was applied to executors' bonds.

In Maine an executor's bond which omits to require the principal to account on oath within the year is not conformable to statute, and no action can be maintained on it in name of successor of judge to whom it was given. *Frye v. Crockett*, 77 Me. 157.

It should be remembered, however, that the surety is only liable for a breach of the conditions of the instrument he signs. *Roberts v. Calvin*, 3 Gratt. (Va.) 358; *Frazier v. Frazier*, 2 Leigh (Va.), 642; *Small v. Commonwealth*, 8 Pa. St. 101.

Private arrangements, however, between the principal and sureties as to the manner in which the bond should be filled out and used, will not be tolerated to the detriment of third persons who were led to rely upon the security. *Franklin v. Depriest*, 13 Gratt. (Va.) 257; *Field v. Van Cott*, 5 Daly (N. Y.), 308; *Cohea v. State*, 34 Miss. 179.

A surety who signs the bond conditionally must retract before the bond is returned to the court, and the court and innocent parties have placed reliance upon it. *Canal & Banking Co. v. Brown*, 4 La. Ann. 545.

The fact that the surety signed on con-

dition that another surety should be procured, and that the judge of probate was so informed, is immaterial, unless there is evidence that the bond was delivered as an escrow. *Wolff v. Schaeffer*, 74 Mo. 154.

Mr. Schouler thinks it questionable whether in States in which two sureties are required by statute, the surety may not presume that the judge will not accept the bond unless another surety joins in the execution. *Schoul. Exrs. and Admrs.* § 142 n.

Void Probate Bond Good as a Common-Law Bond.—A bond given by one acting under a void grant of administration, while deriving no validity from the statute, may be good as a common-law bond. *McCord v. Fisher*, 13 B. Mon. (Ky.) 193. See *State v. Crensbauer*, 68 Mo. 254.

But such bond can only be enforced by the judge of probate to whom it was given, and no action can be maintained on it in name of his successor. *Frye v. Crockett*, 77 Me. 157.

The fact that an administrator's appointment was improper will not exempt himself or sureties from liability on his bond to parties interested after he has acted under the grant of administration. *Cleaves v. Dockray*, 67 Me. 118; *Shalter's App.* 43 Pa. St. 83. See *Burnett v. Nesmith*, 62 Ala. 261.

1. *Schoul. Exrs. & Admrs.* §§ 118, 141; *Clarke v. Chapin*, 7 Allen (Mass.), 425; *Kidd's Est. Myrick* (Cal.), 239; *Atkinson v. Christian*, 3 Gratt. (Va.) 448; *Bradley v. Commonwealth*, 31 Pa. St. 522; *Tappan v. Tappan*, 4 Fost. (N. H.) 400; *Ullman v. Verne* (Tex.), 4 Sw. Rep. 548.

As to rule in Louisiana, see *Soldani v. Hyams*, 15 La. Ann. 551; *Feray's Succession*, 31 La. Ann. 727.

Under the English practice, if the party entitled is abroad, letters may be taken out for his use and benefit by his agent under a power of attorney, on the same terms as the grant would have been made to the party himself, and hence the court will not alter the usual conditions of the administration bond or terms of the oath. In the *Goods of Goldsborough*, 1 Sw. & Tr. (Eng.) 295.

Under what circumstances third persons may be allowed to intervene and furnish security, see *Goods of Ross*, L. R. 2 P. D. 274; 45 L. J. P. D. A. 100.

It has been held proper to allow such intervention where the husband of a married woman entitled to administration declines to join in the bond, or assist her in obtaining the grant. *Goods of Suther-*

it is expressly provided by statute that the indispensable sureties shall be inhabitants of the State; ¹ in others, the court may accept non-residents, if in its discretion sufficient. ² Sureties are usually permitted to prove their sufficiency under their own oath, and the burden of proof then rests upon the other side to show their insufficiency by cross-examination or evidence *aliunde*. ³

land, 31 L. J. P. M. & A. (Eng.) 126. Compare *Hammond v. Wood*, 10 Atl. Rep. (R. I.) 623.

Non-compliance with the requirement as to sureties will not as a rule render the bond void. *Slagle v. Entek* (Ohio), 10 N. E. Rep. 675; *Harriman v. Janney*, 31 La. Ann. 276. *Contra*, *M'Williams v. Hopkins*, 4 Rawle (Pa.), 382. See also *Mears v. Commonwealth*, 8 Watts. (Pa.) 225; *Bradley v. Commonwealth*, 31 Pa. St. 522; *Jones v. Gordon*, 2 Jones, Eq. (N. C.) 352.

In determining the amount for which an administrator should give bonds, the rule should be to ascertain the value of the personal property which is unpledged, and the value of the surplus of the pledged property over the debts for which it is pledged. *Kidd's Estate*, *Myrick's Probate* (Cal.), 239.

Property fraudulently transferred is not to be estimated in fixing the amount. *Re Peck*, 3 Demarest (N. Y.), 548.

The amount of the security must be calculated upon the value of the property to be administered within the State. *Lewis v. Grogard*, 17 N. J. Eq. 425.

In the case of one who is both administrator *cum test. an.* and *de bonis non*, N. Y. Code, §§ 2645, 2667, must be construed as fixing the minimum penalty of his bond at the value of the property left unadministered. *Sutton v. Weeks*, 5 Redf. (N. Y.) 353.

There have been instances (as in a grant of ancillary administration for special purposes) in which a small penal sum has been considered appropriate. *Re Picquet*, 5 Pick. (Mass.) 65.

N. Y. Code, § 2645 and § 2667, as amended in 1882, are to be construed together, and, so construed, permit an administrator with the will annexed to avail himself of the provisions of the amendment limiting the penalty of the bond with the consent of the descendant's next of kin. *Re Allen*, 3 Demarest (N. Y.), 63.

In Louisiana, neither the judge nor the clerk can fix the amount of the bond of a testamentary executor, this being fixed by law at one-fourth above the amount of the debt claimed. *Feray's Succession*, 31 La. An. 727.

Each of the sureties must be worth at least the penalty of the bond over all debts and property exempt from execution. *Sutton v. Weeks*, 5 Redf. (N. Y.) 353.

In Massachusetts a bond which divides up the penalty among the sureties is not absolutely void, but in the absence of legislative sanction it is not favored. *Baldwin v. Standish*, 7 Cush. (Mass.) 207.

1. Mass. Gen. Stats. c. 101, § 12. Under this section, which applies both to executors' and administrators' bonds, there may be a third person, inhabitant of another State, on an executor's bond, if two sureties are resident. Such a bond at least if approved by the court is sufficient to qualify him to act. *Clarke v. Chapin*, 7 Allen, 425.

The mere fact that the sureties do not reside in the same county in which the application is made, is not of itself sufficient objection. *Barksdale v. Cobb*, 16 Ga. 13.

2. *Jones v. Jones*, 12 Rich. L. (S. C.) 623; *Rutherford v. Clark*, 4 Bush (Ky.), 27.

Under the English practice, non-resident administrators must supply resident sureties. In the *Goods of O'Byrne*, 1 Hagg. 319. See *Cambiaso v. Negrotto*, 2 Add. (Eng.) 439; and VIII. 2. The reason of the rule is said to have been that the assignee of the bond could not serve sureties out of England with process; and as service of a person abroad may now be affected under Common Law Procedure Act, 15 & 16 Vict. c. 76, § 18, the rule has been relaxed. *Wms. Exrs.* (7th Eng. ed.) 545; *Goods of Hernandez*, L. R. 4 P. D. 229.

3. *Schoul. Exrs. & Admsrs.* § 144.

A probate judge cannot arbitrarily reject an administrator's bond, but he has the right to require the sureties to justify if there is any reasonable doubt of their responsibility; and the Supreme Court will not interfere with such an exercise of discretion unless in a clear case of its abuse. *Carpenter v. Ottawa County Probate Judge*, 48 Mich. 318.

In England, justifying securities to the administration bond are called for at the court's discretion according to the circumstances of each case, except that there is one general rule, that, where there is not a personal service of the decree on the party or parties having a prior claim to the grant, justifying securities are required. Where the securities are required to justify in the ordinary course of practice, the court will not dispense with justification unless the circumstances are exceptional. *Wms. Exrs.* (7th Eng. ed.) 545, 546. See 3 Hagg. 194, note a.; *Goods of Milligan*, 2 Robert. 108; *Belcher v. Maberly*, 2 Curt.

4. *New or Additional Bonds.* — Additional bonds may be required of an executor or administrator, whenever it appears to the court that the existing security is inadequate.¹ The court may, in some States, require the additional bond of its own motion, although no petition has been presented;² and sureties, instead of petitioning to be discharged, may petition for counter-security.³ Such new and additional bond relates back to the grant of administration, so that sureties on the new and the original bonds are all regarded as parties to a common undertaking.⁴ Unless it is clear that the

629; *Howell v. Metcalfe*, 2 Add. 348; *Jackson v. Jackson*, 35 L. J. P. M. & A. 3. See further *Coppin v. Dillon*, 4 Hagg. (Eng.) 376; *Taylor v. Diplock*, 2 Phillim. (Eng.) 280; *Friswell v. Moore*, 3 Phillim. (Eng.) 139; *Goods of Hardstone*, 1 Hagg. (Eng.) 487; *Goods of Williams*, 3 Hagg. 217; *Pickering v. Pickering*, 1 Hagg. (Eng.) 480.

Instances in which justifying securities were required in cases of temporary administration. *Goods of Campbell*, 2 Hagg. (Eng.) 555; *Howell v. Metcalfe*, 2 Add. (Eng.) 350.

1 *Schoul. Exrs. & Admsrs.* § 148; *Mass. Gen. Stats. c. 101, § 15*; *Loring v. Bacon*, 3 Cush. (Mass.) 465.

The fact that the aggregate property of the sureties is not equal to the personal estate of the administrator, or that one or more of the sureties has died, or become insufficient, is good ground for requiring additional security. *Renfro v. White*, 23 Ark. 195; *State v. Stroop*, 22 Ark. 328, *Sutton v. Weeks*, 5 Redf. (N. Y.) 353.

An administrator will be required to furnish a new bond to cover newly discovered property shown by an inventory made at his instance, and not shown to belong to another than the decedent. *Calhoun v. McKnight*, 36 La. Ann. 414.

The fact that an executor has given a residuary legatee's bond to pay debts and legacies, does not exempt him from furnishing additional security if required. *Nat. Bank of Troy v. Stanton*, 116 Mass. 438.

2 *Ward v. State*, 40 Miss. 108; *Governor v. Gowan*, 3 Ired. L. (N. C.) 342.

In Massachusetts the court may at any time, on petition by any person interested in the estate, require a new bond with surety or sureties in such penal sum as may appear just. *Loring v. Bacon*, 3 Cush. (Mass.) 465.

In Louisiana, under Rev. Stat. §§ 10 and 3698, such a proceeding may well be by rule. *Bloch v. Bordelon* (La.), 2 So. Rep. 833.

But after a lapse of many years and the death or insolvency of parties to an executor's or administrator's bond, persons claiming to be entitled in remainder should not be allowed to proceed simply by rule

to obtain new security, settlement, etc., but should file a supplemental bill. *Beckwith v. Avery*, 31 Gratt. (Va.) 533.

3 *Russell v. McDougall*, 11 Miss. 234; *Brown v. Murdock*, 16 Md. 521; *Caldwell v. Hedges*, 2 J. J. Marsh. (Ky.) 485.

Under Md. Code, art. 91, § 1, providing that any security of an executor or administrator, conceiving himself in danger from such securityship, may apply to the Orphans' Court, and the said court "may require the party to give counter-security," held, that the "may" was imperative. *Sifford v. Morrison*, 63 Md. 14.

Failure to give the additional bond within the time required by the court, is good ground for removal, and appointment of some other person who can qualify. *Mass. Gen. Stats. c. 101, § 17*; *Nat. Bank v. Stanton*, 116 Mass. 435.

An order requiring an administrator to give a new bond affects his right to administer, and his appeal therefrom without giving the security does not suspend the order. *Bills v. Scott*, 49 Tex. 430.

4 *Schoul. Exrs. & Admsrs.* § 148; *Lacoste v. Splivald*, 64 Cal. 35; *Lingle v. Cook*, 32 Gratt. (Va.) 262; *Brown v. State*, 23 Kan. 164; *State v. Berning*, 6 Mo. App. 105. See *May v. Kelly*, 61 Ala. 489.

If, between the giving of the two bonds, any cause of action has arisen against the sureties on the earlier bond, the sureties on the later bond are bound to indemnify them. *Lingle v. Cook*, 32 Gratt. (Va.) 262.

As among themselves they become responsible in proportion to the penalties of their respective bonds. *Loring v. Bacon*, 3 Cush. (Mass.) 465; *Enicks v. Powell*, 2 Strobb. Eq. 196.

The benefit of counter-securities belongs equally to both sets of sureties, in the absence of express agreement that they should operate for some exclusive benefit. *Schoul. Exrs. and Admsrs.* § 148; *Enicks v. Powell*, 2 Strobb. Eq. (S. C.) 196; *Woods v. Williams*, 61 Mo. 63; *Wolff v. Schaeffer*, 74 Mo. 154.

Money paid on the general liability of one who is surety on both bonds, in the absence of directions at the time of payment, will be applied on his liability on

new bond was taken as a substitute for the old one, — in which case the sureties in the old bond will be treated as liable for all breaches of condition committed before the new bond is executed and accepted by the court,¹ but exempt from liability for defaults committed afterwards,² — the legal effect of the new bond must be to furnish additional security for the performance of the duties imposed by the original obligation.³

5. *Joint and Separate Bonds.* — Co-executors and co-administrators who enter into a joint probate bond become jointly liable as sureties for the acts and defaults of one another,⁴ and jointly liable as principals to indemnify a surety who has been compelled to answer for the default of one of them.⁵ The sureties in such

the older bond. *Lewis v. Gambs*, 6 Mo. App. 138.

Where the first set of sureties of an administrator petition, and are properly released, the effect of the release is to make the second set of sureties primarily liable to the extent of their bond. If they prove insufficient, the first sureties are responsible to the date of their release. The second set must account, first, for any default after their suretyship, and then for any that may have occurred before. *Morris v. Morris*, 9 Heisk. (Tenn.) 814. Liability of sureties. *Perry v. Campbell*, 10 W. Va. 228.

Where waste is committed under circumstances which give a right of action upon the first bond of an executor, and also upon his additional bond, the record of a judgment on the second bond is not competent in an action on the first, as tending to show an admission on the part of plaintiff in both suits that the dereliction of the executor occurred wholly during the existence of the second bond. *State v. Berning*, 6 Mo. App. 105.

1. Mass. Gen. Stats. c. 10, § 18; *McMeekin v. Huson*, 3 Strobb. (S. C.) 327.

2. *Perry v. Campbell*, 10 W. Va. 228; *State v. Fields*, 53 Mo. 474; *Russell v. McDougall*, 11 Miss. 234; *Lingle v. Cook*, 32 Gratt. (Va.) 262; *State v. Stroop*, 22 Ark. 328.

It has been *held*, that, in case of release and substitution, the second set of sureties become primarily liable to the extent of their bond; and then, if they prove insufficient, the first set, to the date of their release. *Morris v. Morris*, 9 Heisk. (Tenn.) 814.

As to the presumption, after lapse of time, that the default occurred after the substitution, see *Phillips v. Brazeal*, 14 Ala. 746.

The *gravamen* of the breach of the substituted bond may be not a prior misapplication, but a failure to pay over. *Morris v. Morris*, 9 Heisk. (Tenn.) 814; *Pinkstaff v. People*, 59 Ill. 148.

3. *Schoul. Exrs. & Admsrs.* § 148;

People v. Curry, 59 Ill. 35; *Wood v. Williams*, 61 Mo. 63; *Brooks v. Whitmore*, 139 Mass. 356.

Where the record does not show that the new bond of an administrator was required, "on the application of a surety," as prescribed by the Alabama Rev. Code, § 2037, a recital in the order approving the new bond, that the sureties in the former bond are thenceforward discharged, is unauthorized by law, and of no effect. *Jones v. Ritter*, 56 Ala. 270.

Under 1 Wag. Mo. St. 75, § 36, providing, in relation to the second bond of an executor, that "such additional bond, when given and approved, shall discharge the former securities from any liability arising from any misconduct of the principal after filing the same, and such former securities shall only be liable for such misconduct as happened prior to the giving of such new bond," where an executor, pending the first bond, converted the assets of the estate, and, pending the second bond, failed to recover such assets as he might have done, *held*, that there was a liability under both bonds. *State v. Berning*, 74 Mo. 87; *Wolff v. Schaeffer*, 74 Mo. 87.

This act does not apply to sureties on the bond of a public administrator. *State v. Wolff*, 10 Mo. App. 95.

4. *Moore v. State*, 49 Ind. 558; *Lidderdale v. Robinson*, 2 Brock. (U. S. C. C.) 159; *Brazier v. Clark*, 5 Pick. (Mass.) 96. See *Ames v. Armstrong*, 106 Mass. 15, 19; *Hannum v. Day*, 105 Mass. 33; *Green v. Hanbury*, 2 Brock. 403; *Schoul. Exrs. & Admsrs.* § 145; *Boyd v. Boyd*, 1 Watts (Pa.) 365; *Sparhawk v. Buell*, 9 Vt. 41; *Clarke v. State*, 6 Gill & J. (Md.) 288; *Little v. Knox*, 15 Ala. 576.

In Massachusetts, neither administrators nor co-executors are required by law to enter into a joint obligation. Each may give a separate bond with his own sureties. Mass. Gen. Stats. c. 101, § 14.

5. *Dobyns v. McGovern*, 15 Mo. 662. See *Caskie v. Harrison*, 76 Va. 85.

a bond are not liable to one administrator for the default of the other.¹ Though one or more joint executors or administrators should die; the better opinion is, that the bond remains as a subsisting security for the performance of duty by the others, unless proper steps are taken to have it made inoperative as to future defaults.²

6. *Liability of Surety. — Property covered by Bond. — Functions included. — Release and Discharge of Sureties.* — The liability of a surety upon an administration bond is limited by the terms of his covenant, and cannot be extended by implication.³ As a general rule, he is liable only for such assets as come, or ought to have

Except as between themselves, it is a matter of indifference what amount of assets each has received. Each is bound for the others as a principal, so far as regards sureties, creditors, and legatees. *Boyd v. Boyd*, 1 Watts (Pa.) 365. See *Dobyns v. McGovern*, 15 Mo. 662, *Caskie v. Harrison*, 76 Va. 85. But see *Morrow v. Peyton*, 8 Leigh (Va.), 54.

In New York it was *held*, that, where A. and B. were co-administrators, and B. defaulted, and was removed, A. might maintain an action against the sureties, although he was an obligor upon the bond. *Boyle v. St. John*, 28 Hun (N. Y.), 454.

1. *Hoell v. Blanchard*, 4 Desau. (S. C.) 21. See *Elliott v. Mayfield*, 4 Ala. 417; *Nanz v. Oakley*, 37 Hun (N. Y.), 495.

2. *Dobyns v. McGovern*, 15 Mo. 662; *Stephens v. Taylor*, 62 Ala. 269. But see *Towne v. Ammidown*, 20 Pick. (Mass.) 535; *Brazier v. Clark*, 5 Pick. (Mass.) 96.

Where two administrators executed a joint bond, and one resigned, *held*, that under 2 Ind. Rev. St. 1876, p. 500, § 19, the other could maintain an action against him and his sureties upon such bond as upon a separate bond. *State v. Wyant*, 67 Ind. 25.

3. *Warfield v. Brand*, 13 Bush (Ky.), 77.

Upon an executor's bond conditioned to account for "the proceeds of all his real estate that may be sold for the payment of debts and legacies," the sureties are not liable for the proceeds of land sold by authority of the will, but not needful for the payment of debts and specific legacies. *White v. Ditson*, 140 Mass. 351; 54 Am. Rep. 473.

Thus, the condition to "well and truly administer according to law" is *held* in some States to have reference only to the interests of creditors, and not of legatees or distributees. *Arnold v. Babbitt*, 5 J. J. Marsh. (Ky.) 665; *Barbour v. Robertson*, 1 Litt. (Ky.) 93; *Small v. Commonwealth*, 8 Pa. St. 101; *Frazier v. Frazier*, 2 Leigh (Va.), 642. But see *Peoples v. Peoples*, 4

Dev. & B. (N. C.) L. 9; *Judge of Probate v. Claggett*, 36 N. H. 381.

"Due administration of the estate" has been *held* to include payment of the balance to persons entitled. *Cunningham v. Soozza*, 1 Redf. (N. Y.) 462. See *Sanford v. Gilman*, 44 Conn. 461.

Under 22 & 23 Chas. II. c. 10, "well and truly administer according to law" did not include distribution, though it would be a breach had the administrator converted the assets to his own use. *Wms. Exrs.* (7th Eng. ed.) 540, 541.

The condition to "obey all orders of the surrogate touching the administration of the estate" is construed in *Scofield v. Churchill*, 72 N. Y. 565.

The presence of the *animus contrahendi* is essential to this as to every other contract, and any alteration in the terms of the contract will discharge the surety. A person who writes to the probate judge that he will become surety if A. B. is appointed, is not so liable unless he executes the bond. *New Orleans Canal Co. v. Grayson*, 4 La. Ann. 511.

A probate bond executed by a principal and two sureties was altered by increasing the penal sum with the consent of the principal, but without the knowledge of the sureties, and was then executed by two additional sureties, who did not know of the alteration, and was approved by the judge of probate; the bond was *held* to be binding on the principal, but not on the sureties; not binding on the first two, because the alteration had discharged them; and not binding on the last two, because they had signed upon the understanding that they were bound only with the first two. *Howe v. Peabody*, 2 Gray (Mass.), 556.

On the same principle, an administration bond, executed by the sureties, but not by the administrator, is not binding on the sureties. *Wood v. Washburn*, 2 Pick. (Mass.) 24.

Where there are several administrators, one joint and several bond, executed by all of them, with proper sureties, is sufficient. *Kirby v. Turner*, *Hopk.* 309.

come, to his principal's hands, in his official capacity, in the State or county in which he was appointed or qualified,¹ and cannot be held liable for property acquired or acts done by him in some other distinct capacity.² Proceeds of such assets arising from sales, conversions, and transfers of any kind, profits and interest, effects left unaccounted for, which have come to the representative's possession or knowledge,³ even though received before appointment, are properly included, since the bond is retrospective, and covers property received before as well as after its execution.⁴ Sureties upon an administration bond do not guarantee the solvency of their principal, and hence are not responsible for a debt due by an insolvent executor or administrator to the estate;⁵ yet

1. *Governor v. Williams*, 3 Ired. (N. C.) L. 157; *Fletcher v. Weir*, 7 Dana (Ky.), 345.

The sureties cannot be held liable for assets which do not legally come to the administrator's hands, even though he charges himself with the receipt of them. *Ennis v. Smith*, 14 How. (U. S.) 400-416; *Harker v. Irick*, 2 Stockt. (N. J.) 269; *McC Campbell v. Gilbert*, 6 J. J. Marsh. (Ky.) 592.

2. *McC Campbell v. Gilbert*, 6 J. J. Marsh. (Ky.) 592; *Barker v. Stanford*, 53 Cal. 451; *Sims v. Lively*, 14 B. Mon. (Ky.) 433; *Reeves v. Steele*, 2 Head. (Tenn.) 647. See *Douglass v. New York*, 56 How. (N. Y.) Pr. 178; *McLean v. McLean*, 88 N. C. 394.

The bond does not extend to duties which may devolve upon him, not as executor, but as trustee. *Warfield v. Brand*, 13 Bush (Ky.), 77.

Where testator directed his executors to carry on a certain business in which he was engaged, and by their imprudent management debts were incurred, *held*, that the sureties on their bonds were not liable therefor. *Carter v. Young*, 9 Lea (Tenn.), 210.

A separate bond should be ordered to secure the performance of the trust. *Hinds v. Hinds*, 85 Ind. 312.

If, however, instead of giving the statutory bond to perform the duties required "by law as executor," he gives a bond to perform the duties enjoined "by the will," he will be liable for failure to perform duties imposed on the executor as testamentary trustee. *Walker v. Potilla*, 7 Lea (Tenn.), 449.

In the absence of such a peculiar bond, where one holds property as executor and trustee, to hold the surety on the executor's bond, liable for a *devastavit*, it must clearly appear that the assets were wasted prior to the time when, by operation of law, they came to his hands as trustee. *State v. Cheston*, 51 Md. 353.

An executor who is also chargeable as trustee under the will, but gives bond only as executor, is chargeable for the property in his hands, in his capacity as executor, until he has given bond, and charged himself as trustee. *Prior v. Talbot*, 10 Cush. (Mass.) 1; *Briggs v. Baptist Church* (Me.), 8 Atl. Rep. 257.

As to the same person being guardian or trustee and administrator, see further, § XII. 2, c; *Schoul. Dom. Rel.* (3d ed.) § 324.

In reference to a public administrator, it is to be observed that the mere fact that the order of appointment and letters of administration to an estate make no mention of his official character, will not exempt the sureties upon his official bond from liability for his default in the administration of the estate. *Mitchell v. Hecker*, 59 Cal. 558.

3. *Watson v. Whitten*, 3 Rich. (S. C.) 224; *Verral v. Belanger*, 6 La. Ann. 109; *Boulware v. Hendricks*, 23 Tex. 667; *Goode v. Buford*, 14 La. Ann. 102; *Wattles v. Hyde*, 9 Conn. 10.

The rule, that, if one holding a fiduciary relation as an administrator makes use of the trust funds, he shall account for them, and for any profits realized, will not be relaxed in favor of a surety on his official bond. *Dowling v. Feeley*, 72 Ga. 557.

Sureties upon the bond of an administrator are liable for misapplication of money received from a railroad company for causing death of intestate, under Tenn. Code, § 2291. *Glass v. Howell*, 2 Lea (Tenn.), 50. See *post*.

4. *Choate v. Arrington*, 116 Mass. 552; *Goode v. Buford*, 14 La. Ann. 102; *Gottsberger v. Taylor*, 19 N. Y. 150; *Scofield v. Churchill*, 72 N. Y. 565; *State v. Crensbauer*, 68 Mo. 254; *Brown v. State*, 23 Kan. 164.

5. *Lyon v. Osgood*, 7 Atl. Rep. 5; s. c., 53 Vt. 707.

A surety is liable for the executor's debt only to the same extent as for the debts of

if he is able to pay, and will not, they will be liable for his breach of duty in not discharging the obligation.¹ In the absence of express legislation, the bond does not extend to proceeds of the sale of real estate or rents received after the death of the decedent.² The obligation extends beyond the life of the surety; and

third parties. *Spurlock v. Earles*, 8 Baxter (Tenn.), 437. See *Baucus v. Barr*, 10 Cent. Rep. (N. Y.) 240; *post*, § XII. 3, *h*, n.

1. *Piper's Est.* 15 Pa. St. 533.

The surety on the bond of a deceased administrator is not relieved from liability on his bond for a debt due by the administrator to the intestate, by the fact that the administrator's estate was settled as an insolvent estate more than five years after his appointment, where it is not shown that the money could not have been recovered during his life. *Kader v. Yeargin* (Tenn.), 3 S. W. Rep. 178.

2. *Brown v. Brown*, 2 Harr. (Del.) 5; *Oldham v. Collins*, 4 J. J. Marsh. (Ky.) 49; *Reno v. Tyson*, 24 Ind. 56; *Hutchenson v. Pigg*, 8 Gratt. (Va.) 220; *Commonwealth v. Higert*, 55 Pa. St. 236; *Hart's App.* 2 Grant (Pa.), 83; *Cornish v. Willson*, 6 Gill (Md.), 299. See also *Beale's Exrs. v. Commonwealth*, 17 Serg. & R. Pa. 392; *Jones v. Hobson*, 2 Rand. (Va.) 483; *Burnett v. Harwell*, 3 Leigh (Va.), 89; *Gregg v. Currier*, 36 N. H. 200; *Perkins v. Perkins*, 46 N. H. 110, 112; *Wills v. Dunn*, 5 Gratt. (Va.) 384; *Powell v. White*, 11 Leigh (Va.), 309; *Kimball v. Sumner*, 62 Me. 307; *Slaughter v. Froman*, 2 Monr. (Ky.) 95; *Allen v. Bruton*, 1 McMullan (S. C.), 249.

The fact that the proceeds are brought into the administration account does not affect the case. *Reed v. Commonwealth*, 11 Ser. & R. (Pa.) 441; *Commonwealth v. Gilson*, 8 Watts (Pa.), 214; *Commonwealth v. Hilgert*, 55 Pa. St. 236.

But the administrator *de bonis non cum testamento annexo*, and his sureties, are liable on the administration bond for money arising out of the sale of real estate of the testator made in pursuance of the directions of the will. *Zeigler v. Sprengle*, 7 Watts & S. (Pa.) 178; *Commonwealth v. Forney*, 3 Watts & S. (Pa.) 356. *Contra*, *Probate Court v. Hazzard*, 13 R. I. 3; *Governor v. Chouteau*, 1 Mo. 731.

In Virginia, the sureties of an executor are not responsible for the proceeds of land sold by him under the will. *Burnett v. Harwell*, 3 Leigh (Va.), 89; *Jones v. Hobson*, 2 Rand. (Va.) 483. As when power to sell will be deemed annexed to the office of executor, see § VIII. 4.

In New Hampshire the sureties on the administration bond are liable for the proceeds of lands in another State, with which their principal has been charged, on settle-

ment of his accounts in New Hampshire. *Judge of Probate v. Heydock*, 8 N. H. 491.

Under Mass. Gen. Stats. c. 93, § 2, the executor's bond covers "the proceeds of all the real estate of the testator that may be sold for the payment of his debts and legacies;" under c. 94, § 2, the administrator's bond covers the administration "of the proceeds of all the real estate of the intestate that may be sold for the payment of his debts;" under c. 98, § 8, an executor must account for rents, and his sureties are liable for their payment. See *Phillips v. Rogers*, 12 Met. (Mass.) 405; *Bennett v. Overing*, 16 Gray (Mass.), 268, 269; *Hannum v. Day*, 105 Mass. 38. But the sureties on a general bond given by an executor, who has also given a special bond, with sureties, to account for, and dispose of according to law, the proceeds of a sale, under a license of the probate court, of the real estate of his testator, remaining after payment of debts, legacies, and charges of administration, are not liable for the neglect of the executor to pay over to the residuary legatees entitled thereto the balance of the proceeds of such sale, although the executor charges himself in his general account with the whole of such balance. *Robinson v. Millard*, 133 Mass. 236.

The provision as to rents does not render sureties liable for rents collected by the executor after his removal from office. *Brooks v. Jackson*, 125 Mass. 307.

Statutes analogous to the first two provisions exist in Maryland. *Cornish v. Willson*, 6 Gill (Md.) 299.

In Missouri, the sureties of an administrator are liable for the misapplication of rents and profits of land received by him. *Strong v. Wilkson*, 14 Mo. 116.

See, as to proceeds of sale of realty, *Wade v. Graham*, 4 Ohio, 126; *Clarke v. West*, 5 Ala. 117; *Worgang v. Clipp*, 21 Ind. 119.

Cal. Code, § 1572, while authorizing one having an estate of inheritance in land fraudulently sold by an administrator, to maintain an action against him for double the value of the land, does not authorize an action against the sureties on his official bond. *Weihe v. Statham*, 67 Cal. 245.

In Kentucky the surety in the administrator's bond is liable for such rents as were due the intestate at his death, or were collected by the administrator upon a contract made by his intestate, which passed into the hands of the administrator;

his estate may be held for defaults of the principal committed after his death, especially if he has expressly bound his own executors and administrators.¹ Nor does the death of the representative himself affect the liability of the sureties as surviving obligors in an action at law.² The surety is released from liability by any subsequent alteration in the contract to which he is not privy,³ and may, under special statutory provisions in many States, upon petition, be discharged from all further responsibility, if the court deems it reasonable and proper, after due notice to all persons interested.⁴ The fact that the executor or administrator has failed to perform the duties prescribed by the bond, is good ground for presenting such petition.⁵ The release, however, is a judicial

but not for rents of lands leased by the administrator and collected by him since the intestate's death. *Wilson v. Unselt*, 12 Bush (Ky.), 215.

Damage to real estate with administrator's consent is no breach of bond required by Me. Rev. Stat. ch. 64, § 19, unless the estate has been represented insolvent to the judge of probate. *Gilbert v. Duncan*, 65 Me. 469.

Probate bonds, in most States, are so worded as to include all the general functions which the representative may be required to perform in the execution of his trust, whether towards the court, creditors, legatees, or distributees. *Woodfin v. McNealy*, 9 Fla. 256; *People v. Miller*, 2 Ill. 83; *Hazen v. Durling*, 2 N. J. Eq. 133.

1. *Mundorff v. Wangler*, 44 N. Y. Super. Ct. 495.

2. *Edes v. Garey*, 46 Md. 24.

The sureties upon the bond of a public administrator continue liable after his resignation, for the faithful discharge of his duties in reference to estates committed to his care before his resignation. *Olsen v. Rich*, 79 Ky. 244.

3. *Howe v. Peabody*, 2 Gray (Mass.), 556.

A surety upon the bond of an executor, who is also a residuary legatee, is released by the act of a legatee who, without the sureties' assent or procurement, accepts the executor's note for the amount of the legacy after the time limited by the will for paying it has expired. *Durfee v. Abbott*, 50 Mich. 479.

If the probate court removes an administrator, and subsequently re-appoints him with additional administrators, the sureties upon his bond are relieved from liability. *Lingle v. Cook*, 32 Gratt. (Va.) 262.

But an order of the probate court, made after a decree directing payment of debts, extending the time for the administrator to render his final account beyond the limits fixed by statute, does not affect the liability of his sureties with respect to

the amounts directed by the decree to be paid to the creditors. *Lanier v. Irvine*, 24 Minn. 116.

4. *Schoul. Exrs. and Admsrs.* § 147; *Mass. Gen. Stats. c. 101, § 16*; *Jones v. Ritter*, 56 Ala. 270; *Harrison v. Turbeville*, 2 Humph. (Tenn.) 242; *McKay v. Donald*, 8 Rich. (S. C.) 331; *Norris v. Fristoe*, 3 La. Ann. 646; *Johnson v. Fuquay*, 1 Dana (Ky.), 514; *Valcourt v. Sessions*, 30 Ark. 515; *Lewis v. Watson*, 3 Redf. (N. Y.) 43.

But in Pennsylvania, if an executor gives bond by order of the Orphans' Court, upon an application charging him with mismanagement of the funds, the legatees acquire a vested interest in the bond, the power of the court over it ceases, and it cannot be released, or another substituted in its stead, without consent of the legatees. *Commonwealth v. Rogers*, 53 Pa. St. 470.

A surety on a bond, who has been discharged from "further responsibility" thereon by the judge of probate, is liable under *Mass. Gen. St. ch. 101, § 18*, for any breaches of the condition of the bond by the principal during the entire time he was his surety. *McKim v. Blake*, 132 Mass. 343.

As to citation, see *Stevens v. Stevens*, 3 Redf. (N. Y.) 507; 27 La. Ann. 344.

The statute discretion of the court to discharge a surety from liability appears to be strictly construed. *Jones v. Ritter*, 56 Ala. 270; *Wood v. Williams*, 61 Mo. 63; *People v. Curry*, 59 Ill. 35.

5. *Sanders v. Edwards*, 29 La. Ann. 696. See *Boutlé's Succession*, 32 La. Ann. 556.

As to proper mode of procedure under Arkansas statutes, see *Valcourt v. Sessions*, 30 Ark. 515.

Upon an application to be released as surety on an administrator's bond, the suggestion that the surety and his relatives are indebted to the estate, and intend to have a new administrator appointed, with a view to avoiding payment, does not affect the right of the surety to be released under

act; and the mere erasure of the names of the sureties found upon a duly accepted bond cannot effect that result.¹

7. *Breaches that induce Forfeiture.*—Under the statute of Charles II., it is incumbent upon the administrator to “deliver a true and perfect inventory,” and make a just and true account, without any previous citation; and a failure to do either will be such a breach of the conditions of the bond as will induce its forfeiture.² Under the condition that the administrator “do well

Laws 1862, ch. 229. *Lewis v. Watson*, 3 Redf. (N. Y.) 43.

As to service of citation upon non-resident executor, see *Stevens v. Stevens*, 3 Redf. (N. Y.) 507.

1. *Brown v. Weatherby*, 71 Mo. 152.

See, as to surety's right to subrogation, *Vanderveer v. Ware*, 69 Ala. 38; *Townsend v. Whitney*, 75 N. Y. 425. See “Subrogation.”

The bond of an administrator is an entirety, and is not to be cancelled in part until the whole gestion is completed. *Stone's Succession*, 31 La. Ann. 311.

2. *Wms. Exrs.* (7th Eng. ed.) 540; *Green-side v. Benson*, 3 Atk. (Eng.) 252, 253; *Archbishop of Canterbury v. Willis*, 1 Salk. (Eng.) 172, 315; 11 Mod. 145. See *Edmundson v. Roberts*, 2 How. (Miss.) 822.

In Massachusetts the administrator must file a “true and perfect” inventory within three months, of “all and singular the goods, chattels, rights, and credits of the deceased which shall, or have, come to the hands, possession, or knowledge of the administrator;” and the judge of probate has no power to dispense with the duty. No citation is necessary to hold the administrator liable on his bond for not returning an inventory. *Potter v. Titcomb*, 2 Fairf. (Mass.) 157. See s. c., 1 Fairf. (Mass.) 53.

In Pennsylvania, if the inventory is not filed within thirty days from the filing of the bond, the bond is forfeited, though there be no citation. *Purd. Dig.* §17, Pl. 53. See *Commonwealth v. Bryan*, 8 S. & R. (Pa.) 126; *Reiff's Appeal*, 2 Pa. St. 257; *King's Est.* 12 W. N. C. (Pa.) 105.

In Maine no citation is necessary to a right of action upon the bond for omitting to inventory, within the time prescribed by statute, property known to the administrator, when he accepted the trust, to belong to the estate. *Bourne v. Stevenson*, 58 Me. 499.

Under the English practice prior to the passage of the Probate Act, to an action on the bond, it was not enough for the defendant, in order to show that the condition as to exhibiting the inventory on a day certain, was performed, to plead that there was no court held, but he must plead also that he was there ready, etc.; for he must show that he has done all that could be

done on his side toward performance. *Archbishop of Canterbury v. Willis*, 1 Salk. 172. Assuming that it was a sufficient excuse that no court was held on the day specified, this must be pleaded in excuse of performance, and cannot be pleaded to a suggestion of breaches, or given in evidence before a jury on trial of breaches suggested on the roll under stat. 8 & 9 W. III. c. 11, § 8; 1 Cr. & M. 690; *Archbishop of Canterbury v. Robertson*, 3 Tyrwh. (Eng.) 390; 1 Cr. & M. (Eng.) 690. Since the passage of the Probate Act an inventory is not required by the court, unless at the instance of some one interested. *Wms. Exrs.* pt. iii. bk. 11, ch. 1, § 111.

A failure to settle an account is a breach of the bond in New Jersey. *Ordinary v. Barcalow*, 7 Vroom (N. J.), 15; *Dickerson v. Robinson*, 1 Hals. (N. J.) 195; *Ordinary v. Hart*, 5 Hals. (N. J.) 65.

In Pennsylvania the account must be filed within one year, although the administrator is not cited, or the bond is forfeited. *Commonwealth v. Bryan*, 8 Ser. & R. (Pa.) 126.

In Massachusetts an executor or administrator is required within one year after giving bond to render his first account of administration upon oath; and if, after being duly cited by the probate court, he neglects to render an account of his administration, his bond may be put in suit. *Genl. Sts.* c. 98, §§ 9, 11; *Munroe v. Holmes*, 13 Allen (Mass.), 109, 112. See *Loring v. Kendall*, 1 Gray (Mass.), 305; *Richardson v. Oakman*, 15 Gray (Mass.), 57.

The return of the commissioners of an insolvent estate, unappealed from, is “the final liquidation” of creditors' demands, within six months of which the administrator is bound to account, under Mass. Gen. St. ch. 99, § 26, and his failure to account within this time is a breach of his bond; and it is immaterial that a contingent claim has been presented, no action having been taken thereupon. *McKim v. Bartlett*, 129 Mass. 226.

A decree of the probate court, that an administrator ought to render an account, furnishes a sufficient basis for a suit upon the bond given to secure performance of the orders of the court. *French v. Winsor*, 24 Vt. 402; *Mathews v. Page, Brayt.* (Vt.) 106.

and fully administer according to law," it is no ground of forfeiture that the administrator has not paid the debts of the intestate; and a creditor cannot sue on the bond, assigning as a breach the non-payment of a debt to himself;¹ nor does the neglect or refusal to make distribution constitute a breach, unless preceded by an order of the probate court.² If, however, the administrator converts to his own use the effects of the intestate, so that they are entirely lost to the estate, this is such a breach of the condition "to well and truly administer," according to law, as will entitle the

A settlement out of court between the heirs and the administrator is not a compliance with the condition of the bond, to render an account, when required, in the probate court. *Clarke v. Clay*, 31 N. H. 393.

An action cannot be maintained against an executor or administrator upon his official bond for not accounting for money lost by his neglect or misconduct until after he has been cited by the court to render his account thereof. *Potter v. Cummings*, 18 Me. 55, 58. See *Potter v. Titcomb*, 7 Greenl. Me. 302; *Ordinary v. Williams*, 1 N. & M. (Eng.) 213; *Madison Co. Ct. v. Looney*, 2 Stew. & P. (Ala.) 70; *Thompson v. Scarcy*, 3 Brev. (S. Car.) 530; *Ordinary v. Caldwell*, 3 McCord (S. C.), 225; *Shelton v. Cureton*, 3 McCord (S. C.), 412; *Lining v. Giles*, 3 Brev. (S. Car.) 530; *Ordinary v. McClure*, 1 Bailey (S. Car.), 7; *Simpkins v. Powers*, 2 N. & M. (S. C.) 213; *Behrie v. Shennan*, 10 Bosw. (N. Y.) 292; *Crawford v. Commonwealth*, 1 Watts (Pa.), 480; *People v. Corties*, 1 Sandf. (N. Y.) 228; *Francis v. Northcote*, 6 Tex. 185; *Ordinary v. Martin*, 1 Brev. (S. Car.) 552; *Gilbert v. Duncan*, 65 Me. 469.

The question whether an account settled in the probate court by an administrator was fraudulent, cannot be tried in an action on the administration bond for not settling a true account. *Paine v. Stone*, 10 Pick. (Mass.) 75.

The failure of an executor or sole legatee to file an inventory, and to render an account within the time prescribed by law, is a technical breach of the bond, which, there being no creditors, is cured by filing the inventory and rendering the account before suit brought. *McKim v. Harwood*, 129 Mass. 75.

1. *Archbishop of Canterbury v. Willis*, 1 Salk. (Eng.) 316; *Browne v. Archbishop*, 1 Lutw. (Eng.) 882 b; *Wms. Exrs.* (7th Eng. ed.) 540. See *Commonwealth v. Evans*, 1 W. (Pa.) 437; *Commonwealth v. Wenrick*, 8 W. (Pa.) 160; *Myers v. Fretz*, 4 Pa. St. 347; *Commonwealth v. Moltz*, 10 Pa. St. 527; *Ordinary v. Hunt*, 1 McMullan (S. C.), 380.

As to fixing the administrator with a *devastavit*, see 8. A mere suggestion that

a *devastavit* has been committed is not sufficient. *Archbishop of Canterbury v. Robertson*, 1 Cr. & M. (Eng.) 711. But it has been held that the assignees of a bankrupt, next of kin, are not to be deemed creditors within this rule. *Drewe v. Long*, 18 Jur. (Eng.) 1060.

2. *Wms. Exrs.* (7th Eng. ed.) 540; *Archbishop of Canterbury v. Tappen*, 8 B. & C. (Eng.) 151; *Archbishop of Canterbury v. Robertson*, 3 Tyrh. (Eng.) 395.

By the terms of the bond prescribed by stat. 22 & 23 Car. 240, sect. 1, a decree or sentence of the ecclesiastical judge should precede the distribution, and hence a neglect or refusal to distribute until such previous decree or sentence, is not a breach of the condition that he should "well and truly administer according to law." *Archbishop of Canterbury v. Tappen*, 8 B. & C. (Eng.) 151. See *Sandrey v. Mitchell*, 3 B. & S. (Eng.) 405; 3 Add. (Eng.) 68; *Barbour v. Robertson*, 1 Litt. (Ky.) 93; *Ordinary v. Barcalow*, 7 Vroom (N. J.), 15; *Ordinary v. Smith*, 3 Green (N. J.), 92; *Probate Court v. Kimball*, 42 Vt. 320; *Hurlbut v. Wheeler*, 40 N. H. 75; *Judge of Probate v. Lane*, 51 N. H. 342, 347, 348; *Probate Court v. Van Duzer*, 13 Vt. 135; *Adams v. Adams*, 16 Vt. 228; *Coffin v. Jones*, 5 Pick. (Mass.) 61.

In *Judge of Probate v. Adams*, 49 N. H. 150, it was held that no action would lie on the bond of an executor or administrator for the benefit of the heirs or legatees until after a decree of distribution by the probate court, unless the executor or administrator has expressly admitted the claim to be due. See also *Judge of Probate v. Briggs*, 5 N. H. 68; *French v. Winsor*, 24 Vt. 402; *Williams v. Cushing*, 34 Me. 372; *Jones v. Anderson*, 4 McCord (S. C.), 113; *Gordon v. Justices of Frederick*, 1 Munf. (Vt.) 1; *Perkins v. Perkins*, 46 N. H. 110; *Judge of Probate v. Emery*, 6 N. H. 141; *Hough v. Bailey*, 32 Conn. 290, 291; *Keeney v. Globe Mill Co.*, 39 Conn. 149, 150; *State v. Stafford*, 73 Mo. 658.

Hence, in alleging the non-payment of a distributive share as a breach of an administrator's bond, it must be shown that such distributee tendered a refunding bond. *Ordinary v. White*, 43 N. J. L. 22.

next of kin to have the bond put in suit; and sureties will be liable for the full amount of the money that has been so misapplied.¹

1. Wms. Exrs. (7th Eng. ed.) 542; Archbishop *v.* Robertson, 1 Cr. & M. (Eng.) 690; 3 Tyrwh. (Eng.) 390.

A legacy was given to the person named as executor of a will. He was directed by the will to invest the legacy and to pay the income to another for life. No investment was made, but the executor used the legacy in his business. *Held*, a breach of the condition of his official bond. *Scituate Probate Court v. Angell*, 14 R. I. 495.

Where an executor, to whom a residuary legacy is bequeathed, uses it, leaving the testator's debts unpaid, his sureties are liable for the amount thereof before the devised realty can be subjected. *Edmunds v. Scott*, 78 Va. 720.

But in a suit on an administrator's bond at the relation of a creditor, something more palpable than mere delay in the payment of a claim against the estate must be proven to make out a case of conversion of the assets. *Embree v. State*, 85 Ind. 368.

Whether the circumstance of the administrator dying, largely indebted to the intestate's estate, is a breach, has been questioned. *Bolton v. Powell*, 2 De G. M. & G. (Eng.) 1.

As to fixing a *devastavit*, see 8.

As to construing statutory provisions respecting the several conditions of an administrator's bond, see further *Lanier v. Irvine*, 21 Minn. 447; *Hartzell v. Commonwealth*, 42 Pa. St. 453; *Ordinary v. Smith*, 14 N. J. L. 479.

As to condition to surrender the letters in case a will should be proved, see *Hunt v. Hamilton*, 9 Dana (Ky.), 90.

In *Judge of Probate v. Claggett*, 36 N. H. 381, a condition to "administer the estate according to law" was *held* to include administration according to a will already admitted to probate.

A testator provided by will that if his executors decided to collect from his surviving partners the money due to his estate, the amount should not be collected before a time specified. *Held*, that the taking by the executors of notes for the amount did not discharge the sureties on a bond given before the notes were taken, conditioned to pay "all sums of money that are now due or hereafter may become due." *Nash v. Heilman*, 14 Fed. Rep. (Ind.) 88.

The condition of the bond prescribed by 2 N. Y. Rev. Stat. 77, § 42, given by an executor upon a surrogate's order under §§ 18-20, that he "shall obey all orders of the surrogate touching the administration of the estate," expressly binds the obligors for his failure to obey an order as to the

payment of moneys which came to his hands, although lost or disposed of before the bond was executed. *Scofield v. Churchill*, 72 N. Y. 565.

An action may be brought on a probate bond in the name of the judge, in case of refusal or omission of the administrator to perform any order or decree mentioned in Minn. Gen. St. ch. 55, § 5. *O'Gorman v. Lindeke*, 26 Minn. 93. *Compare Palmer v. Pollock*, 26 Minn. 423.

Where, by the terms of the will, the executor was directed to invest the amount bequeathed for the benefit of the legatee, and failed to do so, an action may be maintained upon the undertaking of his surety. *United States v. Parker*, 2 MacArthur (C. C.), 444.

But where the only party whom an administrator represents has received all that he is entitled to, the administrator cannot maintain an action based on the omission of a former administrator to act promptly in collecting a claim, which said party himself took charge of. *Shurtleff v. Ferry*, 138 Mass. 371.

The failure of an executor to pay an allowance on finding, by the court having jurisdiction, that there were sufficient funds therefor, *held*, a breach of the obligation in his bond to "perform all other things touching said executorship required by law or the order or decree of any court having jurisdiction." *State v. James*, 82 Mo. 509.

The fact of an attachment execution being issued out of the common pleas, against a legatee as defendant, and an executor as garnishee, does not afford valid ground for the executor's refusing to comply with a peremptory order of the Orphans' Court, directing him to pay over the amount of the legacy to an assignee, claiming under the legatee by an assignment prior to the date of the issuing of the attachment execution. The mere fact that the creditor of the legatee has not presented his claim before the court, does not affect the force of its decree. *Sex's App.* 97 Pa. St. 289.

Where a claim, although barred, was allowed by the administrator, and ordered by the court to be paid, *held*, that his sureties were liable for his failure to pay it out of the funds in his hands. *Webber v. Noth*, 51 Iowa, 375.

In an action on a bond under Neb. Rev. St. 307, § 165, "to pay all the debts and legacies," if no fraud or mistake is alleged, the fact of sufficient assets in the executor's hands will be conclusively presumed. *Buel v. Dickey*, 9 Neb. 285.

As to the alterations produced in the English practice by the passage of the Pro-

8. *Suits on Administration Bonds.* — After the administrator has been fixed with a *devastavit*,¹ and leave has been obtained from the

bate Act (20 & 21 Vict. c. 77), see Wms. Exrs. (7th Eng. ed.) 531, 543.

1. Commonwealth v. Evans, 1 Watts (Pa.), 437; Commonwealth v. Wenrick, 8 Watts (Pa.), 159; Myers v. Fretz, 4 Pa. St. 347; Commonwealth v. Moltz, 10 Pa. St. 527; Ordinary v. Hunt, 1 McMullan (S. C.), 380. See Hood v. Hood, 85 N. Y. 561; Weihe v. Stratham, 67 Cal. 84; Chaquette v. Orlet, 60 Cal. 594. In New Mexico the action may be brought against the principal and surety jointly. Beall v. Territory, 1 New Mex. 507.

"The liability of the surety is contingent and not absolute; and therefore, before suit can be brought against the surety, the party in interest, whether creditor, legatee, heir, or distributee, must proceed against the administrator, and fix him personally for the debt." It is only in the event of the administrator being unable to pay, that the surety can be called on for the amount. Myers v. Fretz, 4 Pa. St. 346.

A summary execution against the securities on an administrator's bond, issued before the return-day of the execution against the administrator, is voidable only, and a sale made thereunder would be valid until set aside. Steele v. Tutwiler, 68 Ala. 107.

There must be a judgment and decree fixing the amount of the particular claim and the liability of the executor or administrator. Commonwealth v. Moltz, 10 Pa. St. 527; Myers v. Fretz, 4 Pa. St. 346; Judge of Madison County Court v. Looney, 2 Stew. & Port. (Ala.) 70; Potter v. Cummings, 18 Me. 55; Groton v. Tallman, 27 Me. 68; Davant v. Pope, 6 Rich. (S. C.) 247; Commonwealth v. Stub, 11 Pa. St. 150; Taylor v. Stewart, 5 Call (Va.), 520; State v. Dailey, 7 Mo. App. 548; Beasley v. Mott, 12 Rich. L. (S. C.) 354; Jones v. Anderson, 4 McCord, 113; Ohio v. Cutting, 2 Ohio St. 1; Thornton v. Glover, 25 Miss. 132; Dinkins v. Bailey, 23 Miss. 284; Eaton v. Benefield, 2 Blackf. (Ind.) 52; County Court v. Price, 6 Ala. 36; Florida v. Redding, 1 Fla. 242; Perkins v. Moore, 16 Ala. 9; Thompson v. Scarcy, 6 Port. (Ala.) 393; Glenn v. Conner, Harp. Ch. (S. C.) 267; Justices v. Sloan, 7 Ga. 31; Gordon v. State, 11 Ark. 12; State v. Ritter, 9 Ark. 244; People v. Guild, 4 Denio (N. Y.), 551; Matter of Webster, 1 Halst. Ch. (N. J.) 89; Brooks v. Hope, 139 Mass. 351.

Fixing Devastavit. — Under La. Code, Art 3066, inhibiting suit against the surety of an administrator, etc., "until the necessary steps have been taken to fix the liability upon the principal," a breach of the condition must first have been judi-

cially declared in a proper proceeding, conducted contradictorily with the principal. If the principal has died, and his succession is insolvent, the insolvency must first have been established by the proper judicial proceedings.

The plea of *lis pendens* must prevail in a suit against the surety, when the issues it presents are pending in an opposition to an account of an administrator. Pickett v. Gilmer, 32 La. An. 991.

But, as a general rule, it is not necessary that the administrator should have been driven to insolvency. Commonwealth v. Stub, 11 Pa. St. 150. See Hazen v. Durling, 2 N. J. Eq. 133.

A judgment against an executor in his official capacity, and an execution thereon returned "no property found," conclusively establish a *devastavit* as against the sureties on his bond. Grimmet v. Henderson, 66 Ala. 521.

Where a judgment has been had in a competent court against an administrator, suit may be maintained upon the bond, notwithstanding the fact that the claim never was presented in course of administration. People v. Allen, 8 Ill. App. 17.

A creditor who has recovered judgment against the administrator *de bonis non* can make this the basis of a suit against the sureties on the bond of the administrator-in-chief for a *devastavit* committed by the latter. Pilcher v. Drennan, 51 Miss. 873.

An administrator filed a bill to marshal assets, and enjoined the creditors to await the decree; but, dying, his administrator, and the administrator *de bonis non* of the original estate, were made parties to the bill, and a decree was rendered in favor of a creditor for a debt of the highest dignity. Execution was issued and returned *nulla bona*. The administrator *de bonis non* had no assets, as his predecessor had wasted them, refused to call his estate to account, and was, together with his sureties, insolvent. Held, that said creditor might sue on the bond of the first administrator for his debt, making his administrator a party defendant. Thornton v. Park, 61 Ga. 549.

But the settlement of a general account by an executor, disclosing a general balance in his hands, does not so fix the executor as to enable a distributee to maintain an action on the official bond. From such settlement it would nowise appear how much the distributee had been advanced. Commonwealth v. Stub, 11 Pa. St. 150.

But a decree by the surrogate to an administrator who has been removed, to pay over to his successor the amount, if valid, and without collusion, concludes the

sureties on his bond. *Harrison v. Clark*, 87 N. Y. 572.

The "order" of the court, under Tennessee Code, § 2352, for an administrator to distribute the assets, does not operate as a judgment against both him and his sureties. *Cooper v. Burton*, 7 Baxter (Tenn.), 406.

Where a decree is made by a probate court, directing debts allowed by the commissioners to be paid, it will be presumed that they gave the proper notice, or that the administrator appeared before them; and in an action on the administrator's bond to recover the amount directed to be paid, proof of notice by the commissioners need not be made otherwise than by the decree. *Lanier v. Irvine*, 24 Minn. 116.

In Texas, suit cannot be brought on the administration bond before final settlement of his account; and the fact that the administration has been practically closed, is immaterial. *Buchanan v. Bilger*, 64 Tex. 589.

As to construction of Texas Act of August, 1870, affecting right of creditors to sue on bond for *devastavit*, see *Collins v. Warren*, 63 Tex. 311.

After a court of equity has assumed jurisdiction of a bill to compel an administrator to account, an action on the bond cannot be brought by a distributee until the suit in equity is finally decided. *State v. Dilley*, 64 Md. 314.

Exceptions.—Where an executor who has given security, or an administrator, absconds, conceals himself, or resides beyond the jurisdiction of the court, an action will lie on his official bond against the surety, without recourse in the first instance to the principal. *Commonwealth v. Wenrick*, 8 Watts (Pa.), 160.

This case is an exception to the general rule, and founded on necessity; for otherwise the parties in interest would be without remedy, induced it may be by fraudulent combination between the administrator and surety. The principle can only apply where there is but one administrator, or, if more, where there is no person within the jurisdiction of the court liable to suit. *Myers v. Fretz*, 4 Pa. St. 347.

In New York, action against the parties to an executor's bond, based on the executor's bad faith and neglect in selling land and in investing the proceeds, and demanding damages, may be maintained, although the executor's default has not been established by a decree of the surrogate. [*Learned, P. J.*, dissenting.] *Haight v. Brisbin*, 36 Hun (N. Y.), 579.

In Indiana, suit may be brought on an administrator's bond to recover the amount of a judgment against the estate, where the same is solvent, and the administrator has always had money in his hands to pay the claim, the same being the only outstanding

one against the estate. No demand is necessary before bringing the suit. *Pence v. Makepeace*, 75 Ind. 480.

An administrator having refused to pay a demand, although having assets sufficient therefor, an order of the probate court upon him to do so is not necessary before bringing suit upon his bond. *State v. Shelby*, 75 Mo. 482.

But proceedings against executors, administrators, and their sureties, provided for by Mo. Rev. Stats. §§ 282, 285, can only be instituted after final settlement. *Ridgway v. Kerfoot*, 22 Mo. App. 661.

Suits in Equity.—Under special circumstances the ecclesiastical court would order the bond to be attended with, as well if sued on in a court of equity as if put in suit in a court of law. Such cases, however, were exceptional, and no suit for the purpose of enforcing the bond has ever been instituted in the first instance in a court of equity. The administrator *de bonis non* cannot institute such suit on his predecessor's bond, unless there are very special circumstances to give the court of equity jurisdiction. *Wms. Exrs.* (7th Eng. ed.) 538; *Goods of Harrison*, 2 Robert. (Eng.) 184; *Bolton v. Powell*, 14 Beav. 275, 286; 2 De G. M. & G. 1, 22.

In New York an equitable action cannot be maintained against a non-resident executor and the sureties upon his bond, to establish a *devastavit* on the part of the former, and to enforce the liability of the latter, in the absence of proof of special circumstances showing the necessity for the intervention of a court of equity. *Hood v. Hood*, 85 N. Y. 561. *Compare Williams v. Kiernan*, 25 Hun (N. Y.), 355; *Haines v. Meyer*, 25 Hun (N. Y.), 414.

Under Ohio Act, March 23, 1840, § 184, suit may be brought in the name of a legatee upon an executor's bond for conversion of the assets; and the probate court need not, before suit brought, either fix the amount of the legacy, or order its payment. *Mighton v. Dawson*, 38 Ohio St. 650.

In Rhode Island an executor may be sued on his bond for neglecting to make final distribution, without proving that any formal order for distribution was made; but not without showing that there was a residue, which had been definitely ascertained in due course of administration, and awaited distribution. *Municipal Court of Providence v. Henry*, 11 R. I. 563.

An administrator *de bonis non*, suing upon the bond of a deceased administrator, is not required in Ohio to procure the amount due the estate from the deceased administrator to be judicially determined, before he can sue. *Douglass v. Day*, 28 Ohio St. 175.

Under Minn. Gen. Stat. ch. 55, § 4, a creditor may, in his own name, bring an

probate court to place the bond in suit,¹ an action may be maintained thereon by a creditor, legatee, distributee, or any other

action upon a probate bond, although his claim against the estate has not been ordered to be paid. *Forepaugh v. Hoffman*, 23 Minn. 295.

Miss. Code, 1871, § 1186, dispenses with a separate suit against the administrator to fix his personal liability, and permits the *devastavit* to be primarily litigated on the bond. If the *devastavit* is established in that suit, judgment may be rendered against the obligors. But this provision does not authorize a distributee to bring suit on the bond until the amount due him has been determined by a decree. *Dobbins v. Halfacre*, 52 Miss. 561.

1. *Probate Court v. Kent*, 49 Vt. 380; *Probate Court v. Sawyer* (Vt.), 7 Atl. Rep. 281; N. J. Rev. p. 788, § 164; *Mighton v. Dawson*, 38 Ohio St. 650; Mass. Gen. Sts. c. 101, §§ 19-28. In Massachusetts the cases named in §§ 19, 20, and 21 are the only cases in which the probate bond may be sued by a person for his own benefit, without leave of probate court. *Newcomb v. Williams*, 9 Met. (Mass.) 525, 537; *Fay v. Taylor*, 2 Gray (Mass.), 154, 158; *Robbins v. Hayward*, 16 Mass. 524; *Loring v. Kendall*, 1 Gray (Mass.), 305, 316.

The bond is filed in the probate office, for the benefit of all persons interested. "Suits may be brought upon it by certain creditors and distributees, whose claims have been liquidated by judicial decision, without application to the judge of probate. In all other cases application is to be made by a party interested, to the judge of probate, for leave to sue the bond; if granted, such applicant indorses the writ, and becomes personally liable for costs if he fail in the suit. The suit must be brought originally in the Supreme Judicial Court, and in the same county in the probate court of which the bond is taken." *Loring v. Kendall*, 1 Gray (Mass.), 305, 316. See also *Newcomb v. Williams*, 9 Met. (Mass.) 525; *Bennett v. Russell*, 2 Allen (Mass.), 537.

The leave of the judge of probate, under Mass. Gen. Sts. c. 101, § 22, to bring an action on the bond, can be granted only by decree in writing. *Fay v. Rogers*, 2 Gray (Mass.), 175; See *Richardson v. Hazelton*, 101 Mass. 108; *Newcomb v. Goss*, 1 Met. (Mass.) 335; *Bennett v. Russell*, 2 Allen (Mass.), 537, 539; *Munroe v. Holmes*, 13 Allen (Mass.), 109; *Richardson v. Oakman*, 15 Gray (Mass.), 57, 58; *Chapin v. Waters*, 110 Mass. 195, 197; *Jones, Appellant*, 8 Pick. (Mass.) 121; *Robbins v. Hayward*, 16 Mass. 524. See also *Bradley, J.*, in *Beall v. New Mexico*, 16 Wall. (U. S.) 535, 543.

Leave may be granted by the probate

court to bring an action upon a probate bond in favor of legatees without notice to the obligors of the application for such leave, or previously summoning the principal obligor to render an account, and ordering distribution thereon. *Richardson v. Oakman*, 15 Gray (Mass.), 57; *Bennett v. Overing*, 16 Gray (Mass.), 267, 270; *Richardson v. Hazelton*, 101 Mass. 108.

A joint and several bond may be prosecuted against one only of the obligors. An order that the bond be prosecuted does not make it imperative to sue all. *O'Gorman v. Lindeke*, 26 Minn. 93.

If the bond given to the ordinary under the statute of Charles had been forfeited, the ecclesiastical court under the old English practice must have been prayed at the instance of the parties desirous of putting the bond in suit in a court of law to order the bond "to be attended with" for that purpose. *Wms. Exrs.* (7th Eng. ed.) 534-538.

Under the Vermont statute (R. L. Vt. § 2303) requiring the name of the applicant for leave to sue on an administrator's bond to be indorsed on the writ sued out on the bond, the indorsement of the name of the attorney for decedent's heirs is sufficient, and leave to sue granted to him enures to the heirs he represents. Where the prosecutors are married women, their husbands should indorse the writ with them; but if they have not done so, the defect can be reached only by a plea in abatement. Unless such leave is granted to the party or his attorney, the action cannot be maintained. *Probate Court v. Sawyer* (Vt.), 7 Atl. Rep. 281.

Where the party has neither applied for leave to sue, nor given a bond, the court may cause his name to be stricken from the record. *Probate Court v. Hull*, 58 Vt. 306.

Under the Mass. Gen. St. ch. 101, § 21, the administrator of the next of kin may bring an action on a probate bond to recover his share of the personal estate, without obtaining leave of the probate court. *White v. Weatherbee*, 126 Mass. 450.

After the death of an executor or an administrator against whom no execution has been returned unsatisfied, and who has not failed to obey some lawful order or decree of the surrogate, the prosecution of the bond of such executor or administrator is a matter with which the surrogate has no concern. *Scofield v. Adriance*, 1 Demarest (N. Y.), 196.

The objection that leave to sue on an administrator's bond has not been obtained, must be taken by special plea in abatement.

person interested in the estate.¹ In such an action several breaches may be joined, even though they relate to several persons, pro-

Johannes v. Youngs, 48 Wis. 101. See Prindle v. Holcomb, 45 Conn. 111.

Relief in Equity. — In Thomas v. Archbishop of Canterbury, 1 Cox (Eng.), 399; 2 De G. M. & G. 17; a creditor put the bond in suit assigning as breach the failure to exhibit an inventory on a bill filed by the administratrix. An injunction was granted on the terms of her giving judgment in the action, to stand as security for costs at law and in equity (but not for the debt), and amending the bill by submitting to an account.

In New Jersey, under N. J. Rev. p. 788, § 164, the prosecution of an action is left to the sound discretion of the ordinary; and he may stay the proceedings after commencement. *In re Lee* (N. J.), 1 Atl. Rep. 124; *Matter of Lee*, 2 N. J. L. 504; 9 Cent. Rep. 508.

Where the defendants in a suit on an administrator's bond had paid, in satisfaction of the judgment obtained, a larger sum than, as afterwards appeared, was equitably due, or than was needed for the settlement of the estate, equity had jurisdiction to afford them the necessary relief. *Stetson v. Moulton*, 140 Mass. 597.

1. *Dunnell v. Municipal Court*, 9 R. I. 189; *Pilcher v. Drennan*, 51 Miss. 873; *Green v. Raymond*, 58 Tex. 80; *Mighton v. Dawson*, 38 Ohio St. 650; *Beall v. Territory*, 1 New Mex. 507.

The next of kin may maintain a suit on a former administrator's bond for a failure to deliver over the assets of the estate. *Neal v. Becknell*, 85 N. C. 299.

That an executor has settled his account in the probate court is no bar to an action by a legatee, under Ohio Act, March 23, 1840, § 184, to recover assets converted to his own use, and not accounted for. *Mighton v. Dawson*, 38 Ohio St. 650.

Sureties upon an executor's bond have no such interest in the estate as entitles them to bring suit upon the failure of the administrator to perform its conditions. *Dunnell v. Municipal Court*, 9 R. I. 189.

But they may properly be made parties to a proceeding under Wag. Mo. Stat. 81, § 67, to ascertain and deliver to the administrator's successor the amount of property in his hands. *Lewis v. Gambs*, 6 Mo. App. 138.

Where, as formerly in South Carolina, parties at whose instance suit is brought on an administration bond are required to indorse the record in order to claim a right, or be liable for costs, those not so indorsing have no standing in court to move the restoration of the suit to the docket, it having been discontinued. *Bomar v. Ezell*, 22 S. C. 394.

To a suit on an administrator's bond, on the relation of a creditor, neither other unpaid creditors, nor the administrator's administrator, are necessary parties. *Embree v. State*, 85 Ind. 368.

One whose demand has been allowed and classified, cannot maintain an action on the administrator's bond to recover the amount because of the latter's failure to sell land for the payment of debts when required to do so by an order of the probate court. *State v. Smith*, 6 Mo. 641.

Only those who have been injured by the breach can maintain the suit on the bond; *prima facie* heirs cannot maintain an action on an administrator's bond. To maintain such action, they must show an injury to themselves as heirs. *Peveler v. Peveler*, 54 Tex. 53.

In California it is held that an heir cannot recover for a misappropriation until there has been an accounting in the probate court, and a refusal to pay the amount adjudged. *Weihe v. Stratham*, 67 Cal. 84.

In a suit by the heirs against an administrator and his sureties, his final report, showing plaintiffs as heirs entitled to distribution, is sufficient proof of their heirship. *Beal v. State*, 77 Ind. 231.

Where an administrator pays on general debts money arising from the sale of land on which are judgment liens, so as to render himself unable to pay such liens, the holder of the liens may sue on his bond. *tate v. Brown*, 80 Ind. 425.

Suits by Administrator de bonis non. — If the original administrator were dead, and administration *de bonis non* had been obtained, it was held, under the English practice, that such administrator might sue the executors of the deceased administrator at law on the administration bond in the name of the ordinary; and the court would order the bond "to be attended with" in the common-law court, and produced in the hearing of the cause. *Wms. Exrs.* (7th Eng. ed.) 539; *Goods of Hall*, 1 Hagg. (Eng.) 139.

If, however, the administrator *de bonis non*, with or without a will annexed, has been appointed to succeed an executor or administrator whose letters have been revoked, it is a grave question whether he has authority to require the removed executor or administrator to account fully for his administration of the estate, and maintain the necessary actions for that purpose. In many States, special statutes authorize such proceedings. *Miller v. Jasper*, 10 Tex. 513; *Boulware v. Hendricks*, 23 Tex. 667; *Foster v. Brown*, 1 Bailey (S. C.), 221; *O'Connor v. State*, 18 Ohio, 225; *Hard-*

vided they are all covered by the bond; and under the English practice, when an order to sue had once been obtained from the Prerogative Court, the court of common law, in which the action was brought, could not restrain the party from suggesting as many breaches as he chose, although the order was obtained solely on one particular ground.¹ In an action on the bond, the sureties

wick v. Thomas, 10 Ga. 266; Shackelford v. Runyan, 7 Humph. (Tenn.) 141.

As to who may sue upon the bond, see further Anthony v. Negley, 2 Carter (Ind.), 211; Stevens v. Cole, 7 Cush. (Mass.) 467; Rawson v. Piper, 34 Me. 98; Perkins v. Moore, 16 Ala. 9; Justices v. Wooton, 7 Ga. 465; Burke v. Adkins, 2 Porter (Ala.), 236; Crawford v. Commonwealth, 1 Watts (Pa.), 480; Holmes v. Cock, 2 Barb. Ch. (N. Y.) 426; Ellis v. M'Bride, 5 Cushm. (Miss.) 155; State v. Moore, 11 Ired. Law (N. C.), 160; Burch v. Clark, 10 Ired. (N. C.) 172; Judge of Probate v. Tillotson, 6 N. H. 292; State v. Porter, 9 Ind. 342; Graham v. State, 7 Ind. 470; Coleman v. M'Murdo, 5 Rand. (Va.) 51; Hagthorp v. Hook, 1 Gill & J. (Md.) 270; Marsh v. The People, 15 Ill. 284; Wickham v. Page, 49 Mo. 526; Weld v. McClure, 9 Watts (Pa.), 495; Commonwealth v. Strobocker, 9 Watts (Pa.), 479; Drenkle v. Sharman, 9 Watts (Pa.), 485; Carter v. Trueman, 7 Pa. St. 320; Parrish v. Brooks, 4 Brewst. (Pa.) 154; Stair v. York Nat. Bank, 55 Pa. St. 364; Beall v. Territory, 1 New Mex. 507; Neal v. Becknell, 85 N. C. 299; Harrison v. Clark, 87 N. Y. 572; State v. Smith, 64 Md. 101; Beach v. Hooper, 32 Minn. 158.

He may receive an ascertained balance in the hands of the former administrator. Miller v. Alexander, 1 Hill (S. C.), Ch. 25; Little v. Walton, 23 Pa. St. 164.

And may maintain an action against the sureties of the removed executor or administrator to recover such balance admitted or proved to be due, without first obtaining judgment against the principal. Badger v. Jones, 66 N. C. 305; Wickam v. Pope, 49 Mo. 526; Franklin Co. v. M'Elvain, 5 Ohio, 200.

But in the absence of legislative enactment, the better opinion would appear to be, that, for delinquencies and *devastavit*, he cannot sue his predecessor or his predecessor's representatives, either directly or on their administration bond. Beall v. New Mexico, 16 Wall. (U. S.) 540, 541; Brownlee v. Lockwood, 20 N. J. Eq. 239; Potts v. Smith, 3 Rawle (Pa.), 361; Bank of Pa. v. Haldeman, 1 P. & W. (Pa.) 161; Kendall v. Lee, 2 P. & W. 482; Small's Est. 5 Pa. St. 258; State v. Rottaken, 34 Ark. 144; Carter v. Trueman, 7 Pa. St. 315; Thomas v. Stanley, 4 Sneed (Tenn.), 411; Adams v. Johnson, 7 Blackf. (Ind.) 529; Young v. Kimball, 8 Blackf. (Ind.) 167;

Coleman v. M'Murdo, 5 Rand. (Va.) 51; Johnson v. Hogan, 37 Tex. 77; Gregory v. Harrison, 4 Fla. 56; Johnson v. Hogan, 37 Tex. 77; Stose v. People, 25 Ill. 600; Rowen v. Kirkpatrick, 14 Ill. 1; American Board of Commrs. App. 27 Conn. 344; Hardwick v. Thomas, 10 Ga. 266; Smith v. Carere, 1 Rich. (S. C.) Ch. 123; Hagthorp v. Hook, 1 Gill & J. (Md.) 270; Cheatham v. Burfoot, 9 Leigh (Va.), 580; Waddy v. Hawkins, 4 Leigh (Va.), 458; State v. Porter, 9 Ind. 342; Graham v. State, 7 Ind. 470; Searles v. Scott, 14 Sm. & M. (Miss.) 94; Reeves v. Patty, 43 Miss. 338; Demert v. Heth, 45 Miss. 388.

In Mississippi, balances found against an original administrator, upon final settlement of his account, should, if for distribution, be decreed to be paid to the distributees, and not to the administrator *de bonis non*. Gray v. Harris, 43 Miss. 421.

See, for fuller discussion, Wms. Exrs. (7th Eng. ed.) 539 n. (b), 915 n. (e); "Special and Limited Administration," Am. & Eng. Enc. of Law.

1. Hoover v. Berryhill, 84 N. C. 132; Archbishop of Canterbury v. Robertson, 1 Cr. & M. (Eng.) 181; Crowley v. Chipp, 1 Curt. (Eng.) 460; Wms. Exrs. (7th Eng. ed.) 544.

Under the English practice the defendant cannot plead payment as to some breaches, and performance as to the rest. Bishop of London v. McNeil, 9 Exch. 490.

In a suit on an administrator's bond, a complaint alleging as breach "failure to return a true inventory" and "unreasonable delay" in selling certain real estate, without alleging in what respect the inventory was untrue, or the delay unreasonable, *held*, too definite. Stratton v. McCandless, 27 Kan. 296.

The averment of a failure of an administrator who has resigned to pay to his successor the balance found due on his accounts, is sufficient assignment of breach of condition to administer according to law. Slagle v. Entrekin (Ohio), 10 N. E. Rep. 675.

In an action against the sureties on a public administrator's bond, the complaint must allege that the defendants executed the bond. Jeffree v. Walsh, 14 Nev. 143.

As to requisites of allegation, proof, and practice in a proceeding under the Ill. Administration Act, § 114, to recover under an administrator's bond as for a *devastavit*,

are estopped from denying the legality of the administrator's appointment,¹ but may show that the judgment upon which the action was brought is for a debt which the administrator was not bound to pay.² No action can be maintained on the bond of a deceased administrator for assets of his intestate on hand and capable of identification at his death, or for waste and mismanagement after his death.³ That a succeeding administrator is negligent in first seeking to recover assets wrongfully transferred to third parties, is no defence to an action on the bond of the first administrator for wasting the assets.⁴ Judgment will not be rendered on the bond for a failure to apply for a license to sell land to pay the plaintiff's debt;⁵ and if the liability which the bond was meant to secure is barred by the statute of limitations, action on the bond to enforce that liability is barred also.⁶ In most States

on his failure to pay over moneys, see *Tucker v. People*, 87 Ill. 76.

As to requisites of an action against administrators on their bond for failure to account by persons aggrieved under Wisconsin statutes, see *Johannes v. Youngs*, 45 Wis. 445.

1. *Johnson v. Smith*, 25 Hun (N. Y.), 171.

Sureties on an administrator's bond cannot protect themselves by showing that the bond was not approved by the surrogate, as required by statute. They cannot rest upon what is in the nature of an objection to their own acts. *Mundorff v. Wangler*, 44 N. Y. Super. Ct. 495.

2. *Bennett v. Graham*, 71 Ga. 211.

In an action on an administrator's bond, after judgment for the penalty has been rendered at one term, defendant may demur at a second term on the trial of the alleged breaches. *Rutland Probate Court v. Hull*, 58 Vt. 306.

Sureties on an administration bond may question the decree of the surrogate on the ground of an excess of jurisdiction. *Browning v. Vanderhoven*, 4 Abb. (N. Y.) N. Cas. 166.

Irregularities in the form of the surrogate's decree, against an absconding administrator, not personally served, — considered not to be available as a defence to the sureties. *Harrison v. Clarke*, 20 Hun (N. Y.), 404.

In an action by a creditor of an estate, brought under Minn. Gen. St. 1878, chap. 55, § 5, upon the executor's bond, it is a good defence that the estate has been fully administered, or that the creditor's claim has never been adjudged a lawful charge against such estate. *St. Paul Bank v. Howe*, 28 Minn. 150.

In a creditor's suit on an administrator's bond, where the probate court has ordered the payment of claims, the administrator

may show that his inventory was drawn under a mistake, and that there are not assets sufficient to pay the claims against the estate. *Hilton v. Briggs*, 54 Mich. 265.

In an action on an administrator's bond by the widow, who was the sole owner of her husband's estate, an answer by a surety that the administrator was insolvent at the time of his appointment, and had ever since remained so, that decedent's estate consisted solely of a note due from the administrator, that there were no debts due from the estate, and that he was induced to become surety by the fraud of the widow and the administrator in order to make him liable for the latter's worthless debt, — held, to constitute a good defence. *Campbell v. Johnson*, 41 Ohio St. 588.

3. *State v. Rottaken*, 34 Ark. 144.

4. *Re Connolly* (Cal.), 15 Pac. Rep. 56.

An administrator in a suit against him as surety on the bond of his deceased predecessor, is not liable for moneys that came into his hands as such successor. *People v. Allen*, 86 Ill. 166.

After the executor's sale duly ratified and a conveyance to the purchasers, the executrix failed to produce the proceeds on the ground that her co-executor, who managed the business, was dead, and she could not respond, and an administrator *de bonis non* was appointed, who brought suit on the executor's bond, — held, that defendant could not show by the purchase that no money was paid for the property. *Campbell v. State*, 62 Md. 1.

5. *Hawkins v. Carpenter*, 88 N. C. 403.

6. *Biddle v. Wendell*, 37 Mich. 452.

Va. Code, 1873, ch. 146, § 9, declares that the action upon the bond of an executor or administrator may be brought within ten years after the right of action accrues; and there is no other limitation applicable to the sureties. *Leake v. Leake*, 75 Va. 792.

suit must be brought in the name of the Commonwealth, judge of probate or ordinary, and one judgment rendered for the entire penalty, and execution averred according to circumstances and upon particular breaches averred and proved. In case the awards of execution do not exhaust the whole penalty, the judgment for the residue stands as security for any other breach which may at any time afterwards occur, to be sued for by a *scire facias* for the benefit of the party entitled.¹

XII. Of the Estate of an Executor or Administrator. — I. *Of the Time when the Estate vests.* — The title of an executor to the estate of the decedent is derived solely from the will, and vests in him from the moment of the testator's death;² that of an adminis-

1. *Loring v. Kendall*, 1 Gray (Mass.), 305, 312. See *Newcomb v. Williams*, 9 Met. (Mass.) 525; *Bennett v. Russell*, 2 Allen (Mass.), 537, 538-540; *People v. Stacey*, 6 Ill. App. 521; *State v. Ruggles*, 20 Mo. 99; *Judge of Probate v. Lane*, 51 N. H. 342; *Conant v. Stratton*, 107 Mass. 474; *Commonwealth v. Bryan*, 8 S. & R. (Pa.) 126.

In a suit for breach of an executor's bond, brought in the name of "the people for the use," etc., the plaintiff may sue for the use of more than one person in the same action. *People v. Stacey*, 6 Ill. App. 521.

In Minnesota, a creditor may sue in his own name on an administrator's bond, though the bond was executed prior to Gen. St. ch. 60, § 6. *Lanier v. Irvine*, 24 Minn. 116.

On a final settlement the surrogate may, under 2 N. Y. Rev. Stat. ch. 223, § 17, issue separate certificates to each of the next of kin to whom separate payments have been decreed, and separate judgments may be entered thereon, and each may maintain a separate action on the administrator's bond. *Bramley v. Forman*, 15 Hun (N. Y.), 144.

Measure of Damages. — The measure of damages is ordinarily the injury sustained. Where waste is committed by the conversion of notes, the absence of testimony that the notes were not worth their face, the measure of damages, in an action against the sureties upon the executor's bond, is the face value of the notes, though the executor was allowed full commissions on final settlement. *State v. Berning*, 6 Mo. App. 105.

Upon an application to assess the damages on a judgment recovered against an administrator and his sureties, because of his failure to apply to the payment of the intestate's debts the proceeds of lands sold under an order of the Orphans' Court, held, that there could be no deduction in the administrator's favor because of his failure

to exhaust the personal estate of the intestate in payment of his debts before applying the proceeds of the realty thereto. *Re Givens*, 34 N. J. Eq. 191.

A recovery by distributees of an intestate in a suit against the administrator is not conclusive of the amount due in an action on an administration bond against the surety. *Kaminer v. Hope*, 9 S. Car. 253.

But a judgment in a suit against an administrator, and the sureties on his bond, for an undistributed balance, is conclusive as to such balance. *Tunnell v. Burton*, 4 Del. Ch. 382.

In Massachusetts, the failure of an administrator to account within the time required by law will not render the original sureties upon his bond, who were discharged after its breach, liable for the full value of the estate, it not having been misappropriated, but only for damages actually incurred by the failure to account; and interest on money lying idle during the delay chargeable against them. *McKim v. Bartlett*, 129 Mass. 226.

If the judge of probate, at the request of all parties in interest, allows an account subsequently rendered by the administrator, this is a waiver of the prior breach in not rendering the account within the specified time. *Loring v. Kendall*, 1 Gray, 305. See *Bennett v. Russell*, 2 Allen (Mass.), 537. Compare *Campbell v. Adcock*, cited in 8 Ser. & R. (Pa.) 132; *Commonwealth v. Bryan*, 8 Ser. & R. (Pa.) 126.

In Illinois, to entitle the plaintiff to substantial damages for a failure to file an inventory, as required by statute, he must prove that he has sustained actual and substantial injury by the failure, otherwise he can recover only nominal damages. *People v. Hunter*, 89 Ill. 392.

In Connecticut, on a mere technical breach of an administrator's bond from which no injury results, a suit on the bond is not maintainable. *State v. Smith*, 52 Conn. 557.

2. Wms. Exrs. (7th Eng. ed.) *293, *629;

trator is derived wholly from the grant of letters of administration, and becomes vested only from the time of the grant.¹

Com. Dig. Administration B. 10; Wolley v. Clark, 5 B. & Ald. 745, 746. Compare §§ I. II.—VII. 2. "It is an established rule of law that all the personal property of the testator vests in the executors, for some purposes, before probate of the will, but to all intents and purposes upon its probate. This they take not merely as donees by force of the gift, as *inter vivos*, but by operation of the rules of law, controlling, regulating, and giving effect to wills." Shaw, C. J., in Newcomb v. Williams, 9 Met. (Mass.) 525, 534. "The law knows no interval between the testator's death and the vesting of the right in his representative. As soon as he obtains probate, his right is considered as accruing from that period." Denman, C. J., in Whitehead v. Taylor, 10 Ad. & El. (Eng.) 210, 212.

As a general rule, an executor may do, before probate, all acts pertaining to his office, which do not require him to establish his title affirmatively. Whitehead v. Taylor, 10 Ad. & El. 210, 212; *ante*, § VII. 2.

Thus, where the demise by an executor, the lessor of the plaintiff in ejectment, was laid two years before he had proved the will, under which he claimed, it was held good, and cognizance by defendant as bailiff of an executor for rent due the testator is supported by proof of distress made before probate, and afterwards ratified by the executor. Roe v. Summersett, 2 W. Bl. (Eng.) 692; Whitehead v. Taylor, 10 Ad. & El. (Eng.) 210; 2 Per. & Dav. (Eng.) 367. See Hutchins v. State Bank, 12 Met. (Mass.) 425; Carlisle v. Burley, 3 Greenl. (Me.) 250; Rand v. Hubbard, 4 Met. (Mass.) 256, 257; Lane v. Thompson, 43 N. H. 320, 325; Seabrook v. Williams, 3 McCord (S. C.), 371; Johns v. Johns, 1 McCord (S. C.), 132; Shirley v. Healds, 34 N. H. 407, 411.

Distinction between Chattels Real and Personal. — The property of personal chattels draws to it the possession; and hence all movable goods, though in ever so many different and distant places from the executor, vest in him in possession presently upon the testator's death. Wms. Exrs. (7th Eng. ed.) 635; 2 Saund. (Eng.) 47 b, note (1) to Wilbraham v. Snow.

Of chattels real, the executor or administrator is not deemed to be in possession before entry. Went. Off. Ex. 228 (14th ed.); Parke, B., in Barnett v. Earl of Guildford, 11 Exch. (Eng.) 32.

But a reversion of a term which the testator granted for a part of the term, is in the executor immediately by the death of the testator. Trotter v. King, T. Jones (Eng.), 170.

As to leases for years of rectories, glebe lands, and tithes, see Went. Off. Ex. (14th ed.) 229; 11 Vin. Abr. 240.

1. Wms. Exrs. (7th Eng. ed.) 404; Wolley v. Clark, 5 B. & Ald. (Eng.) 745; Rand v. Hubbard, 4 Met. (Mass.) 256, 257; Hagthorp v. Hook, 1 Gill & J. (Md.) 276; Snodgrass v. Cabin, 15 Ala. 160.

No right of action accrues to an administrator until the grant of letters of administration and the statute of limitations begins to run against him from that date. Murray v. E. I. Company, 5 B. & Ald. (Eng.) 204; Pratt v. Swaine, 8 B. & C. 285; 1 Man. & Ryl. 451. See also Cary v. Stephenson, 2 Salk. (Eng.) 421; Perry v. Jenkins, 1 My. & Cr. (Eng.) 118; Benjamin v. Degroot, 1 Denio (N. Y.), 151; Wms. Exrs. (7th Eng. ed.) 631, 1864.

Doctrine of Relation. — What acts by rightful administrator before obtaining letters will be validated by a subsequent grant, see § VII. 2.

Necessity of Administration. — "If a testator were to appoint no executor, or direct that the estate should go immediately into the hands of legatees, or of one or more trustees, for particular purposes, such direction would be nugatory and void." Shaw, C. J., in Newcomb v. Williams, 9 Met. (Mass.) 525, 534.

As to necessity of a regular grant of administration, see remarks of Bland, Ch., in Hagthorp v. Hook, 1 Gill & J. (Md.) 277. See Clarke v. Clay, 31 N. H. 393.

Under what circumstances private arrangements between parties in interest for the settlement of the estate without the intervention of an administrator will be sustained, after they have been acted upon, see Hibbard v. Kent, 15 N. H. 516, 519; Clarke v. Clay, 31 N. H. 393; Giles v. Churchill, 5 N. H. 337; Harris v. Seals, 29 Ga. 585. But see Echols v. Barrett, 6 Ga. 443.

In Vermont and Mississippi it has been held competent for the heirs, if of full age, to settle and pay the debts of the estate, and divide the property among themselves without the intervention of an administrator, and neither creditors nor debtors of the estate have any right to complain. Taylor v. Phillips, 30 Vt. 238; Babbitt v. Bowen, 32 Vt. 437; Henderson v. Clarke, 27 Miss. 436; Hargroves v. Thompson, 31 Miss. 211.

In Pennsylvania it has been held that a sale of personal property of the deceased by the widow and heirs before administration was taken out, cannot be disturbed by the administrator unless debts are shown. Walworth v. Abel, 52 Pa. St. 370.

Under what circumstances letters may be

2. *Of the Quality of the Estate, or Nature of the Title.* — a. *Representative's Title excludes that of all Others.* — Title to all the personal property of the deceased, including choses in action, and incorporeal rights, vests in the executor or administrator as against all others; and until he has made a transfer of title to a legatee, or other party in interest, such interest cannot be set up against him.¹ Not even a creditor can take possession of assets for the purpose of securing or paying himself the debt; nor can he withhold possession from the representative, unless obtained for that purpose by express agreement with the decedent in his lifetime. Payment by a debtor to any one than the executor or administrator is a mispayment, and the representative may recover money so paid from a residuary legatee, or next of kin.² Assets in the hands of the rightful representative cannot be seized and sold under an execution on a judgment rendered against the decedent after his death.³

dispensed with, see "Probate and Letters of Administration," Am. & Eng. Ency. of Law.

1. Schoul. Exrs. & Adms. §§ 239, 276; Highnote v. White, 67 Ind. 596; Male v. Hagthorp, 3 Bland (Md.), 551; Beecher v. Buckingham, 18 Conn. 110. See Bearss v. Montgomery, 46 Ind. 544; Alston v. Cohen, 1 Woods (U. S. C. C.), 487.

Neither creditors nor legatees can dispose of property of the estate, or follow it into the hands of the vendees when sold by the executor. Wms. Exrs. (7th Eng. ed.) 932; Haynes v. Forshaw, 11 Hare (Eng.), 93; Nugent v. Gifford, 1 Atk. (Eng.) 463; Beattie v. Abercrombie, 18 Ala. 9; Goodwin v. Jones, 3 Mass. 514.

Only through administration can the title to the personal estate of one deceased pass to those entitled to it. State v. Moore, 18 Mo. App. 406.

Where two sons are named in their father's will as executors, and one of them dies before administration, there must be an administration by the surviving executor before the representatives of the deceased executor can claim any specific property from the father's estate. Burke v. Beall (Ga.), 3 S. E. Rep. 155.

Where the residuary legatee or next of kin is suffered to remain in possession of the personal property of the deceased pending a final settlement of the estate, he is presumed to be a mere bailee of the property for the personal representative, and may be held in trover for the goods if necessary to pay legacies. Carlisle v. Burley, 3 Greenl. (Me.) 250.

Under the peculiar systems of California and Texas, both real and personal estate vest in the heir subject to the representative's heir derived from the deceased for the payment of debts, etc., and to his right

of present possession. Beckett v. Selover, 7 Cal. 215. But see Page v. Tucker, 54 Cal. 121.

The object of § 2606 is to enable any one interested to compel the placing of the funds in official custody: the legatee himself is not a "person authorized by law" (§ 2603) to receive them. Spencer v. Popham, 5 Redf. (N. Y.) 425.

An administrator cannot be required to turn over the personal estate to a receiver appointed in a proceeding to have decreed the escheat of the estate. Such receiver is entitled only to the custody of the realty and of the rents and profits thereof. Territory v. Forrest, 1 Ariz. 49.

Upon removal by the Orphans' Court of an executor or administrator who has wasted the estate, the right of redress for such *devastavit* passes to his successor in office, and cannot be exercised by creditors. McDonald v. O'Connell, 39 N. J. L. 317. Compare § XI. 8, n.

2. Eisenbise v. Eisenbise, 4 Watts (Pa.), 134.

The creditor of a succession cannot demand that the auctioneer, who has sold property of the succession, shall pay over the proceeds of the property. Only the one charged with the administration of the succession is empowered to make such demand. Succession of Dowler, 29 La. Ann. 437.

3. Snodgrass v. Cabiness, 15 Ala. 160.

The levy of a writ of attachment upon the undivided interest of an heir in land, pending the administration of an estate of which the land is part, does not dispossess the administrator, nor interfere with the administration. McClellan v. Solomon, 2 So. Rep. (Fla.) 825. As to representative's title to real estate in Florida, see 3, c, n.

If a principal die in the possession of

b. Title by Way of Trust. — The executor or administrator holds the property in *autre droit*, as trustee for the purposes of administration,¹ and, like other trustees, his estate is such only as may be necessary to enable him to perform the objects of the trust.² So long as the identity of the trust property is preserved and distinguished from the representative's individual property, it is not subject to levy and execution for his individual debts,³ nor upon his bankruptcy or insolvency will it pass to his assignees,⁴ nor

goods, and they come afterwards to the possession of his administrator, the title is changed, and a factor who has received them from the administrator cannot retain them for advances made the decedent in his lifetime without the administrator's assent. *Swilley v. Lyon*, 18 Ala. 552.

1. Wms. Exrs. (7th Eng. ed.) 636; Schoul. Exrs. & Admsrs. § 242; Pinchon's Case, 9 Co. (Eng.) 88 b; *Re Potter*, 32 Hun (N. Y.), 599; 2 Inst. (Eng.) 236.

The title vests in the representative by way of trust to enable him to administer the property according to law, by paying the debts of the deceased, funeral expenses, and other proper charges, and making distribution on final settlement. *Lewis v. Lyons*, 13 Ill. 117; *Hall v. Hall*, 27 Miss. 458; *Farr v. Newman*, 4 T. R. (Eng.) 645.

The goods of the deceased are not forfeited by attainer of the executor or administrator; and, though disabled by such attaint from suing *proprio jure*, he may still maintain an action in *autre droit* as executor or administrator. Wms. Exrs. (7th Eng. ed.) 636.

Where one receives money in his capacity as administrator, he cannot withhold it from the next of kin of his intestate on the ground that it is not a part of the estate. *Sain v. Bailey*, 90 N. C. 566.

Where executor holds notes as trust fund to pay income to widow, and at her death fund to go to son, the notes cannot be surrendered up to pay executor's individual debt to her. *Woodburn v. Woodburn*, 11 West. Rep. (Ill.) 789.

Where executors managed a farm under an arrangement that they should take the products and account for them as assets, held that the fact that such sole devisee was also an executor, would not prevent the executors from occupying the farm for the benefit of the estate, so as to be chargeable with the income, and that the products belonged to them in their representative capacity. *Brigham v. Elwell*, 145 Mass. 520.

2. *Smith v. Dunwoody*, 19 Ga. 238.

Thus, a trust term devised to executors cannot continue so as to retain the legal estate in them a moment longer than is necessary to enable them to perform the objects of the trust. *Smith v. Dunwoody*, 19 Ga. 238.

3. Wms. Exrs. (7th Eng. ed.) 639, 640; *Ludlow v. Browning*, 11 Mod. (Eng.) 138; *Farr v. Newman*, 4 T. R. (Eng.) 621; *McLeod v. Drummond*, 17 Ves. (Eng.) 168; *Kinderley v. Jervis*, 22 Beav. (Eng.) 23; *Branch Bank v. Wade*, 13 Ala. 427.

Such property is not applicable to debts which the executor owes the crown. *Went. Off. Ex.* (14th ed.) 194.

In *White v. Booth*, 4 T. R. (Eng.) 625, n (a), it was held that where the goods of the testator had actually been sold under a *feri facias* against the executor for his own debt, and the executor had joined in a bill of sale, the property passed and the goods could not afterwards be seized under a writ sued out by a creditor of the testator, upon the ground that the execution sale, taken in connection with the joinder of executor in bill of sale, could not be distinguished from an alienation by the executor. See also *Quick v. Staines*, 1 Bos. & Pul. (Eng.) 295; *Ray v. Ray*, Coop. (Eng.) 267; *Gaskell v. Marshall*, 1 Mood. & Rob. (Eng.) 132; 5 C. & P. 31.

4. Wms. Exrs. (7th Eng. ed.) 637, 638; *Farr v. Newman*, 4 Tr. (Eng.) 648; *Serle v. Bradshaw*, 2 Cr. & M. (Eng.) 148; 4 Tyrwh. (Eng.) 69; *Viner v. Caddell*, 3 Esp. (Eng.) 88; *Ex parte Ellis*, 1 Atk. (Eng.) 101; *Ex parte Marsh*, 1 Atk. (Eng.) 159; *Ludlow v. Browning*, 11 Mod. (Eng.) 138.

The assignees cannot seize even money which can be specifically distinguished as the property of the deceased. Lord Mansfield in *Howard v. Jemmett*, 3 Burr. (Eng.) 1369; cited by Lord Kenyon in *Farr v. Newman*, 4 T. R. (Eng.) 648.

Under the bankruptcy of an executor and trustee, directed by the will to carry on a trade, and a limited sum to be paid to him for that purpose, the general assets beyond that fund are not liable. *Ex parte Garland*, 10 Ves. (Eng.) 110. See § XV.

Under what circumstances the funds of the estate will be deemed to be so mingled with the representative's private property as to be subject to the claim of the assignees, see *Fox v. Fisher*, 3 B. & Ald. (Eng.) 135; *In re Thomas*, 1 Phill. C. C. (Eng.) 159; s. c., 2 Mont. D. & D. (Eng.) 294.

If the assignees of the executor or

upon his death to his own representatives, or under the provisions of his will.¹ A transfer by the executor or administrator of all his goods, or a release of all his rights of action, will not operate upon the property of the decedent, unless the grantor have no goods but as executor or administrator.² Title to property held in *autre droit* does not pass to the husband in his own right on his marriage with the executrix, although by the marriage he becomes entitled to administer in his wife's right for his own protection.³ There can be no merger of the estate held by a man as executor in that which he holds in his own right.⁴ If the executor mingles

administrator have improperly possessed themselves of the property of the estate, on bill filed the court will appoint a receiver to whom the assignees shall account for the property so seized. *Ex parte Tupper*, 1 Rose (Eng.), 179; 2 Madd. Ch. (Eng.) (2d ed.) 641.

If an executor who is also a residuary legatee, and has paid the debts and particular legacies out of the assets, refuses to collect the rest, his assignees in bankruptcy may obtain the assistance of the court to get in the remainder in the name of the executor. *Ex parte Butler*, 1 Atk. (Eng.) 213.

A bankrupt executor may have a *scire facias*, as the bankruptcy does not affect his representative character. 2 Saund. (Eng.) 728, note to *Underhill v. Devereux*.

Where a lease is made with provision for forfeiture and re-entry, if the lessee "or his executors, administrators, or assignees" shall become bankrupt, the bankruptcy of the executor or administrator gives a right of re-entry accordingly. *Doe v. David*, 1 Cr. M. & R. (Eng.) 405; 5 Tyrwh. (Eng.) 125.

1. Wms. Exrs. (7th Eng. ed.) 644, citing *Bransby v. Grantham*, 2 Phrod. (Eng.) 525.

As to power of alienation *inter vivos*, see § XIII. 7, as to when executor of executor represents deceased executor. See § X.

2. *Knight v. Cole*, 1 Show. (Eng.) 153; *Went. Off. Ex.* (14th ed.) 193; Wms. Exrs. (7th Eng. ed.) 645; *Hutchinson v. Savage*, 2 Ld. Raym. (Eng.) 1307.

3. Co. Litt. 351 a; *Thompson v. Pinchell*, 11 Mod. (Eng.) 178; Wms. Exrs. (7th Eng. ed.) 645. If the husband and wife recover judgment for a debt due to the wife as executrix, and the wife dies, the husband shall not have a *scire facias* upon the judgment, but the succeeding executor or administrator. *Beaumont v. Long*, Cro. Car. 208, 227; s. c., W. Jones (Eng.) 248; 2 Saund. 72 m, note to *Underhill v. Devereux*.

Incident to the husband's right to administrator is his power of disposition over the personal estate vested in his wife as executrix or administratrix. Wms. Exrs. (7th Eng. ed.) 646.

4. 2 Bl. Com. 177; *Jones v. Davies*, 5 H. & N. 767.

Such at least is the general principle; but a distinction has been suggested by *Preston on Conveyancing*, vol. iii. p. 273, 309, and approved by *Williams' Exrs.* 641, viz., that where either of the two estates is an accession to the other by *act of law*, there will not be any merger; but where the accession is by the *act of the party*, the less estate will merge. Thus, if the tenant for years dies, and makes him that has the reversion in fee his executor, whereby the term for years vests in him, or if the lessee shall make the lessor his executor, the term shall not merge, for here the accession of the estate for years is by act of law. But if an executor or administrator has a term for years in right of the deceased, and purchases reversion, the exemption shall not prevail, but the term will merge; for here the reversion is acquired by the party by his own act. Wms. Exrs. (7th Eng. ed.) 641. See 2 Bl. Com. 177; 4 Leon. (Eng.) 58; *Brooke*, "Surrender," pl. 52, "Extinguishment," pl. 54; *Smith v. Tracy*, 1 Freem. (Eng.) 289; *Stephens v. Bridges*, Madd. & Geld. (Eng.) 66; *Jones v. Davies*, 5 H. & N. (Eng.) 767; *Sugden*, V. & P. 395, 396 (7th ed.).

But the distinction is by no means universally admitted. In *Gage v. Acton*, 1 Salk. (Eng.) 326; s. c., 1 Ld. Raym. 520, Lord Holt says, "If a man hath a term in right of his wife or as executor, and purchases the reversion, there is no extinguishment, because he hath the term in one right, and the executorship in another. In that case the difference of the rights hinders an extinguishment, because a third person is concerned, and may be prejudiced, which cannot be by act of law." "Nothing is clearer," says Lord Kenyon in *Webb v. Russell*, 3 T. R. (Eng.) 401, "than that a term which is taken *alieno jure* is not merged in a reversion acquired *suo jure*."

Mergers are odious in equity, and never allowed unless under special circumstances. *Philips v. Philips*, P. Wms. (Eng.) 41.

The possession of personal property,

trust and individual funds, so that they become indistinguishable, the title is changed, and the estate becomes a creditor for its just balance.¹ It is also a well-established rule, that if the executor or administrator pays out of his own moneys debts to the value of the personal assets in his possession, he may apply the assets to his own use towards satisfaction of the moneys so expended, and by such election the assets become absolutely his own property.²

which one acquires as administrator, cannot be united to and perfect an equitable title which he holds in his private capacity so as to defeat an action by the party having the legal estate. *Gamble v. Gamble*, 11 Ala. 966.

When an estate held by an executor or administrator in *autre droit* devolves upon him in his own right, it becomes subject to merger. 3 Preston, Convey. 310, 311; *Weeks v. Gibbs*, 9 Mass. 74, 75.

1. Went. Off. Ex. c. 7, p. 196 (14th ed.); Wms. Exrs. (7th Eng. ed.) 646; Schoul. Exrs. & Admrs. § 243.

2. *Livingston v. Newkirk*, 3 John. Ch. (N. Y.) 312, 318.

In such case he may dispose of the assets as he pleases without being guilty of a *devastavit*. *Merchant v. Driver*, 1 Saund. (Eng.) 307; *Chalmer v. Bradley*, 1 Jac. & W. (Eng.) 64; *Vanquelin v. Boward*, 15 C. B. N. S. (Eng.) 341.

If an executor pays a debt of the testator's with his own money, he may elect to take any specific chattel as compensation; and if it be not more than adequate, the chattel by such election shall become his own. Wms. Exrs. (7th Eng. ed.) 647; *Elliott v. Kemp*, 7 M. & W. (Eng.) 313.

Such election is a good defence to an action of *detinue* brought for the chattel by the surviving executor of the first testator against a deceased executor's personal representative. Toller, 239.

In equity the position that an executor can acquire an absolute title to chattels of the estate by paying debts of the testator to an amount exceeding the value of the chattels has been gravely doubted. *Knight Bruce, V. C.*, in *Hearn v. Wells*, 1 Coll. (Eng.) 333.

But in *Livingston v. Newkirk*, 3 John. Ch. (N. Y.) 312, 318, *Chancellor Kent* says, that if the personal assets prove deficient, and the executor pays out of his own moneys, to the value of the land, and the court of chancery were to direct the land to be sold in such case, it would certainly allow the executor to retain for his indemnity. See also *McClure v. McClure*, 19 Ind. 185; *Haslett v. Glenn*, 7 Harr. & J. (Md.) 17; *Hill v. Buford*, 9 Mo. 869.

An agreement of compromise entered into between an administratrix on the one hand and the heirs of the intestate on the

other, by which the former surrendered her dower interest, in consideration of which the heirs gave a receipt "in full satisfaction of all liabilities" incurred by the administratrix on account of all matters connected with the estate, whether in her representative or personal capacity, and discharging and releasing her from her trust as administratrix of said estate," held, to change her bare legal title as trustee of certain lands purchased by her as administratrix into a fee-simple, so that a purchaser of such lands from her would get a good title as against the heirs. *Jones v. Slaughter* (N. C.), 2 S. E. Rep. 681.

Where an administrator pays debts of the intestate out of his own funds, and is removed before he has received assets sufficient to repay him, he should be allowed to stand in the place of the creditor whose demand he has extinguished, and assert the demand against the subsequent administrator. *Smith v. Hopkins*, 7 J. J. Marsh. (Ky.) 502. See *Munroe v. Holmes*, 9 Allen (Mass.), 244; s. c., 13 Allen, 109.

See as to the executor's right to retain for a debt due himself from the testator, and his right to stand in the place of a creditor whose demand he has extinguished, "Debts of Decedents" and "Retainer," Am. & Eng. Ency. of Law.

Election and Appropriation.—If an executor or administrator makes an under lease of a term of years of the deceased, by making a lease of a part of the term, he thereby appropriates that part to himself, and divides it from the rest, and has the rent in his own right. If he brings an action for it, he must bring it in the *debet*, and not in the *detinet*, and on his death, the rent will be payable to his personal representative, and not to the administrator *de bonis non*. Wms. Exrs. (7th Eng. ed.) 649. See also *Skeffington v. Whitehurst*, 3 Y. & Coll. (Eng.) Exch. 1; *Sury v. Cole*, Latch (Eng.), 266, 267; *Drue v. Baylie*, 1 Freem. (Eng.) 403. See also *Boyd v. Sloan*, 2 Bailey (S. C.), 311; *Logan v. Caldwell*, 23 Mo. 373; *Foltz v. Pronse*, 17 Ill. 487; *Stinson v. Stinson*, 38 Me. 593. But see *Cowell v. Watts*, 6 East (Eng.), 405; *Catherwood v. Chaband*, 1 B. & C. (Eng.) 150; *Bank of Hamilton v. Dudley*, 2 Pet. (U. S. C. C.) 492; *Taylor, Land & Ten.* § 133; *Margrave v. Archbold*, 1 Daw (Eng.) 107.

Property of the estate may also vest in the executor in his own right by purchase at a sheriff's sale, under a *fiery facias*.¹ An executor's assent to his own legacy vests the thing bequeathed in himself as legatee; and an administrator who is also a distributee may appropriate his own share, either with or without an agreement with the other distributees.²

c. Devolution of Title when Representative is also Guardian or Testamentary Trustee.—Where the same person is both executor or administrator, and also testamentary trustee or guardian of the decedent's children, the question arises whether he holds a fund in one or the other capacity.³ One ought not to be held liable,

If one of several executors or administrators alone sell any of the goods of the testator, he alone may maintain an action for the price, not naming himself executor. *Wms. Exrs.* (7th Eng. ed.) 649; *Brassington v. Ault*, 2 Bing. (Eng.) 177; s. c., 9 Moore (Eng.), 340.

In a case where bills of exchange had been accepted by A. for the accommodation of B., one of the executors of C., it appeared that B. having considerable sums of money in his hands belonging to C.'s estate, which were deposited in a box in his possession, discounted the bills with such money by taking out of the box the requisite amount, deducting the discount, and at the same time placing the bills in the box. *Held*, that B. could not sever his character of accommodation holder of these bills from his character of executor so as to enable him and his co-executor to sue as indorsees of the bills for valuable consideration. *Edwards v. Adams*, 1 Younge (Eng.), 117. As to right to elect to which of two estates certain property belongs, see § XIII. 7, n.

1. *Went. Off. Ex. c. 7*, p. 200 (14th ed.); *Toller*, 239; *Wms. Exrs.* (7 Eng. ed.) 649.

2. *Wms. Exrs.* (7th Eng. ed.) 649; *Elliot v. Kemp*, 7 M. & W. (Eng.) 313.

Devolution of Title where Executor is also Residuary Legatee, and has given the Requisite Bond.—See § XI. 2.

Executor's Right to Undisposed Residue.—Formerly it was *held* that the executor took the residue of the estate undisposed of by the will beneficially. *Wilson v. Wilson*, 3 Bin. (Pa.) 557, 559; *Wms. Exrs.* (7th Eng. ed.) 1474. But at the present time he is considered, in case of such partial intestacy, a trustee for the next of kin, and may administer the estate undisposed of *ex officio* without procuring letters of administration for that purpose. *Dean v. Biggers*, 27 Ga. 73; *Venables v. Mitchell*, 29 Ga. 566; *Paris v. Cobb*, 5 Rich. Eq. (S. C.) 450; *Landers v. Stone*, 45 Ind. 404; *Wilson v. Wilson*, 3 Bin. (Pa.) 557; *Hays v. Jackson*, 6 Mass. 149.

As to the effect of appointing an ad-

ministrator in such cases. *Patten's App.* 31 Pa. St. 465.

3. *Wren v. Gayden*, 1 How. (Miss.) 365; *Johnson v. Fuquay*, 1 Dana (Ky.), 514; *Schoul. Dom. Rel.* § 324.

Executors and administrators are not *virtute officii* guardians of the decedent's minor children, and cannot incur fiduciary liability on their account. *Menippe v. Ball*, 7 Ark. 520; *Stallsworth et al. v. Stallsworth*, 5 Ala. 143; *Schoul. Dom. Rel.* § 324.

They cannot be sued as such for the maintenance of the minor children of the deceased, nor can they control property exempt from administration for the special benefit of widow and children. *Stiles v. Stiles*, 2 N. J. L. 368; *Davis v. Davis*, 63 Ala. 293; *Wright v. Wright*, 64 Ala. 88. See *Sieckman v. Allen*, 3 E. D. Smith (N. Y.), 561.

The offices of executor and testamentary trustee are distinct. *Warfield v. Brand*, 13 Bush (Ky.), 77; *Gulick's Admrs. v. Bruere*, (N. J.) 9 Atl. Rep. 719. Where the same persons are appointed to both, a revocation of their appointment as executors is not necessarily a revocation of their appointment as trustees. *Graham v. Graham*, 16 Beav. (Eng.) 550; *Cartwright v. Shepherd*, 17 Beav. (Eng.) 301; *Worley v. Worley*, 18 Beav. (Eng.) 58.

So the appointee may accept the office of executor, and decline that of trustee, in which case the probate court may appoint another to the residuary trust. In some States separate bonds are required for the respective offices; and if the person appointed gives bonds as executor, but not as trustee, he will be deemed to have declined the latter office. *Williams v. Cushing*, 34 Me. 370.

In Pennsylvania, where executors are declared trustees by will, security can only be demanded as executors, the offices being inseparable. *Re Wilson v. Est.*, 2 Pa. St. 325.

In Massachusetts trustees must give bonds, except in special cases as trustees for charities. *Gen. Sts. c. 100, § 1*; *Shaw*

both as executor or administrator and as guardian; nor should both sets of sureties be held responsible for the fund, nor should one be made liable as trustee for funds which came to his hands as executor.¹ Passing the final accounts of administration is a sufficient transfer of responsibility, and fixes his liability as that of guardian or trustee.² Where a sole representative is at the same time guardian, the law will adjudge his ward's property to be in his hands as guardian after the full expiration of the time fixed for the settlement of the estate.³ And, after a lapse of a consid-

v. Paine, 12 Allen (Mass.), 297; *Drury v. Natick*, 10 Allen (Mass.), 169; *Tainter v. Clark*, 13 Met. (Mass.) 220, 226; *Clark v. Tainter*, 7 Cush. (Mass.) 567.

Persons who are both executors and trustees cannot continue the office of executor after their duties as such have ceased, and they should have acted as trustees; but if executors authorized to purchase and sell as trustees take and execute conveyances as executors, the title to the real estate will not be affected, as the law will attribute the act to the proper authority. *State v. Cheston*, 51 Mo. 352.

1. *Schoul. Exrs. & Admsrs.* § 247.

Where the person is appointed executor and trustee, and he fulfils the duties of executor, and files a sworn account, which is allowed by the probate court, in which he, as trustee, credits himself with the amount of the trust fund, and he is appointed trustee, and gives bond as such, and at the time has in his hand the amount of the trust fund, and he afterwards misappropriates and wastes the fund, his default is as trustee, and not as executor, and the loss must fall on the trust estate, and not on the general estate. *Crocker v. Dillon*, 133 Mass. 91.

But in doubtful cases, where the delinquency of the executor or administrator, who is also guardian, has occasioned the doubt, the tendency of the more recent decisions is to let the ward sue both sets of sureties, leaving them to adjust their equities among themselves. *Perry v. Carmichael*, 95 Ill. 519; *Harris v. Harrison*, 78 N. C. 202. But see *Bell v. People*, 94 Ill. 230.

2. *Scott's Case*, 36 Vt. 297; *Stillman v. Young*, 16 Ill. 318; *Burton v. Temnell*, 4 Harring. (Del.) 424; *Alston v. Memford*, 1 Brock. Marsh. (C. C.) 266; *Schoul. Dom. Rel.* § 324.

Where the same person is appointed by the will executor and trustee, "if for greater convenience he wishes to close his account as executor, and open a new account as trustee, he must give bond in the capacity of trustee, and charge himself in one capacity *eo instanto* and by the same act by which he claims his discharge in the other. *Shaw, C. J.*, in *Prior v. Talbot*, 10 Cush.

(Mass.) 1, 3; *Dorr v. Wainwright*, 13 Pick. (Mass.) 328.

He is chargeable as executor for property in his hands until he has given bond as trustee, and charged himself with the property as trustee. *Prior v. Talbot*, 10 Cush. (Mass.) 1; *Deering v. Adams*, 37 Me. 264; *Treadwell v. Cordis*, 5 Gray (Mass.), 341. See *Conkey v. Dickinson*, 13 Met. (Mass.) 53; *Johnson v. Fuquay*, 1 Dana (Ky.), 514; *Swope v. Chambers*, 2 Gratt. (Va.) 319.

Where, by the constitution of the trust, the trustees are exempted from giving bonds, it would probably be held sufficient to show by any authoritative and notorious act that they had elected to hold as trustees: as, for instance, if they claim a credit in their executorship account, filed in the probate office, for a sum held by themselves as trustees, and also file an inventory or account, charging themselves with a like sum as trustees. *Newcomb v. Williams*, 9 Met. (Mass.) 525; *Hall v. Cushing*, 9 Pick. (Mass.) 395; *Elliott v. Sparrell*, 114 Mass. 404, 406. See *Miller v. Congdon*, 14 Gray (Mass.), 114.

One who is appointed commissioner to sell a decedent's land, and also administrator *de bonis non*, may fix the liability of himself and sureties as administrator, simply by electing to hold the funds in that capacity, and manifesting the election by some act, declaration, or admission. *Gilmer v. Baker*, 24 W. Va. 72.

3. *Carroll v. Bosley*, 6 Yerg. (Tenn.) 220; *Weaver v. Thornton*, 63 Ga. 655; *Re Wood*, 71 Mo. 623; *Townsend v. Tallant*, 33 Cal. 45; *Wilson v. Wilson*, 17 Ohio St. 150; *Crosby v. Crosby*, 1 S. C. (N. S.) 337; *Karr v. Karr*, 6 Dana (Ky.), 3; *Watkins v. State*, 2 Gill & J. (Md.) 220.

But the rule may be otherwise with respect to co-executors or co-administrators. *Coleman v. Smith*, 14 S. C. 511; *Watkins v. State*, 2 Gill & J. (Md.) 220.

The law effects the necessary transfer of a fund from one holding it as executor to himself as guardian. No formal transfer is necessary. *United States v. May*, 4 Mackey (D. C.), 4.

But an administrator cannot defeat his liability to account for real estate purchased

erable period, a presumption arises that one who is both executor and testamentary trustee has fully administered the estate, and holds the funds in his hands in the latter capacity.¹

Where trusts are raised by the will, and no trustee is appointed by the testator, the executor becomes trustee *ex officio* for many purposes, and may consequently retain funds in his hands for the objects of such trust until the probate court expressly appoints a trustee.²

3. *Quantity of the Estate. — What are Assets? — a. Personal Property in Possession — Animals, Live-Stock, Growing Trees and Plants — Emblements — Property pledged or mortgaged — Property fraudulently conveyed — Partnership Property — Property held as Bailee or Trustee — Property held under a Power of Appointment — Heirlooms, Fixtures — Wife's Paraphernalia, Pin-money, and Separate Estate — Gifts Mortis Causa — Foreign Assets.* — The title of the executor or administrator extends to all the personal property of the deceased.³ This includes domestic animals,

in his own name with money of the estate, by subsequently qualifying as guardian of the minor heirs of the intestate, and as guardian receipting to himself as administrator for the money so expended. *Merket v. Smith*, 33 Kan. 66.

In Louisiana, where the same person is both administrator and tutor of a part of the heirs, his possession is that of administrator. *Goux v. Moucla*, 30 La. Ann. pt. 1, 743.

1. *Jennings v. Davis*, 5 Dana (Ky.), 127. See *Lark v. Limstead*, 2 Md. Ch. 162; *Carroll v. Bosley*, 6 Verg. (Tenn.) 220; *Kirby v. Turner*, Hopkins (N. Y.), Ch. 309; *Drane v. Bayliss*, 1 Humph. (Tenn.) 174; *State v. Cheston*, 51 Md. 352; *Groton v. Ruggles*, 17 Me. 137; *Dorr v. Wainwright*, 13 Pick. (Mass.) 328; *Saunderson v. Stearns*, 6 Mass. 37; *Grareley v. Grareley*, 20 S. C. 93.

The effect of the resignation or removal of an executor may be considered in testing whether trust duties enjoined by the will are a mere enlargement of executorial functions, or involve the existence of a trustee as such. *Re Roosevelt*, 5 Redf. (N. Y.) 601.

C., who died in 1864, named D. executor, and devised to him her real estate in trust, to sell and pay half the proceeds in a certain manner, and hold the other half for the benefit of A. and B., her grandchildren, and to make advances therefrom, as expedient, for their education and maintenance. D sold the realty, paid the first half, and died intestate in 1878, without having filed any inventory, rendered any account, or paid any sum to A. or B. On A.'s application, under N. Y. Code, § 2818, for appointment of a successor to D. as testamentary trustee, *held*, that D. was not

such "trustee," within N. Y. Code, § 2514, subd. 6, the trust not being "separable from his functions as executor." The trust fund derived from the conversion of the real estate constituted legal assets, for which D. was accountable only as executor. The petition for a "trustee" must be refused; but on a proper petition, an administrator with the will annexed might be appointed. *Re Clark*, 5 Redf. (N. Y.) 466.

2. Where a will creates certain trusts, and imposes upon the executors duties which are usually performed by trustees, they will take such interest in the property as is requisite, although the will fails to name them as trustees, or bequeath the property to them in trust. *Scott v. West*, 63 Wis. 529.

Where the will contains express directions what the executors are to do, an executor who proves the will must do all which he is directed to do as executor, and he cannot say that, though executor, he is not clothed with any of those trusts. *Wms. Exrs.* (7th Eng. ed.) 1796. See also *Stiles v. Guy*, 4 G. & Coll. (Eng.) 571, 575; *Williams v. Nixon*, 2 Beav. (Eng.) 472; *Hall v. Cushing*, 9 Pick. (Mass.) 395; *Prior v. Talbot*, 10 Cush. (Mass.) 1; *Carson v. Carson*, 6 Allen (Mass.), 397; *Towne v. Ammidown*, 20 Pick. (Mass.) 535; *Holbrook v. Harrington*, 16 Gray (Mass.), 102, 105; *Chesnut v. Strong*, 1 Hill, Ch. (S. C.) 124; *Pettingill v. Pettingill*, 60 Me. 411, 423; *Knight v. Loomis*, 30 Me. 204; *Nutтер v. Vickery*, 64 Me. 490.

3. *Palmer v. Palmer*, 55 Mich. 293. This includes property covered by the intestate's bill of sale, but never delivered. *Palmer v. Palmer*, 55 Mich. 293.

The liability of the representative extends to assets of the estate received before his appointment. *Head v. Sutton*, 31 Kan. 616.

Under the Alabama Acts, 1872-73, pp. 64-69, an administrator has no title or right of possession of so much of his intestate's personal property as is exempted from administration by said acts for the benefit of the widow. *Davis v. Davis*, 63 Ala. 293.

Devises and legacies given to a widow in lieu of dower, and amounting to less than the value of the dower, are not assets liable for the testator's debts. *Smith v. Smith*, 79 N. Car. 455.

But an administrator has no interest in, or control over, the body of his intestate. *Griffith v. Charlotte, Columbia & R. R. Co.*, 23 S. C. 25; s. c., 55 Am. Rep. 1.

What are chargeable as Assets against the Executor or Administrator. — "All those goods and chattels, actions, and commodities which were of the deceased in right of action or possession as his own, and so continued till the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship or administratorship, and all such things as do come to the executor or administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee." Touchst. 496. See *Gray v. Swain*, 2 Hawks. (N. C.) 15; *Paff v. Kinney*, 1 Bradf. (N. Y.) Sur. 1; *Montgomery v. Armstrong*, 5 J. J. Marsh. (Ky.) 175; *De Valengin v. Duffy*, 10 Peters (U. S.), 280.

Money received by an executor or administrator from the Government of the United States, by means of a treaty with a foreign nation, as an indemnity for loss of property taken from the deceased by such foreign nation, is to be administered as assets of the estate of the deceased. *Thurston v. Lowder*, 40 Me. 197; *Rogers v. Hosack*, 18 Wend. (N. Y.) 319; *De Valengin v. Duffy*, 14 Peters (U. S.), 282; *Thurston v. Doane*, 47 Me. 79; *Foster v. Fifield*, 20 Pick. (Mass.) 67; *Grant v. Bodwell* (Me.), 7 Atl. Rep. 12. Interest collected on debts due the estate is assets. *Ray v. Doughty*, 4 Blackf. (Ind.) 115.

An administrator should not be charged with sums advanced by the intestate, as they form no part of the estate to be administered upon. *French v. Davis*, 38 Miss. 167; *Black v. Whittall*, 9 N. J. Eq. 572.

As to letters received by intestate, see *ib.* n.

As to title to lands, see *e.*

As to buildings erected by the intestate on the land of his wife or another person, see *Washburn v. Sproat*, 16 Mass. 449.

As to renewal of leases, see *c.*

Damages for right of way over land, see *e.*, n.

A salary voted to a person after his decease, and paid to his executor, is assets in his hands. *Loring v. Cunningham*, 9 Cush. (Mass.) 87.

Money recovered on an appeal bond, given to the obligees as executors on an appeal from a judgment obtained by them in that character, will be assets in their hands. *Sasscer v. Walker*, 5 Gill & J. (Md.) 102.

Chattels which were never vested in the testator in possession, but accrue to the executor by way of remainder, or increase since the testator's death, are assets in his hands. *Wms. Exrs.* (7th Eng. ed.) 1658; *Whitney v. Whitney*, 14 Mass. 88; *Leverett v. Armstrong*, 15 Mass. 26.

Where one dies intestate leaving sheep, the administrator is accountable for lambs born after the intestate's death, and for the wool shorn from the sheep after his death. *Re Merchant*, 39 N. J. Eq. 506.

This applies to all savings or accumulations out of the estate by an executor or administrator, and interest, revenues, and profits received by him. *Wingate v. Pool*, 25 Ill. 118; *Gen. Sts. Mass. c. 98, § 2*; *Soldini v. Hyams*, 15 La. Ann. 551; *Wms. Exrs.* (7th Eng. ed.) 1658; *Kellar v. Belor*, 5 T. B. Mon. (Ky.) 573.

If the executor of a lessee for years enter into the tenements, the profits over and above the rent shall be assets; but up to that amount they are received by the executor as terre-tenant, and appropriated to the use of the lessor. *Buckley v. Pirk*, 1 Salk. (Eng.) 79; *Went. Off. Ex.* (14th ed.) 190, 191; *Stagg v. Jackson*, 1 Comst. (N. Y.) 206; *Body v. Hargrave*, Cro. Eliz. (Eng.) 712.

A leasehold estate, though not sold, is assets *ad valorem*. *Jury v. Woodhouse*, Barnes (Eng.), 333; *Vincent v. Sharpe*, 2 Stark. (Eng.) 507.

In *Gibblett v. Read*, 9 Mod. (Eng.) 459, *Lord Hardwicke* said that there were many cases, as in the instance of physical secrets or nostrums, where every thing was carried on with materials purchased after the testator's death, in which the executor had been held accountable for the profits of the business, although no part of the testator's property except the *nostrum* had been employed in carrying it on. See also *Moseley v. Rendell*, L. R. 6 Q. B. (Eng.) 338; *Abbott v. Parfitt*, L. R. 6 Q. B. 346.

Whether the executor must account for the value of the good will of a commercial partnership, has been much questioned. *Gibblett v. Read*, 9 Mod. (Eng.) 459; *Worrall v. Hand*, Peake, N. P. C. (Eng.) 74 acc.; *Hammond v. Douglass*, 5 Ves. (Eng.) 539; *Crawshay v. Collins*, 15 Ves. (Eng.) 227; *Featherstonhaugh v. Fenwick*, 17 Ves. (Eng.) 298; *Wedderburn v. Wedderburn*, 22 Beav. (Eng.) 84, 104; *Smith v. Everett*, 27 Beav. (Eng.) 446.

such as horses, cattle, sheep, and poultry,¹ and such animals *feræ naturæ* as the deceased possessed *per industriam*, or had obtained

The good will of a trade of a personal nature, such as attorney, has been *held* not to be the subject of administration. *Spicer v. James*, Rolls M. T. 1830, cited in Collyer on Partnership, 82. *Contra*, *Small v. Graves*, 3 De G. & Sm. (Eng.) 706. See also *Farr v. Pearce*, 3 Modd. (Eng.) 78.

The legatee of a share of the mere good will of a deceased partner cannot support a bill against the surviving partner to obtain the benefit of his legacy, even after assent by the executor. But if it be ascertained that the executor has been able so to deal with the business as to make something of the good will, the legatee may have a right to be paid in respect of his interest in it. *Robertson v. Quiddington*, 28 Beav. (Eng.) 529.

What are Assets come to Hand.—The general rule has long been established that an executor or administrator shall not be charged with any other goods as assets than those which *come to his hands*. But considerable difficulty arises in determining what is to be considered coming to the hands of the executor or administrator. *Wms. Exrs.* (7th Eng. ed.) 1667; *Read's Case*, 5 Co. 33 b, 34 a.

The mere fact that the executor or administrator had such title to goods out of possession, as would enable him to maintain trespass or trover in his own name against a stranger taking them away or despoiling them, will not render him liable for more than he actually recovers in such action. *Jenkins v. Plombe*, 6 Mod. (Eng.) 181; *Tuttle v. Robinson*, 33 N. H. 104. But see *Went. Off. Ex.* (14th ed.) 227, where it is said that a title which will enable the executor or administrator to maintain trespass, is such a coming to hand of the goods as will charge him with payment of debts and legacies, and make his own goods liable instead of the goods taken.

If, however, the loss occurred through his own negligence, he may be charged with the value of the property, though it never came into his possession. *Tuttle v. Robinson*, 33 N. H. 104; *Deberry v. Ivey*, 2 Jones Eq. (N. C.) 370.

It has also been *held*, that if the executor or administrator omits to sell the goods at a good price, and afterwards they are taken from him, then the value of the goods shall be assets in his hands, and not merely what he recovers. *Jenkins v. Plombe*, 6 Mod. (Eng.) 181, 182; *Wightwick v. Lord*, 6 H. L. Cas. 234, 235, per Lord Wensleydale.

If the goods be perishable, and before any default on the part of the executor to preserve, or sell them, at due value, they are impaired, he shall not answer for the

first value, but give that matter in evidence to discharge himself. So if animals die, or ships perish by tempest. *Went. Off. Ex.* (14th ed.) 236; *Jenkins v. Plombe*, 6 Mod. (Eng.) 181. See *post*, § XV.

An executor or administrator cannot be charged with debts or *choses in action* till he has actually received the money. *Wms. Exrs.* (7th Eng. ed.) 1669; *Ruggles v. Sherman*, 14 John. (N. Y.) 446; *Smith v. Hurd*, 8 Sm. & M. (Miss.) 682. See also *Jones v. Williams*, 2 Call. 102; *Douthitt v. Douthitt*, 1 Ala. 594; *Tunstall v. Pollard*, 11 Leigh (Va.), 1; *Lowe v. Peskett*, 16 C. B. (Eng.) 500; *Williams v. Innes*, 1 Campb. (Eng.) 364.

It has been laid down, that where an executor sues for money had and received to his use as executor, the debt or damages is assets immediately; for if the money was had and received by the defendant, by the consent or appointment of the executor, it was assets in his hands forthwith; and if without his consent, yet the bringing the action is such consent, that, upon judgment obtained, it shall be assets immediately without execution. *Jenkins v. Plume*, 1 Salk. (Eng.) 207; 6 Mod. (Eng.) 181.

Debts released become assets in hand. *Wms. Exrs.* *1670. See *post*, § XIII. 3.

As to when costs will be deemed assets, see § XIV.

Equitable Assets.—Legal assets are such as are liable to debts in the temporal courts, and were formerly liable to legacies in the spiritual, by the course of law. Equitable assets are such as are liable only by the help of a court of equity.

Distinction between Legal and Equitable Assets.—See "Assets," "Debts of Decedents," *Am. & Eng. Enc. of Law*; *Wms. on Exrs.* (7th Eng. ed.) 1680, 1686; *Strong on Equity*, ch. ix. sect. 551; *Schoul. Exrs. and Admr.* § 221.

Estates pur Autre Vie.—See XII. 3, c.

1. *Wms. Exrs.* (7th Eng. ed.) 703, 704 Hounds, greyhounds, spaniels, and the like, go to the executor. *Wms. Exrs.* (7th Eng. ed.) 703, 704; *Went. Off. Ex.* (14th ed.) 143.

Animals which a man has *propter privilegii*, as deer in a park, coveys in a warren, doves in a dove-house, are considered as incident to the freehold and inheritance, and do not pass to the executor or administrator. *Went. Off. Ex.* (14th ed.) 127; *Co. Litt.* 8 a; *Liford's Case*, 11 Co. 50 b; *Wms. Exrs.* (7th Eng. ed.) 705; *Commonwealth v. Chall*, 9 Pick. (Mass.) 15.

If the deceased has only a term for years in the lands in which the park, warren, dove-house, or pond is situated, the deer,

a qualified property in *propter impotentiam*.¹ Growing trees and plants, unless severed from the soil, descend to the heir along with the inheritance.² Emblements go to the executor or admin-

coveys, doves, and fish will go to the executor or administrator, as accessory chattels, following the estate of their principal. But the executor or administrator can have no further interest than the deceased had in them; i.e., a right to take to his own use as many as he pleases during the term, provide he leaves enough for the stores. Wms. Exrs. (7th Eng. ed.) 706.

1. Wms. Exrs. (7th Eng. ed.) 703.

In animals *feræ naturæ*,—wild animals such as are usually found at liberty, and wandering at large,—generally speaking, a man can have no property transmissible to his representatives. 2 Bl. Com. 390, 391.

But in such animals a man may obtain a qualified property *per industriam hominis* by reclaiming them from their wild state by art, or by so confining them that they cannot escape. If such animals once regain their liberty, the property in them instantly ceases, unless they have *animam revertens*, which can only be known by their constant habit of returning. Qualified property may also subsist in animals *feræ naturæ propter impotentiam*, as in young pigeons, which, though not tame, being in the pigeon-house, are unable to fly. Wms. Exrs. (7th Eng. ed.) 705.

Thus, if a man buys fish, and turns them loose in his pond, on his death they go to his heir as incident to the inheritance: if he keep them in a tank or net, they are severed from the soil, and go to the executor.

Bac. Abr. tit. "Executors," H. 3, vol. iii. 64. As to oysters artificially planted in a bed clearly separated and marked out for the purpose of retaining them, see Brinkerhoff v. Starkins, 11 Barb. (N. Y.) 248; Lowndes v. Dickerson, 34 Barb. (N. Y.) 586; Decker v. Fisher, 4 Barb. (N. Y.) 592; Fleet v. Hegeman, 14 Wend. (N. Y.) 42.

But though animals *feræ naturæ* are not, while living, the personal property of the owner of the soil, yet if they are found and killed on the land by a trespasser, the qualified property in them *natione soli* becomes absolute in the owner of the soil. Blades v. Higgs, 12 C. B. N. S. 501; 13 C. B. N. S. 844; 11 H. L. Cas. 621. See Buster v. Newkirk, 20 Johns. (N. Y.) 75; 2 Kent, 349, 350; Pierson v. Post, 3 Cai. (N. Y.) 175.

Bees are property, and may be the subject of larceny. Harman v. Mockett, 2 B. C. (Eng.) 944; Ferguson v. Miller, 1 Cowen (N. Y.), 243; Hol v. Jones, 2 Dev. (N. C.) L. 162. See 2 Bl. Com. 393.

Bees which swarm upon a tree do not become the subject of property until ac-

tually hived. Wallis v. Mease, 3 Binn. (Pa.) 546. While on the tree they belong to the owner of the soil, if unreclaimed; but if reclaimed and identified, they belong to their former owner. Goff v. Kitts, 15 Wend. (N. Y.) 550.

But one who merely finds a tree containing a swarm of bees on the land of another obtains no property in the bees by marking the tree. Gillet v. Mason, 7 John. (N. Y.) 16.

2. Wms. Exrs. (7th Eng. ed.) 708; Mitchell v. Billingley, 17 Ala. 391; Price v. Brayton, 19 Iowa, 309; Maples v. Milton, 31 Conn. 598.

But if tenant in fee-simple grants away the trees, they are absolutely passed from the grantor and his heirs, and vested in the grantee; and if the latter should die before they are felled, they will go to his executor or administrator, for, in consideration of law, they are divided as chattels from the freehold. If the tenant in fee sells the land, reserving the trees, the trees are in property divided from the land, although in fact they remain annexed to it, and will pass to the executors or administrators of the vendor. But if the person so entitled to the trees, distinct from the land, afterwards purchases the inheritance, the trees will be re-united to the freehold in property, as they are *de facto*, and will descend to the heir. On the other hand, if tenant in fee lease land for years, excepting the trees, a subsequent grant of the trees to lessee does not re-annex them to the inheritance, but the lessee obtains by the original grant a property in them which will go to his executors or administrators. Wms. Exrs. (7th Eng. ed.) 708. See also Warren v. Leland, 2 Barb. (N. Y.) 613; 1 Dryden V. & P. (8th Am. ed.) 126, note (n).

But if tenant in tail, or tenant in tail after possibility of issue extinct, or a tenant for life without impeachment for waste, sells trees, and dies before actual severance, the trees descend, notwithstanding the sale, to the issue in tail, and the vendee or his executor cannot take them; and it seems that equity will not afford relief. Liford's Case, 11 Co. (Eng.) 50 a; Pyne v. Dor, 1 T. R. 55; Bishop of London v. Webb, 1 P. Wms. (Eng.) 528; Wms. Exrs. (7th Eng. ed.) 709; Treat. on Equity, bk. 1, c. 4, § 19.

There appears to be a distinction between timber-trees and bushes when severed. Thus, if tenant in dower, or by curtesy, or tenant for life or years, unless he be so without impeachment of waste, cuts down timber-trees, or a stranger does so, or the wind blows them down, the trees so severed

istrator of one seized of an estate of inheritance as against the heir, but not as against a dowress or devisee.¹ The executor or administrator of a life-tenant is entitled to them as against a reversioner or remainder-man.² Property pledged or mortgaged consti-

shall not go to the tenant or his executor, but to the owner of the first estate of inheritance. But if such tenant cuts down hedges or trees, not timber, or they are severed by act of God, they belong to the tenant, and go to his executors or administrators. So if trees which are in their nature timber, but are dottards, without any timber in them, are blown down, or wrongfully severed by the lessor, they belong to the tenant, and go to his executors. Wms. Exrs. (7th Eng. ed.) 709. See Cook v. Whitney, 16 Ill. 481; Kittredge v. Woods, 3 N. H. 503; Brackett v. Goddard, 54 Me. 309; Kerlakenden's Case, 4 Co. (Eng.) 63 a; Bewick v. Whitfield, 3 P. Wms. (Eng.) 268; Channon v. Patch, 5 B. & C. (Eng.) 897; 8 D. & R. (Eng.) 651.

The principle applies to the commission of equitable waste by a tenant for life without impeachment for waste. Lushington v. Bolders, 15 Beav. (Eng.) 1; Ormande v. Kindersley, 15 Beav. (Eng.) 10.

But if timber-trees be cut by order of the court of chancery on account of their being in a decaying state by reason of standing too thickly, the tenant for life, though subject to impeachment for waste, is entitled to the interest of the money produced by their sale. Tooker v. Annesley, 5 Sim. (Eng.) 235; Consett v. Bell, 1 Y. & Coll. C. C. (Eng.) 569.

1. Wms. Exrs. (7th Eng. ed.) 713, 714, 718; Spence's Case, Winch (Eng.), 51; Cooper v. Woolfitt, 2 H. & N. (Eng.) 122; Dennett v. Hopkinson, 63 Me. 350.

The executor of a joint tenant is not entitled to emblements, for joint tenants are supposed to carry on the cultivation of the soil by joint stock; and in all joint stock, except merchants', there is survivorship. Gilb. Ev. 212, 213. Yet if a joint tenant agree that his companion shall occupy and sow all the land, who sows and dies before severance, his executors shall have the emblements. James v. Portman, Owen (Eng.), 102.

The distinction in favor of the devisee is founded upon a presumption that it is the intention of the testator that he who takes the land should take the crops also, because every man's donation shall be taken most strongly against himself. Gilb. Ev. 214. See Grubb's App. 4 Yeates (Pa.), 23; Budd v. Hiler, 27 N. J. L. 43; Pratte v. Coffman, 27 Mo. 424; Fetrow v. Fetrow, 50 Pa. St. 253; Taylor v. Bond, 1 Busb. (N. C.) Eq. 5; Carnagy v. Woodcock, 2 Munf. (Va.) 234.

The distinction, though fully established, was characterized by Lord Ellenborough as capricious enough. West v. Moore, 8 East (Eng.), 343. See also Hargrave's note, Co. Litt. 55 b.

The presumption may be rebutted by words in the will which show an intent that the executor shall have the emblements. West v. Moore, 8 East (Eng.), 343; Cox v. Godslave, 6 East (Eng.), 614, note. See also Vaisey v. Reynolds, 5 Russ. (Eng.) 12; Blake v. Gibbs, 5 Russ. 13; Judge v. Winnall, 12 Beav. (Eng.) 357.

If the husband sows the ground, and dies, and the heir assigns the land sown to his wife for dower, she shall have the crop, and not the executors of the husband; for she shall be in *de optima possessione viri*, alone the title of the executor. 2 Just. 81, Andr. Dyer, 316 a; Wms. Exrs. (7th Eng. ed.) 718.

If tenant in dower sows the land and takes a husband who dies before severance, the dowress shall have the crops, and not the executor of the husband. But if the husband of a dowress sows the land, and dies before severance, the executor of the husband shall have them. Bro. Abr. tit. "Emblements," pl. 26; Haslett v. Glenn, 7 Harr. & J. (Md.) 17; Hall v. Browder, 4 How. (Miss.) 224.

If a man seized in right of his wife sow and die before severance, his executors shall have the emblements; but if the land was sown before marriage, the wife shall have them. If husband and wife are joint tenants for life, and the husband sows, and the land survives to the wife, it is said that she shall have the corn. Wms. Exrs. (7th Eng. ed.) 719; Co. Litt. 55 o.

The executor or administrator of a jointress, like a tenant in dower, is entitled to emblements of the estate settled in jointure; but she is not entitled to them at her husband's death to the exclusion of the husband's executors, as a dowress is. Fisher v. Forbes, 9 Vin. Abr. tit. "Emblements," pl. 82, p. 373.

2. Wms. Exrs. (7th Eng. ed.) 715, 716.

The rule is, that every one who has an uncertain estate or interest, if his estate determine by the act of God before severance of the crop, shall have the emblements, or they shall go to his executor or administrator. Com. Dig. Biens. G. 2; Debow v. Colfax, 5 Halst. (N. J.) 128; Bevans v. Briscoe, 4 Harr. & J. (Md.) 139; Gee v. Gee, 2 Dev. & Bat. Eq. (N. C.) 103.

tutes assets subject to the preferential claim of the secured

If tenant for years, *si tamdiu vixerit*, sows, and dies before severance, his executor shall have the emblements. 1 Roll. Abr. "Emblements," A. pl. 12, p. 727.

It is essential to the right of the personal representative that the deceased should have sown the crop. *Grantham v. Hawley*, Hob. (Eng.) 135; *Spencer's Case*, Winch. (Eng.) 51; *Knevett v. Pool*, Cro. Eliz. 464. See *Gee v. Young*, 1 Hayw. (N. C.) 17.

But if the devise be to B. for life, without remainders over, and B. dies before severance, the executor of B. shall have the corn, though B. did not sow. *Spencer's Case*, Winch. (Eng.) 51; Co. Litt. 55 b.

On death of tenant by curtesy or tenant at will, his executors or administrators are entitled to emblements. 1 Roper, H. & W. (2d ed.) 35; Co. Litt. 55 b.

Emblements.—The term includes all those crops produced by human toil, which ordinarily repay the labor expended upon them strictly within the year. Such are hemp, flax, saffron, hops, and potatoes. Went. Off. Ex. (14th ed.) 147, 153; Co. Litt. 55 b. note (1); *Fisher v. Forbes*, 9 Vin. Abr. 373, tit. "Emblements," pl. 82; *Evans v. Roberts*, 5 B. & C. (Eng.) 832; *Penhallow v. Dwight*, 7 Mass. 34; *Evans v. Inglehart*, 6 Gill & J. (Md.) 171, 190; *Shofner v. Shofner*, 5 Sneed (Tenn.), 94; *Waring v. Purcell*, 1 Hill, Ch. (N. Y.) 193; *Gwin v. Hicks*, 1 Bay (S. C.), 503; *McLaurin v. McColl*, 3 Strobb. (S. C.) 21; *Singleton v. Singleton*, 5 Dana (Ky.), 87; *Thornton v. Burch*, 20 Ga. 791; *Wadsworth v. Alcott*, 6 N. Y. 64; *Budd v. Hiler*, 27 N. J. L. 43.

The mere fact that the crop springs from old roots, as hops, does not affect the question, provided it require annual manuring and cultivation. Co. Litt. 55 b, note (1).

Growing clover and hay are not emblements, and go to the heir or devisee, and not to the executor or administrator. *Evans v. Inglehart*, 6 Gill & J. (Md.) 171, 188; *Kittredge v. Woods*, 3 N. H. 503, 504; *Parkham v. Tompson*, 2 J. J. Marsh. (Ky.) 159; *Craddock v. Riddlesbarger*, 2 Dana (Ky.), 206; *Kain v. Fisher*, 6 N. Y. 597; 1 Schoul. Pers. Prop. 128.

The ground for the position is said to be that the improvement is not distinguishable from the natural product. Gilb. Ev. 215, 216. See also *Evans v. Roberts*, 5 B. & C. (Eng.) 832; and Co. Litt. 56 a.

Williams, however, is of the opinion that artificial grasses, such as clover, saintfoin, and the like, by reason of the great care necessary for their production, are within the rule of emblements. Wms. Exrs. (7th Eng. ed.) 712, citing 4 Burn.

E. L. 299. Compare *Graves v. Weld*, 5 B. & Ad. (Eng.) 105.

As to teasles, see *Kingsbury v. Collins*, 4 Bing. (Eng.) 202; 5 B. & Ad. (Eng.) 120.

Things under the ground, as parsnips, turnips, skerrets, carrots, and the like, would probably, at the present time, go to the executor. Co. Litt. 55 b. See 2 Bl. Com. 123.

Although it was formerly thought to be otherwise. Godolph. pl. 2, c. 14, sect. 1; Went. Off. Ex. (14th ed.) 152.

Trees and plants, with the exception of such as are planted by nursery-men expressly for sale, are not comprehended under the term "emblements," since they do not ordinarily return the labor expended upon them within the year. Co. Litt. 55 b; Gilb. Ev. 210; 2 Bl. Com. *123; Lord Kenyon in *Penton v. Robart*, 2 East (Eng.), 90; Gibbs, C. J., in *Lee v. Risdon*, 7 Taunt. (Eng.) 191; Lawrence, J., in *Elwes v. Mawe*, 3 East, 44, note (c). See also *Wyndham v. Way*, 4 Taunt. (Eng.) 316; *Wetherell v. Howells*, 1 Campb. (Eng.) 227; *Emerson v. Sodon*, 4 B. & Ad. (Eng.) 655.

Under 2 N. Y. R. S. 83, sect. 6, subds. 5 and 6, "the crops growing on the land of the deceased at the time of his death," and every kind of produce raised annually by labor and cultivation, except grass growing, and fruit not gathered, shall be regarded as assets, and go to the executor or administrator. See *Bank of Lansingberg v. Crary*, 1 Barb. (N. Y.) 544; *Kain v. Fisher*, 6 N. Y. 597.

A purchaser of land at a sale for the payment of debts takes the growing crops, although sown by the tenant of the heir or devisee. *Jewett v. Keenholts*, 16 Barb. (N. Y.) 193.

In Ohio, crops in the ground belong to the administrator, if the intestate die after the first of March, and they are gathered before the first of December. All other crops go to the heir. *Green v. Cutright*, Wright (Ohio), 738. See *Thompson v. Thompson*, 6 Munf. (Va.) 514.

Under Code Ala. 1876, § 2439, which enacts that "the executor or administrator may complete and gather a growing crop commenced by the decedent;" and section 2440, which makes a crop completed by the executor assets in his hands,—it is optional with the executor to complete and gather a growing crop. *Blair v. Murphree* (Ala.), 2 So. Rep. 18.

An administrator has no right to the crops planted and grown after the intestate's death; and the fact that the inventory includes them, does not render the estate or the administrator liable for them to the

creditor.¹ Debts due the deceased upon chattel security, such as pledge or mortgage, give the benefit of the security to the estate; and the security must not be left out of the consideration of the assets.² Property transferred by the deceased in fraud of creditors, and recovered by the personal representative, becomes assets, and subsequent creditors are let in.³

owner. *Kidwell v. Kidwell*, 84 Ind. 224; *Rodman v. Rodman*, 54 Ind. 444.

Ingress and Egress.—Incident to the right to emblements is the right of ingress and egress, in order to cut and carry them away. Co. Litt. 56 a. See *Hayling v. O'Key*, 8 Ex. (Eng.) 531, 545.

If forcibly interrupted in the reasonable exercise of this right, the executor or administrator may have the offender indicted. *State v. Hogan*, 2 Brev. (S. C.) 437.

But the emblements do not give a title to exclusive occupation; and it has been doubted whether the executors of lessee for life shall not pay rent for the land till the corn is ripe, though perhaps the executors of a tenant in fee-simple shall have the corn without paying for it. *Plowden*, 239th query; *Wms. Exrs.* (7th Eng. ed.) 720.

See, as to the executor's procuring an order from the probate court to sell or cultivate a crop, *McCormick v. McCormick*, 40 Miss. 760; *McDaniel v. Johns*, 8 Jones, L. (N. C.) 414.

For further discussion, see "Emblements," Am. & Eng. Enc. of Law.

1. *Schoul. Exrs. & Admsrs.* § 203; *Wms. Exrs.* (7th Eng. ed.) 1660; *Haynsworth v. Frierson*, 11 Rich. (S. C.) 476; *Vincent v. Sharp*, 2 Stark, N. P. 507; *Went. Off. Ex.* (14th ed.) 181, 182.

But if the executor redeem with his own money the goods pledged by the testator, he shall be indemnified in respect to the sum he has disbursed out of the effects of the testator, or if necessary by the sale of the chattel itself; and in that case the surplus over and above such indemnity shall be assets. If the executor redeem the chattel after the time specified for redemption is elapsed at law, at law it is held a sale to him by the pawnee or mortgagee, and belongs to him in his own right absolutely; but in equity the excess in the value of the thing beyond the money paid for the redemption shall be regarded as assets in the hands of the executor. If the executor redeem the chattel with his own funds, and the amount so advanced be fully equivalent to the value of the chattel, the property is altered, and vests in the executor in his own right. *Went. Off. Ex.* 182, 187 (14th ed.); *ante*, 2.

2. *Schoul. Exrs. & Admsrs.* § 203.

Bonds executed to an administrator or executor in his fiduciary capacity, in con-

sideration of assets transferred by him, are not assets in the hands of the administrator *de bonis non*, on the estate. *Saffran v. Kennedy*, 7 J. J. Marsh. (Ky.) 188.

A bond of indemnity, or a judgment recovered thereon by the deceased during his lifetime, vests only as assets for the purpose of applying it to the satisfaction of the debt or demand against which the indemnity was afforded. *Molloy v. Elam*, *Meigs* (Tenn.), 590.

3. *Wms. Exrs.* (7th Eng. ed.) 756, 1679; *Walker v. Farrows*, 1 Atk. (Eng.) 94, by Lord Hardwicke; *Richardson v. Smallwood*, 1 Jac. (Eng.) 552; *Bump's Fraud. Convey.* 329; *Clark v. French*, 23 Me. 221; *Parkman v. Welch*, 19 Pick. (Mass.) 231; *McLane v. Johnson*, 43 Vt. 48; *Gilliam v. Spence*, 6 Humph. (Tenn.) 160; *Holland v. Cruft*, 20 Pick. (Mass.) 338; *Trimble v. Turner*, 13 Sm. & M. (Miss.) 348; *Ammon's Appeal*, 63 Pa. 284; *Norton v. Norton*, 5 Cush. (Mass.) 524.

Property so recovered by the executor or administrator is now assets within the special statute of limitations in Massachusetts, against which creditors may enforce their claims at any time within two years after its actual receipt. *Welsh v. Welsh*, 105 Mass. 229, 231; *Aiken v. Morse*, 104 Mass. 277; *Holland v. Cruft*, 20 Pick. (Mass.) 321, 325; *Chenery v. Webster*, 8 Allen (Mass.), 76.

As to construction of special statutes of limitation, see "Debts of Decedents," Am. & Eng. Enc. of Law.

An assignment within the statute, 13 Eliz. c. 5, is utterly void as against creditors, and the property assigned is assets in the hands of the executor. *Shears v. Rogers*, 3 B. & Ad. (Eng.) 362; *Marr v. Ricker*, 1 Humph. (Tenn.) 348; *Buckmeyer v. Mairs*, *Riley* (S. C.), 208; *Holland v. Cruft*, 20 Pick. (Mass.) 321; *Welsh v. Welsh*, 105 Mass. 229.

Such transfer, however, must be attacked in reasonable time; and an unexplained delay of fifteen years is fatal to an attempt to invalidate it. *Dickinson v. Seaver*, 44 Mich. 624.

As to whether to render a conveyance fraudulent within that statute, the party at the time of making it must be indebted to the extent of insolvency. See *Shears v. Rogers*, 3 B. & Ad. (Eng.) 362; *Jackson v. Bowley*, Carr. & M. (Eng.) 97; 1 *Smith's Leading Cas.* (4th ed.) 17; *Spirrett v. Wil-*

To constitute personal assets, the title must have been in the decedent at the time of his death: hence goods and chattels, notes, securities, or other incorporeal property, duly transferred in good faith to others by the decedent, are not assets in the hands of the personal representative.¹ For the same reason, partnership

lows, 3 De G. J. & S. (Am. ed.) 293, notes (1) and (2) cases cited, 302; 2 Sugden V. & P. (8th Am. ed.) 714, note (t). See also Fish v. Wilkinson, 5 Ves. (Eng.) 384; Townsend v. Westcott, 2 Beav. (Eng.) 340; Skarf v. Soulby, 1 Mac. & G. (Eng.) 364; Malins, V. C., in Smith v. Chevrill, L. R. 4 Eq. 389, 395; Bridgford v. Riddell, 55 Ill. 261; Robinson v. Stewart, 10 N. Y. 189; M'Elwee v. Sutton, 2 Bailey (S. C.), 128; Hudnal v. Wilder, 4 McCord (S. C.), 294; Parish v. Murphree, 13 How. (U. S.) 92; Worthington v. Bullitt, 6 Md. 172; 2 Md. Ch. 99; Wilson v. Buchanan, 7 Gratt. (Va.) 334; Wilson v. Howser, 12 Pa. St. 109; Dewey, J., in Parkman v. Welsh, 19 Pick. 231, 235; Potter v. McDowell, 31 Mo. 62; Smith v. Yell, 3 Eng. (Ark.) 470; Norton v. Norton, 5 Cush. (Mass.) 524.

Where property subject to a certain mortgage is passed by a simulated transfer to a nominal buyer, who formally recognizes the mortgage in the transfer, the widow and administratrix of the owner, who joined her husband in the simulated transfer, cannot afterwards have the property sold as part of her husband's succession to the prejudice of the mortgage creditor. Tabary's Succession, 31 La. An. 409.

But the fact that one has received money of the estate from the executor, which he knows has been transferred in violation of the latter's duty, does not estop the executor from subsequently recovering it. Zimmerman v. Kinkle, 3 N. Y. (L. ed.) 726; 11 Cent. Rep. 118.

The Wisconsin statute empowering an administrator, in case of a deficiency of assets, to sue for property conveyed by the intestate with intent to defraud his creditors, confers on the administrator no power to maintain a bill *quia timet* to prevent one alleging herself to be the intestate's widow from claiming dower on the ground of the invalidity of the marriage. Paige v. Fagan, 61 Wis. 667.

An executor or administrator may maintain an action at law or suit in equity, to set aside a conveyance by the deceased in fraud of creditors, although the deceased himself could not do so. Tenney v. Poor, 14 Gray (Mass.), 500; McLane v. Johnson, 43 Vt. 48; Chase v. Redding, 13 Gray (Mass.), 418; Martin v. Root, 17 Mass. 222; Holland v. Cruft, 20 Pick. (Mass.) 321; Brown v. Finley, 18 Mo. 375; Judson v. Connolly, 4 La. An. 169; Morris v. Morris, 5 Mich. 171; McKnight v. Morgan, 2 Barb.

(N. Y.) 171. See also Bonslough v. Bonslough, 68 Pa. St. 495; Cross v. Brown, 51 N. H. 486; Doe v. Clark, 42 Iowa, 123.

If he neglects to do so, he will be liable to creditors of the estate. Danzey v. Smith, 4 Tex. 411; Lee v. Chase, 58 Me. 436; Cross v. Brown, 51 N. H. 488; Martin v. Bolton, 75 Ind. 295. See *e.*

He is also bound to inventory land which to his knowledge has been fraudulently conveyed. Bourne v. Stevenson, 58 Me. 504; Andrus v. Doolittle, 11 Conn. 283; Booth v. Patrick, 8 Conn. 106; Andrews v. Tucker, 7 Pick. (Mass.) 250; Minor v. Mead, 3 Conn. 289.

But his omission to do so will not render him liable unless he knew that the conveyance was fraudulent. Booth v. Patrick, 8 Conn. 106. See Cringan v. Nicholson, 1 Han. & Munf. (Va.) 428; Potter v. Titcomb, 1 Fairf. (Me.) 53. As to inventory, see § XIV.

Creditors can also pursue their own remedies, in which case the personal representative is a proper party. Blake v. Blake, 53 Miss. 182; 1 Am. L. Cas. *43; notes to Sexton v. Wheaton; 2 Schoul. Pers. Prop. 112.

See, as to creditors setting aside fraudulent marriage settlements, Jenkyn v. Vaughan, 3 Drew. (Eng.) 419; Reese River Silver Mining Co. v. Atwell, L. R. 7 Eq. Ca. (Eng.) 347; Fish v. Wilkinson, 5 Ves. (Eng.) 387; Richardson v. Smallwood, 1 Rop. (Jacob's ed.) 313, note (c); Touchstone, 66, note by Atherley.

The opinion is, that, if any balance remains in the hands of the representation after the payment of debts, and expenses of administration, it goes to the grantee or donee of the decedent, and not to the next of kin; for the revocation of any gift, transfer, or conveyance, for the benefit of creditors, is only *pro tanto*. Schoul. Exrs. & Admsrs. § 220; 2 Schoul. Pers. Prop. §§ 112, 113; Burch v. Elliott, 3 Ind. 100; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481; Abbott v. Tenney, 18 N. H. 109; Rochelle v. Harrison, 8 Porter (Ala.), 352; 2 Sugden V. & P. (8th Am. ed.) 713, note (1¹); McLean v. Weeks, 61 Me. 277. But see Martin v. Root, 17 Mass. 222, 228; Holland v. Cruft, 20 Pick. (Mass.) 321, 338.

In McLean v. Weeks, 61 Me. 277, it was held incumbent upon the administrator to show the amount required for debts and administration expenses.

1. Schoul. Exrs. & Admsrs. § 204; Wms. Exrs. (7th Eng. ed.) 1675; Burke v.

property,¹ or property in which the deceased had but a joint estate,²

Bishop, 27 La. Ann. 465; *Gasner v. Graves*, 54 Ind. 188; *Thomas v. Smith*, 3 Wharton (Pa.), 401.

Where the transfer did not divest the title of the decedent, the chattel must be administered as assets. *Madison v. Shockley*, 41 Iowa, 451; *Cummings v. Bramhall*, 120 Mass. 552.

A bailment made under instructions which death countermands, does not divest the title of the decedent. *Bigelow v. Patton*, 4 Mich. 170.

A. in his lifetime deposited money with B. to be used after A.'s death in purchasing masses for the repose of his soul. *Held*, that there was no gift to B., as A. might have revoked his instructions, and recovered the money; that there was not a valid trust created for want of a beneficiary; and that, therefore, the money belonged to the executor after A.'s death. *Gilman v. McArdle*, 12 Abb. (N. Y.) N. Cas. 414; s. c., 65 How. (N. Y.) Pr. 330.

But where one delivers personal property in trust, passing the title, his representative cannot recover the property on the ground that a part of the limitation is illegal, there having been no breach of trust on the part of the trustee. [Reversing s. c., 49 N. Y. Super. Ct. 463.] [Andrews and Finch, JJ., dissenting.] *Gilman v. McArdle*, 99 N. Y. 451.

A mistaken delivery of a thing by the custodian to the executor or administrator, does not make it assets, if the title has in fact passed out of the owner before his death. *Sherman v. Sherman*, 3 Ind. 337.

Where personal property attached by trustee process was assigned by the owner subject to the attachment, and the attachment was subsequently dissolved by the owner's death, it was *held* that the property passed by the assignment, and did not constitute assets. *Coverdale v. Aldrich*, 19 Pick. (Mass.) 391.

1. Schoul. Exrs. & Admsrs. § 210; *Tiermann v. Molliter*, 71 Mo. 512. See *Buckley v. Barber*, 6 Ex. (Eng.) 164.

The title to the specific property remains in the surviving partner as representing the firm: all that the representative of the decedent can demand, is that he proceed at once to wind up the concern, and account with him for the decedent's interest. *Shenkl v. Dana*, 118 Mass. 236, 239; *Moses v. Moses*, 50 Ga. 9; *Washburn v. Goodman*, 17 Pick. (Mass.) 519; *Willett v. Blandford*, 1 Hare, 253; *Platt v. Platt*, 42 Conn. 330; *Cooper v. Reid*, 2 Hill, Ch. (S. C.) 549; *Hite v. Hite*, 1 B. Mon. (Ky.) 179; *Dougherty v. Van Nostrand*, 1 Hoff. Ch. (N. Y.) 88; *Patton v. Calhoun*, 4 Gratt. (Va.) 138; *Collyer, Partn.* (5th Am. ed.) § 199, note

(1); Schoul. Exrs. & Admsrs. § 210. As to proper mode of taking accounts. *Bates v. Robbins*, 32 Beav. (Eng.) 73.

Where the surviving partner is also executor of the estate of his deceased co-partner, and he collects partnership assets which are not needed to pay partnership debts, he will be presumed to hold such assets as executor, and the sureties upon his official bond are liable for his misappropriation of the same. *Caskie v. Harrison*, 76 Va. 85.

An administrator cannot be held liable for not receiving and accounting for funds arising from the sale of his intestate's partnership interest in real estate, when the whole property was needed to satisfy the debts of the firm, and the sale was made to the surviving partner in order to transfer to him the legal title to be used in settling the business. *Merritt v. Dickey*, 38 Mich. 41.

The final settlement of a partnership estate in the probate court does not of itself vest in the administrator title to the property of the estate on hand at the time of the settlement. *Tiermann v. Molliter*, 71 Mo. 512.

"If the surviving partners continue the trade, the representative of the deceased partner may elect to take his share of the profits, or may charge the survivors with interest on the amount of capital retained and used by them. If the property of the partnership consists in part of leaseholds, the executor of the deceased partner may treat the survivors as trustees; and if they renew the lease, they are considered to do so for the benefit of the partnership." Wms. Exrs. (7th Eng. ed.) 653; *Clements v. Hall*, 2 De G. & J. (Eng.) 173, 186; *Townend v. Townend*, 1 Giff. (Eng.) 201; *Wedderburn v. Wedderburn*, 22 Beav. (Eng.) 84, 86; *Leach v. Leach*, 18 Pick. (Mass.) 68; *Clegg v. Fishwick*, 1 McN. & G. (Am. ed.) 299, note (1).

2. Wms. Exrs. (7th Eng. ed.) 650. Survivorship existed at common law as well between joint tenants of goods and chattels in possession or right as between joint tenants of inheritance or freehold. Co. Litt. 182 a; *Harris v. Fergusson*, 16 Sim. (Eng.) 308; *Crossfield v. Such*, 8 Ex. (Eng.) 825.

Goods held by merchants for purposes of trade formed an exception. Co. Litt. 182 a; *Rex v. Collectors of Customs*, 2 M. & Sel. (Eng.) 225. See also *Buckley v. Barber*, 6 Ex. (Eng.) 164.

As to what constitutes a joint tenancy in personal property, see "Joint Tenants," Am. & Eng. Enc. of Law; Wms. Exrs. pt. iii. bk. iii. ch. v. § 1.

or held as bailee or trustee,¹ is not assets in the hands of the executor or administrator. On the other hand, personal property in the hands of a third person, to which the decedent had a good title at the time of his death, vests as assets in his executor

With respect to choses in action, though the right of the deceased joint tenant devolves upon his personal representative, the remedy survives to his companion, who alone can enforce it. Perkins' note, Wms. Exrs. (6th Am. ed.) 652. See also Wms. Exrs. (7th Eng. ed.) 843; *post d.* (1).

1. Schoul. Exrs. & Admsrs. §§ 205, 244, 245; Wms. Exrs. (7th Eng. ed.) 653, 654, 1675, 1676; Thompson v. White, 45 Me. 445; Green v. Collins, 6 Ired. L. (N. C.) 139; Johnson v. Ames, 11 Pick. (Mass.) 173; United States v. Cutts, 1 Sumn. (U. S.) 133; Shakespeare v. Fidelity Co., 97 Pa. St. 173; Smiley v. Allen, 13 Allen (Mass.), 465; Cooper v. White, 19 Ga. 554.

Money, goods, and securities belonging to a third person, and capable of identification, found among the goods of the deceased, are not to be reckoned as assets. Cooper v. White, 19 Ga. 554.

If the identity of the property is lost, the owner can only come in as a general creditor. Story, J., Trecothick v. Austin, 4 Mason (U. S.), 16, 29; Johnson v. Ames, 11 Pick. (Mass.) 173.

If the personal representative sells such property as the decedent's, he is individually liable in trover to the true owner. Yeldelk v. Shinholster, 15 Ga. 189; Newsum v. Newsum, 1 Leigh (Va.), 86.

As against a mere wrong-doer, however, a mere possession in the decedent at the time of his death, enables the representative to maintain trover. Cullen v. O'Hara, 4 Mich. 132. See Fryson v. Chambers, 9 M. & W. (Eng.) 460; Morgan v. Knight, 15 C. B. N. S. 669; Reeves v. Mathews, 17 Ga. 449. But it has been held that the fact that one died in possession of property of another as administrator, will not enable his personal representative to maintain trover, even against a mere wrong-doer, as it will be a good defence that the right to the goods in question has devolved upon the administrator *de bonis non* of the original intestate. Elliott v. Kemp, 7 M. & W. (Eng.) 306.

Nothing but the decedent's lien as bailee for reimbursement or *jus tertii* can obstruct the recovery of the property in such cases. Schoul. Bailm. § 71.

Money collected by an attorney, factor, or agent, and kept distinct and unmixed with the rest of his property, is not assets in the hands of his personal representative. Schoolfield v. Rudd, 9 B. Mon. (Ky.) 291.

Nor is property held by decedent as

trustee. In such case it is the duty of the administrator to render a final account closing up the trust, as respects the deceased, to see that his estate is properly reimbursed for all charges and expenditures, and relieved from all further responsibility. Should there remain a surplus or further duties to be discharged under the trust, he should transfer the fund to the proper successor in the trust, and leave him to perform all further functions relative thereto. Schoul. Exrs. & Admsrs. § 245; Little v. Walton, 23 Pa. St. 164; Crowe v. Brady, 5 Redf. (N. Y.) 1. *Compare 2, c, n.*

Where one holds the title to letters-patent as trustee of an express trust, his executor can maintain an action for royalties. Keller v. West, Bradley, etc., Manuf. Co., 39 Hun (N. Y.), 348.

Money deposited in a bank to the credit of "G. Guardian," is not assets of G. in the sense that it is subject to be checked out, upon the death of G., by his executor. Gary v. People's Nat. Bank (S. C.), 2 S. E. Rep. 568.

An administrator of a deceased guardian cannot maintain an action to collect a note made payable to his intestate as guardian, unless it be shown that the money due thereon had become the property of the intestate's estate upon a final settlement with his wards. Alexander v. Wriston, 81 N. Car. 191.

In Florida an executor of the estate of a deceased guardian, into whose hands the ward's money comes, holds it, as did the guardian in trust for the ward. As to such fund, the statute of limitations does not run against the ward, and in favor of the executor; nor is a claim necessary, as in ordinary cases of demands against an executor; for such fund is not general assets of the testator's estate. Bloxham v. Crane, 19 Fla. 163.

When a township trustee dies, the public moneys in his hands pass to his administrator, but for the township. It is the administrator's duty to deliver them up to the successor of the trustee. Rowley v. Fair, 104 Ind. 189.

The administrator of an assignee in trust for creditors is not bound, in continuance of the trust, to superintend the trust property, nor is it strictly proper for him to do so. Bowman v. Rainetaux, 1 Hoffm. (N. Y.) 150.

As to construction of English Insolvent Act (1 & 2 Vic. c. 110), see Wms. Exrs. (7th Eng. ed.) 654.

or administrator.¹ Property held by the decedent under a general power of appointment, whether by deed or will, in equity is considered upon the execution of the power, assets of his estate, and rendered subject to the demands of his creditors, in preference to the claims of his voluntary appointees or legatees.²

As between the personal representative and the heir or devisee of a tenant in tail or in fee, the law favors the title of the latter to fixtures;³ but as between the personal representative of a tenant

1. Schoul. Exrs. & Adms. § 206.

Money received from a trustee, which would have gone to the grantor in the deed of trust if living, goes into his estate as personalty. *Woerther v. Miller*, 13 Mo. App. 549.

Money and chattels in the hands of a deceased minor's guardian vests for purposes of administration in the minor's executor or administrator, although the guardian may be eventually entitled to the property as legatee or distributee after the estate is settled. *Bean v. Bumpus*, 22 Me. 549.

2. Wms. Exrs. (7th Eng. ed.) 1686; Schoul. Exrs. & Adms. § 222; *Thompson v. Towne*, 2 Vern. (Eng.) 319; *Hinton v. Toye*, 1 Atk. (Eng.) 465; *Bainton v. Ward*, 2 Atk. (Eng.) 172; *George v. Milbanke*, 9 Ves. (Eng.) 190; *Platt v. Routh*, 6 M. & W. (Eng.) 789; *Clapp v. Ingraham*, 126 Mass. 200, 202; *Fleming v. Buchanan*, 3 DeG. M. & G. 976; 2 Sugd. Powers (7th ed.), 27; 4 Kent, Com. 339, 340; *Johnson v. Cushing*, 15 N. H. 298; *Commonwealth v. Duffield*, 12 Pa. St. 277, 279-281.

"The rule, perhaps, had its origin in a decree of Lord Somers, affirmed by the House of Lords in a case in which the person executing the power had in effect reserved the power to himself in granting away the estate. *Thompson v. Towne*, Prec. Ch. 52; s. c., 2 Vern. 319. But Lord Hardwicke repeatedly applied it to cases of the execution of a general power of appointment by will of property of which the donee had never any ownership or control during his life; and while recognizing the logical difficulty that the power when executed, took effect as an appointment, not of the testator's own assets, but of the estate of the donor of the power, said that the previous cases before Lord Talbot and himself (of which very meagre and imperfect reports have come to us) had established the doctrine that when there was a general power of appointment, which it was absolutely in the donee's pleasure to execute or not, he might do it for any purpose whatever, and might appoint the money to be paid to his executors if he pleased; and if he executed it voluntarily, and without consideration for the benefit of third persons, the money should be con-

sidered part of his assets, and his creditors should have the benefit of it." *Gray, C. J.*, in *Clapp v. Ingraham*, 126 Mass. 200, 202.

The soundness of the reasons upon which the doctrine rests has been questioned by *Gibson, C. J.*, and *Mr. Justice Story*. *Story, Eq. Jur.* § 176 and note; *Commonwealth v. Duffield*, 12 Pa. St. 279-281. In Pennsylvania the rule at the present time seems to be that creditors cannot touch the fund unless provision for the payment of debts, either expressly or by necessary implication, has been made by the donee. *Swaly's App.* 14 W. N. C. (Pa.) 553; *King's Est.* 14 W. N. C. (Pa.) 77; *Stoke's Est.* 20 W. N. C. (Pa.) 48.

It is essential to the operation of the equity that the power be actually executed, for equity never aids the non-execution of a power. *Holmes v. Coghill*, 7 Ves. (Eng.) 499; 12 Ves. (Eng.) 206.

The equity of the creditors cannot prevail against a *bona fide* purchaser for valuable consideration from the voluntary appointee, for such purchaser will be preferred to the creditors as having a superior equity. 2 Sugd. Powers (6th ed.), 29; *Hart v. Middlehurst*, 3 Atk. (Eng.) 377; *George v. Milbanke*, 9 Ves. (Eng.) 190.

Nor does the doctrine apply to the case of an appointment by will of a married woman of property settled to her separate use for life, unless she has been guilty of fraud in her contracts. *Shattock v. Shattock*, L. R. 2 Eq. (Eng.) 182; *Blatchford v. Woolley*, 2 Dr. & Sm. (Eng.) 204; *Hobday v. Peters*, 28 Beav. (Eng.) 354; *Vaughan v. Vanderstegen*, 2 Drew (Eng.), 165, 363. But see *Johnson v. Gallagher*, 30 L. J. Ch. 309.

Resort cannot be had in any case to the appointed property till all the testator's own property has been exhausted. *Fleming v. Buchanan*, 3 DeG. M. & G. (Eng.) 976.

3. The term "fixtures" is used to indicate, (1), personal inanimate chattels affixed to the freehold, conveying simply the idea of annexation. Wms. Exrs. *727. (2), Those personal chattels which have been annexed to land, and which may be afterwards severed and removed by the party who has annexed them, against the will of the owner of the freehold. *Amos v. Ferard*, Law of Fixtures, 2. See *Judgments*

for life or in tail, and the remainder-man or reversioner, the title of the personal representative is regarded more favorably.¹ As between the executor and the heir of a tenant in fee, the reasoning upon which the decisions in favor of allowing the removal of trade fixtures is founded, seems to have no application;² and the principle in force at the present time would seem to be that where the fixed instrument, machine, or utensil is an accessory to a matter of a personal nature, it should itself be considered as personalty; but, when accessory to the realty, it will go to the heir.³

of Parke, B., and Martin, B., in *Elliot v. Bishop*, 14 Ex. (Eng.) 507, 518; *State v. Bonhan*, 18 Ind. 231; *Pickerell v. Carson*, 8 Iowa, 544; *Prescott v. Wells*, 3 Nev. 82; *Teaff v. Hewitt*, 1 Ohio St. 511. (3), Personal chattels so affixed to the freehold as to form a part of the real estate. *Providence Gas Co. v. Thurber*, 2 R. I. 15; *McClintock v. Graham*, 2 McCord, 553; *Baker v. Davis*, 19 N. H. 325; *Murdock v. Harris*, 20 Barb. (N. Y.) 407; *Burk v. Baxter*, 3 Mo. 207; *Moore v. Smith*, 24 Ill. 513; *Terry v. Robins*, 5 Sm. & M. (Miss.) 291.

The term is here employed in the first sense. As to the character of the annexation, and modern deviation from the common-law rule *quidquid plantatur solo, solo cedit*, see "Fixtures." See also *Wms. Exrs.* (7th Eng. ed.) 728-748; 1 Schoul. Pers. Prop. 135-143; *Amos & Fer. Fixtures*, 2, 3; *Elwes v. Mawe*, 3 East, 32; 2 Smith's L. Cas. Am. Notes, 228; 2 Kent, Com. 345; *Elliott v. Bishop*, 10 Ex. (Eng.) 507; *Sheen v. Rickie*, 5 M. & W. (Eng.) 175; *Clark v. Burnside*, 15 Ill. 62; *Bishop v. Bishop*, 11 N. Y. 123; *Tuttle v. Robinson*, 33 N. H. 104; *Rex v. St. Dunstan*, 4 B. & C. (Eng.) 686; *Beck v. Rebow*, 1 P. Wms. (Eng.) 94.

1. *Wms. Exrs.* 732, 740; 2 Kent, *345; *Elwes v. Mawe*, 2 Smith L. Cas. (7th Am. ed.) 177-225.

As to the right of the heir or devisee, see Schoul. Exrs. & Admsrs. § 119; *Shep. Touchst.* 469, 470; *Colegrave v. Dias Santos*, 2 B. & C. (Eng.) 76; *Horlaken-den's Case*, 4 Co. (Eng.) 64 a; *Tuttle v. Robinson*, 33 N. H. 104, 120; *Guthrie v. Jones*, 108 Mass. 191, 196; *Lawton v. Salmon*, H. Bl. (Eng.) 259, note to *Fitzherbert v. Shaw*; *Lord Hardwicke in Dudley v. Warde*, Amb. (Eng.) 113; *Went. Off. Ex.* (14th ed.) 149-151; *Bratton v. Clawson*, 2 Strobb. (S. C.) 478; *De Graffenried v. Scruggs*, 4 Humph. (Tenn.) 451; *Bainway v. Cobb*, 99 Mass. 459.

Whatever the executor may claim against the heir, he is equally entitled to against the devisee. But if from the nature or condition of the property devised, it is apparent that the intention was that the fixtures should go along with the freehold

to the devisee, they will pass to him, although they are of such a sort that the executor might have been entitled to them as against the heir. *Wms. Exrs.* (7th Eng. ed.) 740; *Wood v. Gaynon*, 1 Amb. (Eng.) 395; *Lushington v. Sewell*, 1 Sim. (Eng.) 435. As to a bequest of "fixtures and fixed furniture," see *Birch v. Dawson*, 2 Ad. & El. (Eng.) 37.

As to title of life-tenant as against remainder-man or reversioner, see *Elwes v. Mawe*, 2 Smith, Ld. Cas. (7th Am. ed.) 117-225; *Wms. Exrs.* (7th Eng. ed.) 732, 741; *Schoul. Pers. Prop.* § 120; *Amos & Fer. Fixtures*, 128. See *Dudley v. Warde*, Amb. (Eng.) 113; *Lawton v. Lawton*, 3 Atk. (Eng.) 13; *Lawton v. Salmon*, 1 H. Bl. (Eng.) 260 n.

Where chattels remain on the premises unannexed at the death of a tenant for life, the next tenant for life cannot prejudice the rights of his successors by annexing them to the freehold. *D'Eyncourt v. Gregory*, L. R. 3 Eq. (Eng.) 382.

2. *Fisher v. Campbell*, 12 Cl. & Fin. (Eng.) 328, 330, 331, 332; *Wood, V. C.*, in *Mather v. Fraser*, 2 Kay & J. (Eng.) 536; *Walmsley v. Milne*, 7 C. B. N. S. (Eng.) 115. Formerly it was thought otherwise. *Ex rel. Wilbraham* in 3 Atk. (Eng.) 14; *Lawton v. Lawton*, 3 Atk. 13; *Elwes v. Mawe*, 3 East (Eng.), 54.

2 N. Y. Rev. Stats. 83, §§ 6, 7, 8, declare that things annexed to the freehold or to any building for the purposes of trade or manufacture, and not fixed into the wall of the house, so as to be essential to its support, go to the executor as assets; and all other things annexed to the freehold descend to the heir or devisee. The object of this act seems to have been to give the personal representative the same right to remove trade fixtures as a tenant has against his landlord. *House v. House*, 1 Paige (N. Y.), 158, 163.

3. *Fowler, J.*, in *Tuttle v. Robinson*, 33 N. H. 104, 120. See *Fisher v. Dixon*, 12 Cl. & F. (Eng.) 312 (Am. ed. and cases in notes (1) and (2)), 325, 329, 331; *Crenshaw v. Crenshaw*, 2 Hen. & Munf. (Va.) 22; *Lawton v. Salmon*, 1 H. Bl. 260, n.; *Parker, C. J.*, in *Despatch Line of Packets v. Bel-*

The executor of a tenant for life or in tail may remove trade fixtures as against the remainder-man or reversioner.¹ Fixtures set up for ornament and domestic convenience, and capable of severance without injury to the freehold, may be removed by the personal representative as against the heir, and *a fortiori* as against a remainder-man or reversioner.²

Iamy Mfg. Co., 12 N. H. 232; Kittredge v. Woods, 3 N. H. 503. Compare Trappes v. Harter, 2 Cr. & M. (Eng.) 153; s. c., 3 Tyrwh. (Eng.) 603; Cook v. Champlain T. Co., 1 Denio (N. Y.), 92.

Thus, machinery of a mill is part of the realty. Gray v. Holdship, 17 Ser. & R. (Pa.) 415; House v. House, 10 Paige (N. Y.), 158. Also a cotton-gin connected with the running works in the gin-house. Bratton v. Clawson, 2 Strobb. (S. C.) 478; Degraffenried v. Scruggs, 4 Humph. (Tenn.) 431.

Manure, whether scattered about the barnyard of a homestead, or piled upon the land, is a part of the realty, although it may not be in a fit state for incorporation with the soil. Fay v. Muzzey, 13 Gray (Mass.), 53; Plumer v. Plumer, 30 N. H. 558, 568; Conner v. Coffin, 22 N. H. 538; Sawyer v. Twiss, 29 N. H. 345; Strong v. Doyle, 111 Mass. 92; Strong v. Proctor, 1 Chipman, 108; Kittredge v. Woods, 3 N. H. 503; Middlebrook v. Corwin, 15 Wend. (N. Y.) 169; Goodrich v. Jones, 2 Hill (N. Y.), 142; Parsons v. Camp, 11 Conn. 525.

But manure made in a livery stable or in any other way not connected with agriculture, is assets, and must be accounted for by the personal representative. Daniels v. Pond, 21 Pick. (Mass.) 367; Needham v. Allison, 24 N. H. 355; Plumer v. Plumer, 30 N. H. 558; Lassell v. Reed, 6 Greenl. (Me.) 222; Smithwick v. Ellison, 2 Ired. (N. C.) 326; Hill v. De Rochemont, 48 N. H. 87; Perry v. Carr, 44 N. H. 120; 1 Chitty, Contr. (11th Am. ed.) 509, n. o.

The fact that in such case, the administrator expended the manure upon real estate which was afterwards sold for debt, will not relieve him from liability. Fay v. Muzzey, 13 Gray (Mass.), 53.

1. Dudley v. Warde, 1 Ambl. (Eng.) 113; Lawton v. Lawton, 3 Atk. (Eng.) 13. See also Lawton v. Salmon, 1 H. Bl. (Eng.) 266 n.; Lord Kenyon in Penton v. Robart, 2 East (Eng.), 91; Lord Ellenborough in Elwes v. Mawe, 3 East (Eng.), 54; Wms. Exrs. (7th Eng. ed.) 744.

2. Squire v. Mayer, 2 Eq. Cas. Abr. 430; s. c., 2 Freem. (Eng.) 240; Beck v. Redow, 1 P. Wms. (Eng.) 94. See Bishop v. Elliott, 11 M. & W. (Eng.) 113; Harvey v. Harvey, 2 Stra. (Eng.) 1141; Cave v. Cave, 2 Vern. (Eng.) 508, and note; Guthrie v. Jones, 108 Mass. 191; Schoul. Pers. Prop. 143.

The only inference that can be drawn from the cases would appear to be that if the things can be taken away without prejudice to the fabric of the house, as tables, although fastened to the floor, furnaces not made part of the wall, grates, irons, ovens, jacks, clock-cases, and such like, fastened to the freehold by nails, the executor shall have them. 4 Burn. E. L. (8th ed.) 301.

But even in such case the judges of the common-law courts appear not to have favored the relaxation. Winn v. Ingilby, 5 B. & A. (Eng.) 625; Colgrave v. Dias Santos, 2 B. & C. (Eng.) 76; King v. St. Dunstan, 4 B. & C. 686; s. c., 7 D. & R. (Eng.) 178.

Perhaps, after all, such chattels are removable, not because they are domestic or ornamental, but because they have never in any proper sense formed a part of the freehold. Thus, pictures and looking-glasses fastened merely by nails or screws to the walls, go to the executor; but otherwise, if *let into the wainscot*. Wms. Exrs. (7th Eng. ed.) 738.

In some cases it has been said that to form a part of the realty the chattel must be so affixed to the freehold as to be incapable of severance without injury, whether the annexation be for use, ornament, or caprice. Providence Gas Co. v. Thurber, 2 R. I. 15; McClintock v. Graham, 3 Mc. Cord (S. C.), 553; Baker v. Davis, 19 N. H. 325; Murdock v. Harris, 20 Barb. (N. Y.) 407; Morton, J., in Weston v. Weston, 102 Mass. 514, 518. See, however, Smith, J., in Gray v. Holdship, 17 Serg. & R. (Pa.) 415; Gaffield v. Hapgood, 17 Pick. (Mass.) 192; Williams v. Bailey, 3 Dana (Ky.), 152; Greene v. Malden, 10 Pick. (Mass.) 504; Goddard v. Chase, 7 Mass. 432; Parker, C. J., in Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 232; Bigelow, J., in Wall v. Hinds, 4 Gray (Mass.), 270, 271.

As between the administrator and the heir, a heavy stove placed by the ancestor in the chimney, having no fireplace, without legs, set on brickwork, with a heavy, short funnel, bricked around in the chimney so as to render it doubtful whether it could be removed without disturbing the brick, is to be regarded as real estate. Tuttle v. Robinson, 33 N. H. 104.

So of a stone sink or furnace so placed as not to be removed without injury to the freehold. Baimway v. Cobb, 99 Mass. 457;

The personal representative has no title to heirlooms,¹ gifts

Main *v.* Schwartzwaelder, 4 E. D. Smith (N. Y.), 273.

But stills set up in furnaces in the usual manner for making whiskey are personal property. Terry *v.* Robins, 5 Sm. & M. (Miss.) 291; Moore *v.* Smith, 24 Ill. 513; Burk *v.* Baxter, 3 Mo. 207. See Crenshaw *v.* Crenshaw, 2 Hen. & Munf. (Va.) 22.

Also stoves stored for the summer in a garret; but not if in their places where used. Blethen *v.* Towle, 40 Mo. 310.

Chandeliers attached to a house, gas-fixtures, as a gasometer and an apparatus for generating gas, will pass to a grantee or heir-at-law with the real estate. Johnson *v.* Wiseman, 4 Met. (Ky.) 357; Hays *v.* Doane, 11 N. J. Eq. 84; Lawrence *v.* Kemp, 1 Duer. (N. Y.), 363.

But chandeliers and side brackets attached to gas-pipes attached to side pipes by the owner of the house, and readily detachable, have been held not to be such fixtures as pass by a sheriff's sale of the house. Vaughn *v.* Haldeman, 33 Pa. St. 522; Montague *v.* Dent, 10 Rich. (S. Car.) 135.

Force of Decisions in Contests between Landlord and Tenant.—Since the law is more favorable to a tenant in a contest with his landlord as to the right to remove fixtures, than to the personal representative in a contest with heir, remainder-man, or reversioner, — *Elwes v. Mawe*, 3 East (Eng.), 51; 2 Sm. Ld. Cas. (7th Am. ed.) 117-225; *Grimes v. Boweren*, 6 Bing. (Eng.) 439, 440, — it would be wrong to conclude that a fixture set up by a tenant in fee, or for life, may be claimed as personalty by his executor, from the fact that it had been decided to be removable as between landlord and tenant. In regard to contests between the executor of a tenant for life or in tail and the remainder-man or reversioner, it is to be observed that the reasoning upon which the executor's right to remove is founded, is precisely analogous to that upon which decisions in favor of the tenant's right of removal proceed. Lord Hardwicke in *Lawton v. Lawton*, 3 Atk. (Eng.) 13, and *Dudley v. Ward*, 1 Ambl. (Eng.) 113; *Treatise on Fixtures*, Amos & Ferard, p. 116. And hence it is submitted that analogies drawn from the reasoning of such decisions may be valid, although the decision itself is not of absolutely binding force. On the other hand, wherever it has been decided that fixtures are not removable by a common tenant, *a fortiori*, they are not removable by the executor of a tenant for life, or in tail, or the executor of a tenant in fee. *Wms. Exrs.* (7th Eng. ed.) 745; See *Hill v. Sewald*, 53 Pa. St. 271; *Bainway v. Cobb*, 99 Mass.

457, 459; *Miller v. Plumb*, 6 Cowen (N. Y.), 665; *Hayes v. Doane*, 11 N. J. Eq. (3 Stock.) 84; *Northern C. R. Co. v. Canton Co.*, 30 Md. 347, 354; *Wall v. Hinds*, 4 Gray (Mass.), 256; *Bliss v. Whitney*, 9 Allen (Mass.), 114; *Blethen v. Towle*, 40 Me. 310; *Kutter v. Smith*, 2 Wall. (U. S.) 491.

In conclusion, it should be observed that the exception established in favor of the tenant's right to remove trade fixtures does not extend to agricultural tenants so as to entitle them to remove things erected by them for purposes of husbandry. *Elwes v. Mawe*, 2 Sm. L. Cas. (7th Am. ed.) 117-225; *Dean v. Allaley*, 3 Esp. N. P. C. 11; *Fitzherbert v. Shaw*, 1 H. Bl. Eng. 258; *Buckland v. Butterfield*, 2 B. & A. (Eng.); s. c., 4 B. Moore (Eng.), 440. See also *West v. Blake-way*, 2 M. & Gr. (Eng.) 729; *Grimes v. Boweren*, 6 Bing. (Eng.) 437; *Bigelow, J.*, in *Wall v. Hinds*, 4 Gray (Mass.), 256, 273; *McCracken v. Hall*, 7 Ind. 30.

But Stats. 14 & 15 Vict. c. 25, sect. 3, confers upon agricultural tenants the right to remove farm-buildings and machinery erected for trade or agriculture under limitations; and in many States the distinction against agricultural tenants has become obsolete, either through statute or judicial decisions. *Van Ness v. Pacard*, 2 Pet. (U. S.) 140, per Story, J.; *Schoul. Pers. Prop.* §§ 100, 121; *Whiting v. Brastow*, 4 Pick. (Mass.) 310; *Taylor, Landl. & Ten.* § 548.

1. *Wms. Exrs.* (7th Eng. ed.) 720.

Heirlooms are such personal chattels as shall go by special custom to the heir along with the inheritance, and not to the executor or administrator of the last proprietor. They cannot be devised by the testator, because "the will takes effect after his death; and by his death the heirlooms, by ancient custom, are vested in the heir, and the law prefers the custom before the devise;" yet, during life, the owner may dispose of them. Monuments, coat-armor, the sword, pennons, and other ensigns of honor, set up in memory of the deceased, shall go to the heir as heirlooms; and it matters not that they are annexed to the freehold, albeit that is in the person. But the property of the shroud and coffin remains in the executors, or other person who has charge of the funeral; and it may be laid to be theirs in an indictment for stealing them.

Charters, deeds relating to the inheritance, and muniments of title, savor of the realty, and vest in the heir as incident to the inheritance, and likewise the box or chest in which they are kept. *Wms. Exrs.* (7th Eng. ed.) 720-725; 1 *Schoul. Pers. Prop.* 117-123. The administrator has no right to the custody or control of

mortis causa,¹ or the wife's separate estate,² and, unless absolutely

family portraits which were specially bequeathed to heirs. *Moseley's Est.* 12 Phila. (Pa.) 50.

Chattels settled or devised as Heirlooms.

— Personal property may be settled or devised to one for life, with remainder to sons and daughters in tail, so as to be transmissible as heirlooms; but whether trustees be interposed or not, the property in the chattels will vest absolutely in the first tenant in tail, and on his death in the first person seized in tail, and on his death devolve on his executors or administrators. In order to prevent such separation, it is usual, after subjecting the chattels to the same limitations as the freehold which they are to accompany as heirlooms, to add a declaration that they shall not vest absolutely in the tenant in tail by purchase until twenty-one, or death under that age, leaving issue inheritable under the entail. *Co. Litt.* 18 b, n. 109, by Hargrave; *Carr v. Errol*, 14 Ves. (Eng.) 478; *Scarsdale v. Curzon*, 1 John. & H. (Eng.) 40; *Boydell v. Golightly*, 14 Sim. (Eng.) 346, per Shadwell, V. C. See also *Potts v. Potts*, 1 H. L. Cas. 671; *Shelley v. Shelley*, L. R. 6 Eq. Ca. (Eng.) 540; *Holloway v. Weber*, L. R. 6 Eq. Cas. (Eng.) 523; *Christie v. Gosling*, L. R. 1 H. L. 279; 2 Jarman Wills (3d ed.), 548; 1 Pow. Dev. (by Jarman) 716, 730, 732; 2 Pow. Dev. (by Jarman) 642; *Wms. Exrs.* (7th Eng. ed.) 725, 726.

1. *Wms. Exrs.* (7th Eng. ed.) 770.

To constitute such a gift, three attributes are essential: (1) the gift must be made with a view to the donor's death; (2) it must be conditioned to take effect only upon the death of the donor by his existing disorder; (3) there must be a delivery of the subject of the donation. *Wms. Exrs.* (7th Eng. ed.) 771. See also *Mitchener v. Dale*, 23 Pa. St. 59; *Headley v. Kirby*, 18 Pa. St. 326; *Marshall v. Berry*, 13 Allen (Mass.), 43, 47, note; *Rockwood v. Wiggins*, 16 Gray (Mass.), 402, 403; *Delmotte v. Taylor*, 1 Redf. Surr. (N. Y.) 417; *Shirley v. Whitehead*, 1 Ired. Eq. (N. C.) 130; *Champney v. Blanchard*, 39 N. Y. 111; *Pierpont, C. J.*, in *French v. Raymond*, 39 Vt. 625; *Walton, J.*, in *Hatch v. Atkinson*, 56 Me. 326, 327. See *Wms. Exrs.* (5th Am. ed.) 843, *et seq.*, and notes by Perkins. "Gifts *mortis causa*," *Am. & Eng. Enc. of Law*.

2. In cases clear of fraud, neither the husband, nor those claiming under him, have any title, either at law or in equity, to the wife's separate equitable estate conveyed to her before marriage. *Haselinton v. Gill*, 3 T. R. (Eng.) 620, n. (a) by Lord Mansfield; *Jarman v. Woolloton*, 3 T. R. (Eng.) 618.

Ante-nuptial settlements by the husband of his own property upon the wife will be valid against the husband himself, volunteers, and creditors. 2 *Sudgen, V. & P.* (8th Am. ed.) 715, n. (k); *Vogel v. Vogel*, 22 Mo. 161; *Roberts v. Roberts*, 22 Wend. (N. Y.) 140; *De Barante v. Golt*, 6 Barb. (N. Y.) 492.

In order to render the settlement void on account of fraud, both parties must concur in, or have knowledge of, the fraud. See *Magniac v. Thompson*, 7 Peters (U. S.) 348; *Tisdale v. Jones*, 38 Barb. (N. Y.) 523; *Sullings v. Richmond*, 5 Allen (Mass.), 187; *Miller v. Goodwin*, 8 Gray (Mass.), 542; *Eppes v. Randolph*, 2 Call (Va.), 125; *Croft v. Arthur*, 3 Desaus. (S. C.) 223; *Jones, App.* 63 Pa. St. 324; *Frank's App.* 59 Pa. St. 190; *Bunell v. Witherow*, 29 Ind. 123; *Coutts v. Greenhow*, 2 Munf. (Va.) 363; *Andrews v. Jones*, 10 Ala. 400.

It has been held that the fact that the husband was indebted at the time of the settlement, and that his future wife knew it, did not affect its validity. *Campion v. Cotton*, 17 Ves. (Eng.) 264. But compare *Fraser v. Thompson*, 4 De G. & J. (Eng.) 659; *Bulwer v. Hunter*, L. R. 8 Eq. Cas. (Eng.) 46. See further as to *ante-nuptial* agreements, *Brown v. Jones*, 1 Atk. (Eng.) 190; *Ex parte Hall*, 1 Ves. & B. (Eng.) 112; *Southerland v. Southerland*, 5 Bush (Ky.), 591; 2 *Roper, Hus. & Wife*, 156.

A *post-nuptial* settlement binds the husband and volunteers. *Curtis v. Price*, 12 Ves. (Eng.) 89; *Jones v. Morgan*, 6 La. Ann. 631; *Kuhn v. Stansfield*, 28 Md. 210; *Gardner v. Baker*, 25 Iowa, 343; *Bertrand v. Elder*, 23 Ark. 494; *Teasdale v. Rheaborne*, 2 Bay (S. C.), 546; *Paschall v. Hall*, 5 Jones, Eq. (N. C.) 108; *Riley v. Riley*, 25 Conn. 154.

It will also be good as against creditors, unless the circumstances of the case show that it was fraudulent as against them. *Wright v. Wright*, 16 Iowa, 496; *William and Mary College v. Powell*, 12 Gratt. (Va.) 372; *Rogers v. Ludlow*, 3 Sandf. Ch. (N. Y.) 104; *Riley v. Riley*, 25 Conn. 154; *Picquet v. Swan*, 4 Mason (U. S.), 443; *Reynolds v. Lansford*, 16 Tex. 286; *Clayton v. Brown*, 30 Ga. 490; *Scogin v. Stacy*, 20 Ark. 265; *Barker v. Koneman*, 13 Cal. 9; *Woolston's App.* 51 Pa. St. 452; *Larkin v. McMullin*, 49 Pa. St. 29; *Leavitt v. Leavitt*, 47 N. H. 329; *Albert v. Winn*, 5 Md. 66; *Wiley v. Gray*, 36 Miss. 510; *Williams v. Avery*, 38 Ala. 115.

Under what circumstances *post-nuptial* settlements will be deemed fraudulent as against creditors. *Beaumont v. Thorp*, 1 Ves. Sr. 27; *Cristy v. Courtenay*, 26 Beav. (Eng.) 140; 1 *Roper, Hus. & Wife*, 309.

necessary for the payment of debts, can assert none to her pin-

"If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." Lord Westbury, *L. C.*, in *Spirett v. Willows*, 3 De G. J. & S. (Eng.) 293, 302. See also Lord Hatherby, *L. C.*, and Gifford, *L. J.*, in *Freeman v. Pope*, *L. K.*, 5 Ch. App. 543, 544. See *Pomeroy v. Bailey*, 43 N. H. 118; *Belford v. Crane*, 16 N. J. Eq. 265; *Phelps v. Morrison*, 24 N. J. Eq. 195; *Bancroft v. Curtis*, 108 Mass. 49, and cases cited. *Bridgford v. Riddell*, 55 Ill. 261; *Chambers v. Spencer*, 5 Watts (Pa.), 406; *Kuhn v. Stansfield*, 28 Md. 210; *Church v. Chapin*, 35 Vt. 223; *Coolidge v. Melvin*, 42 N. H. 510; *Hunters v. Waite*, 3 Gratt. (Va.) 26; *Stewart v. Rogers*, 25 Iowa, 395; *Girdley v. Watson*, 53 Ill. 186; *Freeman v. Burnham*, 36 Conn. 469; *Filley v. Register*, 4 Minn. 396; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; *Babcock v. Eckler*, 24 N. Y. 623; *Norton v. Norton*, 5 Cush. (Mass.) 524; *Potter v. McDowell*, 31 Mo. 62; *Pomeroy v. Bailey*, 43 N. H. 118. See also *Tripner v. Abrahams*, 47 Pa. St. 220; *Townsend v. Maynard*, 45 Pa. St. 198; *Moritz v. Hoffman*, 35 Ill. 553; *Niller v. Johnson*, 27 Md. 6; *Kipp v. Hanna*, 2 Bland (Md.), 26; *Taylor v. Enbanks*, 3 A. K. Marsh. (Ky.) 239; *Hopkirk v. Randolph*, 2 Brock. Marsh. (U. S. C. C.) 132; *Babcock v. Eckler*, 24 N. Y. 623; *Brookbank v. Kennard*, 41 Ind. 339.

Debts subsequently incurred will not defeat a *post-nuptial* settlement unless the circumstances are such as to warrant the presumption that the settlement was made with a view to future indebtedness. *Stileman v. Ashdown*, 2 Atk. (Eng.) 481; *Barling v. Bishop*, 29 Beav. (Eng.) 417; *Townsend v. Wyndham*, 2 Ves. Sr. (Eng.) 10; *Spirrett v. Willows*, 34 L. J. Ch. (Eng.) 365; 3 De G. J. & S. (Am. ed.) 293, note (2); 2 Sugd. V. & P. (8th Am. ed.) 714, note (t); *Freeman v. Pope*, *L. R.* 9 Eq. (Eng.) 206; *Crossley v. Elunthy*, *L. R.* 12 Eq. (Eng.) 158; *Phillips v. Wooster*, 36 N. Y. 412; *Case v. Phelps*, 39 N. Y. 164; *Carter v. Grimshaw*, 49 N. H. 100, 105, 106; *Bridgford v. Riddell*, 55 Ill. 261; *Thacher v. Phinney*, 7 Allen (Mass.), 146.

As a general rule, however, no presumption of fraud arises if the debts of the husband, owing at the time, were of considerable amount, or if, though considerable, the payment of them was provided for by the settlement itself, or was secured by mortgage or other means. *Wms. Exrs.*

(7th Eng. ed.) 755; *George v. Milbanke*, 9 Ves. (Eng.) 194; *Stephens v. Olive*, 2 Bro. C. C. (Eng.) 90. See also *Bridgford v. Riddell*, 55 Ill. 261; *Parkman v. Welch*, 19 Pick. (Mass.) 231, 235; *Norton v. Norton*, 5 Cush. (Mass.) 524; *Potter v. McDowell*, 31 Mo. 62; *Smith v. Yell*, 8 Ark. 470; *Wilson v. Howser*, 12 Pa. St. 109; *Parish v. Murphree*, 13 How. (U. S.) 92; *Wilson v. Buchanan*, 1 Gratt. (Va.) 334; *Wilson v. Howser*, 12 Pa. St. 109; *Worthington v. Bullitt*, 6 Md. 172; *McElwee v. Sutton*, 2 Bailey (S. C.), 128; *Robinson v. Stewart*, 10 N. Y. 189.

The fact that a *post-nuptial* settlement reserves to the husband a power to revoke the limitations in favor of the wife, or that, while the settlement purports to be an absolute transfer of personal property, the husband still retains possession, inconsistently with its provisions, has been considered to give rise to a presumption of fraud. 1 *Roper, H. & W. (Jacobs' ed.)* 318; *Wms. Exrs.* (7th Eng. ed.) 755; *Benj. on Sales* (1st Am. ed.), § 484 *et seq.*; *Twyne's Case*, 1 *Smith's L. Cas.* 9; *Putnam v. Osgood*, 52 N. H. 148; *Ingalls v. Herrick*, 108 Mass. 353; *Rothchilde v. Rowe*, 44 Vt. 389.

If, however, the settlement is sustained by a valuable consideration, or is made in pursuance of a written agreement before marriage, it is good, even against creditors. In the latter case, the agreement, being in writing, satisfies the statute of frauds, and the subsequent marriage is a valuable consideration. *Wms. Exrs.* (7th Eng. ed.) 756; *Hunt v. Johnson*, 44 N. Y. 27; *Duffy v. Ins. Co.*, 8 W. & S. (Pa.) 413; *R. Amsden v. Hylton*, 2 Ves. Sr. (Eng.) Lord Hardwicke's Judgment, 308; 1 *Roper, H. & W.* (2d ed.) 306, 323, 327; *Peiffer v. Lytle*, 58 Pa. St. 386; 2 Sugd. V. & P. (8th Am. ed.) 718; *Belford v. Crane*, 16 N. J. Eq. 265; *Caines v. Marley*, 2 Yerg. Tenn.) 582; *Rogers v. Hall*, 4 Watts (Pa.), 359; *Smith v. Allen*, 5 Allen (Mass.), 454; *Huston v. Cantril*, 11 Leigh (Va.), 136; *Sterry v. Arden*, 1 John. Ch. (N. Y.) 261; 4 Kent, 463. See also *Wood v. Savage*, 2 Doug. (Mich.) 316; *Borst v. Corey*, 16 Barb. (N. Y.) 136; *Simpson v. Graves*, *Riley* (S. C.), 1 Ch. 232. See, for fuller discussion, "Fraudulent Conveyances."

As to title of wife to separate property acquired by trading on her own account, and to savings from her separate property, and under what circumstances gifts from husband to wife will be sustained, see *Wms. Exrs.* (6th Am. ed.) 828, notes by Perkins; arts. "Gifts," and "Husband and Wife," *Ency. of Eng. & Am. Law*.

money¹ or paraphernalia.² Formerly it was held that assets in any part of the world should be assets in every part of the world; and the principal representative was held personally responsible.³ The rule at the present time may be said to be, that if the principal and domestic representative can collect and realize upon foreign assets of the estate, in the domestic jurisdiction, as by

1. 2 Roper; Hus. & Wife (2d ed.), 132; Wms. Exrs. (7th Eng. ed.) 761; Hanning v. Style, 3 P. Wms. (Eng.) 339. As to nature of pin-money, see Brougham, C., in Howard v. Digby, 8 Bligh (Eng.), 224; s. c., 2 Cl. & Fin. (Eng.) 634; Adams v. Brackett, 5 Met. (Eng.) 285.

It may be defined to be gifts of money by the husband to the wife, for clothes, or to purchase ornaments, or for her separate expenditure. Wms. Exrs. (7th Eng. ed.) 760.

2. Wms. Exrs. 763, 767.

The term signifies apparel and ornaments of the wife, suitable to her rank and dignity, acquired by gift from the husband. What are to be considered paraphernalia are questions to be considered by the court, and will depend upon the rank and fortunes of the parties. The widow's title is good against the executor or administrator of her husband, unless the assets prove deficient for payment of debts, and is preferred to that of a legatee, either general or specific. Upon the exhaustion of the personal estate, including her paraphernalia, in payment of specialty creditors, she is entitled to marshal the assets against the heir, or against a devisee in trust as for the payment of debts. Wms. Exrs. (7th Eng. ed.) 763-770. See "Paraphernalia," Am. & Eng. Enc. of Law.

Widow's Allowance.—See, as to statutory order of payment, when held to be a debt, "Debts of Decedents," Am. & Eng. Enc. of Law.

In Massachusetts, such allowance is temporary, within the discretion of the probate court; and such provisions and other articles as are necessary for the reasonable sustenance of the family, "shall not be taken as assets for the payment of debts, legacies, or charges of administration." Mass. Gen. Stats. c. 96, §§ 4, 5. See Washburn v. Hale, 10 Pick. (Mass.) 431-433; Adams v. Adams, 10 Met. (Mass.) 170; Fisk v. Cushman, 6 Cush. (Mass.) 20, 28; Williams v. Williams, 5 Gray (Mass.), 24, 25; Kingsbury v. Wilmarth, 2 Allen (Mass.), 30; Hale v. Hale, 1 Gray (Mass.), 518; Pettee v. Wilmarth, 5 Allen, 144; Wright v. Wright, 13 Allen (Eng.), 207; Brewster v. Brewster, 8 Mass. 131.

As to the general character of such allowance, see Paine v. Paul K., 39 Me. 15; Kersey v. Bailey, 52 Me. 198; Foster v. Foster, 36 N. H. 437; Hubbard v. Wood,

15 N. H. 74; Kingman v. Kingman, 31 N. H. 182; Mathes v. Bennett, 21 N. H. 189; Schaffner v. Grutzmacher, 6 Iowa, 137; Iowa Rev. Laws (Rev. 1860), pp. 410, 423, §§ 2361, 2402, 2403; Meyer v. Meyer, 23 Iowa, 359; France's Est. 75 Pa. St. 220, 226; Ex parte Rogers, 63 N. C. 110; Ex parte Dunn, 63 N. C. 137; Cox v. Brown, 5 Fred. L. (N. C.) 194; Dorah v. Dorah, 4 Ohio St. 292; Bane v. Wick, 14 Ohio St. 505; Sawyer v. Sawyer, 28 Vt. 245; Richardson v. Merrill, 32 Vt. 27; Silcox v. Nelson, 1 Ga. Dec. 24; Cole v. Elfe, 23 Ga. 235; Elfe v. Cole, 26 Ga. 197; Blassingame v. Rose, 34 Ga. 418; Wells v. Wilder, 36 Ga. 194; Nelson v. Smith, 12 Sm. & M. (Miss.) 662; Lowry v. Herbert, 25 Miss. 101; Coleman v. Brooke, 27 Miss. 71; Whitley v. Stevenson, 38 Miss. 113; Carpenter v. Brownlee, 38 Miss. 200; Turner v. Turner, 30 Miss. 428; Wally v. Wally, 41 Miss. 657; Morgan v. Morgan, 36 Miss. 348; Sanderlin v. Sanderlin, 1 Swan (Tenn.), 441; Sloan v. Webb, 20 Tex. 189; Connell v. Chandler, 11 Tex. 249; Giddings v. Crosby, 24 Tex. 295.

As to the law of Pennsylvania and Tennessee, with reference to allowing the widow to retain goods and chattels exempt from execution, see Wood's Est. 1 Ashm. (Pa.) 314; Duncan v. Duncan, 2 Swan (Tenn.), 351; Bayliss v. Bayliss, 4 Coldw. (Tenn.) 359. As to the law in New York, see Redf. L. & P. of Surr. Cts. 209-212.

Widow's right of quarantine in New York and Alabama. See Siglar v. Van Piper, 10 Wend. (N. Y.) 414; Jackson v. O'Donaghy, 7 John. (N. Y.) 247; Johnson v. Corbett, 11 Paige (N. Y.), 265; Corey v. People, 45 Barb. (N. Y.) 262; Slatter v. Meek, 35 Ala. 528; Glenn v. Glenn, 41 Ala. 571. See also "Dower," "Quarantine," "Intestate Laws," and "Widow's Allowance," Am. & Eng. Enc. of Law.

3. Touchst. 496; Wms. Exrs. (7th Eng. ed.) 1661; Att. Gen. v. Dimond, 1 Cr. & Jerv. (Eng.) 470; Att. Gen. v. Bouwens, 4 M. & W. (Eng.) 191, 192.

The objection to this position is, that it makes the domestic executor or administrator liable for all the assets which are locally situate abroad, although he has not, by virtue of the domestic letters of administration, any authority to collect them, or to compel payment or delivery to himself. Story, Confl. § 514 a. See Tunstall v. Polard, 11 Leigh (Va.), 1.

selling negotiable bonds, bills, notes, or other securities payable abroad, or by delivering bills of lading, or other documents of title, indorsing or assigning by acts of his own, which would be recognized as conferring the substantial title in the foreign jurisdiction, or otherwise, by effectually transferring property of a chattel nature, situated or payable elsewhere, which is capable, nevertheless, of being transferred by acts done in the domestic jurisdiction, he should be held accountable for due diligence as to such net assets.¹ If foreign letters and an ancillary appointment at the *situs* be necessary to make title and realize upon the foreign assets, the principal representative should perform the ancillary trust, or have another perform it, observing due diligence and fidelity, as the laws of the foreign jurisdiction may admit of such course, and in such case will be responsible for the surplus transmitted to him as principal and domiciliary administrator. In any case he is bound to employ all reasonable means under the circumstances, to collect and realize the assets of his estate out of his jurisdiction; and his liability is not fixed and absolute, but depends upon his conduct.²

b. Intangible Rights. — Stock in Corporations. — Annuities. — Pensions. — Life Insurance Policies. — Legacies and Distributive Shares. — Patents and Copyrights. — Contingent and Executory Interests in Personality. — Mortgages. — Debts due from Representative or Legatee. — Stock in a private corporation, or public funds, government and municipal bonds, and securities of all kinds, are, at the

1. Att. Gen. v. Bouwens, 4 M. & W. Eng. 171, 192, per Lord Abinger; Trecothic v. Austin, 4 Mason (U. S. C. C.), 33; Hutchins v. State Bank, 12 Met. (Mass.) 421; Butler's Est. 38 N. Y. 397. See also Schoul. Exrs. & Admsrs. § 175; Merrill v. N. E. Mut. L. Ins. Co., 103 Mass. 245.

2. Schoul. Exrs. & Admsrs. § 175; Wms. Exrs. (6th Am. ed.) 1759, 1763, and Perkins' notes; Att. Gen. v. Dimond, 1 Cr. & Jerv. 370; *In re* Ervin, 11 Cr. & Jerv. 157; Stokely's Est. 19 Pa. St. 476; Jennison v. Hapgood, 10 Pick. (Mass.) 78; Clark v. Blackington, 110 Mass. 369. See Schultz v. Pulver, 11 Wend. (N. Y.) 361; Butler's Est. 38 N. Y. 397.

If foreign assets come into the actual possession of the principal administrator by a voluntary payment or delivery to him without a previous grant of ancillary administration, he will be accountable for them in the domiciliary jurisdiction, whose letters were the recognized credentials in the case. Van Bokkelen v. Cook, 5 Sawyer (C. C.), 587.

Upon this principle it has been held that no conflicting grant of authority appearing, the domiciliary appointee of another State may take charge of and control personal property of the deceased in the State of its *situs*. Deany v. Faulkner, 22 Kan.

75; Barnes v. Brashear, 2 B. Mon. (Ky.) 380; Parsons v. Lyman, 20 N. Y. 103; Vroom v. Van Horn, 10 Paige (N. Y.), 549.

For fuller discussion of the relations between the principal and ancillary administrator, see "Primary and Ancillary Administration," Eng. Enc. of Law. See also Schoul. Exrs. & Admsrs. §§ 162-183; Wms. Exrs. (6th Am. ed.) 1763, *et seq.*, Perkins' notes.

To the effect that in case of insolvency assets in the ancillary administration are to be distributed among creditors who are citizens of the government where the ancillary administration exists. 2 Kent, 431; Goodall v. Marshall, 11 N. H. 88, 100, 101; Mothland v. Wireman, 3 Pa. 185; Carmichael v. Ray, 1 Richardson (S. C.), 116; Harvey v. Richards, 1 Mason (U. S. C. C.), 381, 421; Stevens v. Gaylord, 11 Mass. 256; Boston v. Boylston, 4 Mass. 318, 324; Dawes v. Boylston, 9 Mass. 337; Churchill v. Boyden, 17 Vt. 319. See Partington v. Att. Gen. L. R. 4 H. L. 100; Holmes v. Remsen, 20 John. (N. Y.) 229. Compare Dawes v. Head, 3 Pick. (Mass.) 128, 145-148; Davis v. Estey, 8 Pick. (Mass.) 475; Fay v. Haven, 3 Met. (Mass.) 114; Churchill v. Boyden, 17 Vt. 319; Miller's Est. 3 Rawle (Pa.), 312; Olivier v. Townes, 14 Martin (La.), 93.

present time, treated as personal property, and are primarily assets in the hands of the executor or administrator.¹ Annuities, unless bonds of inheritance, are employed in the grant;² and the proceeds of a life insurance policy taken out generally by the decedent, and not for the express benefit of others surviving him, or where the legal beneficiaries have died before the decedent, go to the personal representatives, and become assets for the payment of debts.³ But where the policy is expressed to be payable to another, as to the decedent's widow or child, or in trust for such one's benefit, the proceeds are not assets of the estate;⁴ and the same principle applies to pensions and public gratuities.⁵ Legacies and

1. Wms. Exrs. 812, 813; 1 Schoul. Pers. Prop. 614-624; Weyer v. Second Nat. Bank, 57 Ind. 198; Bligh v. Brent, 2 Y. & C. (Eng.) 268.

Shares in incorporated companies holding land for the purposes of their business, as railroad or turnpike companies, are considered personal property unless the charter expressly provides otherwise. Abb. Dig. Corp. 736; Cape Sable Company's Case, 3 Bland, Ch. (Md.) 606.

Canal shares were once held to be real estate, but the rule has been since changed to avoid all doubt. The charter frequently declares the stock shall be considered personal property. Wms. Exrs. (7th Eng. ed.) 811; Drycutter v. Bartholomew, 2 P. Wms. (Eng.) 127.

Stock specifically devised or bequeathed devolves upon the personal representative, and, until he assents, the legatee has no right to the legacy. Bank of England v. Moffatt, 3 Bro. C. C. (Eng.) 260; Wms. Exrs. (7th Eng. ed.) 813; Franklin v. Bank of England, 1 Russ. Chanc. Cas. 575; 9 B. & C. (Eng.) 156; Churchill v. Bank of England, 11 M. & W. (Eng.) 323.

Where a dividend was declared on the stock of a turnpike company, being held at the time to be real estate, after the death of the stockholder, of tolls collected before the death, it was held that such dividend was personal estate, to which the executor, and not the heir, was entitled. Welles v. Cowles, 4 Conn. 182.

2. Wms. Exrs. (7th Eng. ed.) 809; 1 Schoul. Pers. Prop. 703, 704; Wms. Pers. Prop. (5th Eng. ed.) 180-182; Parsons v. Parsons, L. R. 8 Eq. Cas. (Eng.) 260; Taylor v. Martindale, 12 Sim. (Eng.) 158.

But when granted with words of inheritance, it is descendible, and goes to the heir to the exclusion of the executor. Stafford v. Buckley, 2 Ves. Sen. (Eng.) 179.

An annuity differs from a rent charge in that it is a charge upon the person of the grantor only, and not upon his land. 2 Bl. Com. 40, 41.

Although granted to a man and his heirs, it is not an hereditament within the

statute of mortmain, — 7 Edw. I. stat. 2, — nor entailable within the statute *de donis*. Wms. Exrs. (7th Eng. ed.) 810; Co. Litt. 20 (a), note (4) by Hargrave. See "Annuities."

3. Hathaway v. Sherman, 61 Me. 466; Re Butson, 9 L. K. Ir. 21.

4. Senior v. Ackerman, 2 Redf. (N. Y.) 302.

If in a life policy the assured himself appears by name as the beneficiary, the money accruing thereon at his death becomes assets in the hands of his administratrix. Union Life Ins. Co. v. Stevens (Ill.), 19 Fed. Rep. 671.

5. Perkins v. Perkins, 46 N. H. 110; Pinneo v. Goodspeed (Ill.), 12 N. E. Rep. 196; Cables v. Prescott, 67 Me. 582; Massachusetts Mut. L. Ins. Co. v. Hayes, 16 Ill. App. 233.

A benefit on a policy in the Knights of Pythias, made, by the constitution of the society, payable to certain legatees, and disposable by will of the member, but in no case subject to his debts, and, in the absence of the specified legatees and any disposition by will, revertible to the society, held, not a part of the assets of a deceased member. Bishop v. Curphey, 60 Miss. 22.

Where it was the manifest purpose of donations of three benevolent societies respectively of \$100, \$200, and \$100, to defray C.'s funeral expenses, and his widow, as his administratrix, charged the estate with \$218, the funeral expenses, but did not credit it with said \$100, \$200, and \$100, nor with a donation of \$150, death aid fund of "Battery B," an article whereof provided that on the death of a member there should be paid that sum "to his legal relatives," held, that the excess beyond the \$218 did not belong to the estate, and the surrogate's court could not hold her responsible therefor. Leidenthal v. Correll, 5 Redf. (N. Y.) 267.

Under the Iowa Code it is the duty of an administrator to collect a life insurance payable to legal representatives; and he and his sureties are liable for failure to inventory and distribute the avails of such

distributive shares, vested in one person by another's death, go on his death before receiving them to his own personal representative as assets.¹ Patents and copyrights, subject to the terms of the statute relating thereto,² mortgages,³ bonds, securities for the payment of money, choses in action,⁴ contingent and executory

insurance paid to him, although, by sections 2371, 2372, such avails are not subject to the debts of the decedent. But an administrator *de bonis non*, appointed after the death of the widow of his decedent, who was his administratrix, cannot maintain an action to recover from her sureties the avails of a policy of insurance on the life of his decedent, collected by her, and not accounted for, such sureties being accountable only to the children of the decedent, or their guardians, for the amount of their shares thereof. *Kelly v. Mann*, 56 Iowa, 625.

1. *Pease v. Walker*, 20 Wis. 573; *Storer v. Blake*, 31 Me. 289.

2. *Wms. Exrs. (7th Eng. ed.)* 817; *Schoul. Exrs. & Admsrs.* § 200; 1 *Schoul. Pers. Prop.* § 536, U. S. Rev. Stats. (1878) § 4952.

Under the acts of Congress, patents are issued to the patentee, "his heirs or assigns." If the inventor dies before the patent is granted, the right of applying for and obtaining the patent will devolve on the executor or administrator in trust for the decedent's heirs-at-law. 1 *Schoul. Pers. Prop.* § 528. See, as to extension of patent on application of executor or administrator of deceased patentee, *Washburn v. Gould*, 3 *Story (U. S. C. C.)*, 122; *Woodworth v. Sherman*, 3 *Story (U. S. C. C.)*, 171; *Wilson v. Rousseau*, 4 *How. (U. S.)* 646; 2 *Kent*, *367, note (c).

3. *Schoul. Exrs. & Admsrs.* § 214; *Wms. Exrs. (7th Eng. ed.)* 687; *Tabor v. Tabor*, 3 *Swanst. (Eng.)* 636; *Burton v. Hintrage*, 18 *Iowa*, 348; *Steel v. Steel*, 4 *Allen (Mass.)*, 117; *Fay v. Cheney*, 14 *Pick. (Mass.)* 399; *Chase v. Lockerman*, 11 *Gill & J. (Md.)* 185. See also *Johnson v. Bartlett*, 17 *Pick. (Mass.)* 477; *Sheldon v. Smith*, 97 *Mass.* 34, 35; *Haskins v. Hawkes*, 108 *Mass.* 379; *Collins v. Hopkins*, 7 *Iowa*, 463.

If the mortgage be in fee, the heir or devisee of the mortgagee will be a trustee of the land for the executor or administrator, and upon application will be directed to convey to him. *Ellis v. Guavas*, 2 *Chanc. Cas. (Eng.)* 187; *Tabor v. Grover*, 2 *Vern. (Eng.)* 367; *Canning v. Hicks*, 2 *Chanc. Cas. (Eng.)* 187. See *Demarest v. Wyn Hoop*, 3 *John. Ch. (N. Y.)* 127.

Under the statutes of Maine the mortgagee's interest in mortgaged lands passes upon his death to his executor or administrator, and not to his heirs; and a deed of release from the heirs and residuary lega-

tees of the mortgagee, does not convey a sufficient title to maintain a real action against a party in possession under the administrator; the estate of the mortgagee never having been settled in probate court, and the mortgage never having been foreclosed. *Hemenway v. Lynde (Me.)*, 9 *Atl. Rep.* 620.

The personal representative is the proper person to enforce the mortgage. *Copper v. Wells, Saxton, Ch. Rep.* 10; *Gibson v. Bailey*, 9 *N. H.* 168; *Haskins v. Hawkes*, 108 *Mass.* 379, 381.

When land mortgaged to the deceased has been taken into possession and foreclosed by the executor or administrator, he holds the estate until his functions touching it are fully performed, and until distribution. *Boylston v. Carver*, 4 *Mass.* 598; *Taft v. Stevens*, 3 *Gray*, 504; *Palmer v. Stevens*, 11 *Cush.* 148; *Terry v. Ferguson*, 8 *Port. (Ala.)* 500; *Harper v. Archer*, 28 *Miss.* 212. See *post e, n.*

The personal representative may also assign the mortgage. *Williams v. Ely*, 13 *Wis.* 1; *Clapp v. Beardsley*, 1 *Vt.* 167; *Shoalbred v. Drayton*, 2 *Desaus.* 246; *Neil v. Newbern*, 1 *Murph. (N. C.)* 133; *Ladd v. Wiggins*, 35 *N. H.* 421; *Crooker v. Jewell*, 31 *Me.* 306; *Clark v. Blackington*, 110 *Mass.* 369, 374, 375; *Burt v. Ricker*, 6 *Allen (Mass.)*, 77. See also *George v. Baker*, 3 *Allen (Mass.)*, 326.

4. *Schoul. Exrs. & Admsrs.* § 200; *Wms. Exrs. (7th Eng. ed.)* 786 *et seq.*; *Stewart v. Chadwick*, 8 *Iowa*, 463; *Re Pollock*, 3 *Redf. (N. Y.)* 100.

A mere right to pre-empt land goes to the executor or administrator. *Bowers v. Keeseaker*, 14 *Iowa*, 301. See *Burch v. McDaniel*, 2 *Wash. (U. S. C. C.)* 5.

So with claims for services, wages due, fees, or salaries of employees or public officers. *Lappin v. Mumford*, 14 *Kan.* 9; *Steger v. Frizzell*, 2 *Tenn. Ch.* 369.

Salary voted to a person after his decease, and paid to his executor, is assets in his hands. *Loring v. Cunningham*, 9 *Cush. (Mass.)* 87.

So with damages assessed in favor of the deceased during his lifetime. *Astor v. Hoyt*, 5 *Wend. (N. Y.)* 603; *Welles v. Cowles*, 4 *Conn.* 182.

A judgment recovered by plaintiff vests on his death in his administrator, who may take out execution in his own name. *Simmons v. Heman*, 17 *Mo. App.* 444.

Proof that a decedent in his lifetime

interests in personalty, vested in the decedent in right, though not in possession,¹ and debts due from the personal representative,²

promised not to enforce certain securities, is sufficient to raise a presumption that they were cancelled or destroyed: the mere fact that they were not found among his papers after death does not. *Gilpin v. Chandler*, 2 Del. Ch. 219.

As to nature of representative's interest in decedent's choses in action, and what actions survive, see *post*, *d*.

1. *Schoul. Exrs. & Admrs.* § 201; *Fearne, Cont. Rem.* *554; 2 *Saund.* 388 1, note u to *Purefoy v. Rogers*; *Wms. Exrs.* (7th Eng. ed.) 887; *Peck v. Parrot*, 1 Ves. Sr. 236; *Fyson v. Chambers*, 9 M. & W. (Eng.) 460; *Clapp v. Stoughton*, 10 Pick. (Mass.) 463; *Dunn v. Sargent*, 101 Mass. 336; *Johns v. Johns*, 1 *McCord* (S. C.), 132; *Ladd v. Wiggins*, 35 N. H. 421; *Gardner v. Hooper*, 3 *Gray* (Mass.), 398; *Nash v. Nash*, 12 *Allen* (Mass.), 345; *Winslow v. Goodwin*, 7 *Met. (Mass.)* 363; *Pike v. Stephenson*, 99 Mass. 188.

But it is obvious, that, if the contingency upon which the interest depends is the endurance of the life of the parties entitled to it until a particular period, the interest itself will be extinguished by the death of the party before the period arrives, and will not be transmissible to his executors or administrators. *Wms. Exrs.* (7th Eng. ed.) 887.

The executor or administrator of the object of a power cannot be an appointee under it. Thus, where a husband gives his wife a power of appointment of a fund in favor of his children, and a child dies without any appointment having been made to him, no part can be appointed to his executor or administrator. *Maddison v. Andrew*, 1 Ves. Sen. (Eng.) 59.

2. *Schoul. Exrs. & Admrs.* § 208.

At common law the appointment of a debtor by the testator as executor operated as a release of the debt, or extinguishment of the debt; the principle being, that a debt is merely a right to recover the amount by way of action: and, as an executor cannot maintain an action against himself, his appointment by the creditor to that office suspends the action for the debt; and when a personal action is once suspended by the voluntary act of the party entitled to it, it is gone forever. *Wms. Exrs.* (7th Eng. ed.) 1310. But in equity it was considered that the debt due from the debtor executor had been paid to him by himself, and he was held accountable for the amount of the debt as assets. A trust is accordingly raised in equity for the benefit of creditors, legatees, and next of kin. *Wms. Exrs.* (7th Eng. ed.) 1315. See *Lord Tenterden* in *Freakley v. Fox*, 9 B. & C. (Eng.) 134;

Ingle v. Richards, 28 *Beav.* (Eng.) 366; *Simmons v. Gutteridge*, 13 *Ves.* (Eng.) 264; *Goods of Boddington*, 6 *Notes of Cas.* (Eng.) 18; *Brown v. Selwyn*, *Cas. Temp. Talb.* 240; s. c., 3 *Bro. P. C.* 607; *Carey v. Gooding*, 3 *Bro. C. C.* (Eng.) 110.

In equity, also, a debt due from the executor retained its priority against his estate in the event of his death. *Turner v. Cox*, 8 *Moore*, P. C. (Eng.) 188, 315.

In most parts of the United States the common-law rule has been changed by statute, or judicial decision, and debts due from the personal representative are placed on the same footing as debts due the estate from other sources. *McCarty v. Frazer*, 62 *Mo.* 263; *Shields v. Odell*, 27 *Ohio St.* 398; *Jacobs v. Woodside*, 6 *S. Car.* 490.

In New York, to obviate the incongruity of requiring the executor to proceed against himself, it is provided by the statute that the debt shall be included in the inventory among the credits and effects of the deceased, and that the executor shall be liable for the same as so much money in his hands, at the time the debt becomes due, and shall apply and distribute the same in payment of debts and legacies, and among the next of kin, as part of the personal estate of the deceased. 2 *N. Y. R. S.* 84, § 13; *Soverhill v. Suydam*, 59 *N. Y.* 142; *Adair v. Brimmer*, 74 *N. Y.* 539.

A similar result appears to have been reached in Massachusetts and Pennsylvania by judicial decision. *Choate v. Arrington*, 116 *Mass.* 552; *Commonwealth v. Gould*, 118 *Mass.* 300, 307; *Kinney v. Ensign*, 18 *Pick. (Mass.)* 232; *Hazleton v. Valentine*, 113 *Mass.* 472, 480; *Chapin v. Waters*, 110 *Mass.* 195; *Griffith v. Chew*, 8 *Ser. & R. (Pa.)* 17; *Eichelberger v. Morris*, 6 *Watts (Pa.)*, 42; *Piper's Est.* 15 *Pa. St.* 533. Under a will appointing the testator's sons, who were indebted to him, executors, and providing, "that, if it is necessary, my hereinafter named executors shall have five years' time to settle up my estate," *held*, that the sons having property were not entitled to wait five years before paying their indebtedness. *Riegel's Appeal*, 106 *Pa. St.* 437.

In Georgia the statute of limitations will not protect the representative from accounting for the debt. *Thompson v. Thompson* (Ga.), 3 *S. E. Rep.* 261.

In some States it has become the established rule that a debt due from the personal representative to the estate is assets in his hands immediately, and he and his sureties are liable for the amount as if he had actually received it from any other creditor. *Stevens v. Gaylord*, 11 *Mass.*

or a legatee, are transmitted to the executor or administrator as assets of the estate.¹

256; *Leland v. Felton*, 1 Allen (Mass.), 531; *Benchley v. Chapin*, 10 Cush. (Miss.) 173; *Ipswich Mfg. Co. v. Story*, 5 Met. (Mass.) 310; *Sigourney v. Wetherell*, 6 Met. (Mass.) 553; *Hays v. Jackson*, 6 Mass. 150.

In *Lanbrecht v. State*, 57 Md. 240, it was held that the surety's liability was irrespective of the executor's ability to pay. But see § XI. 6. *Hall v. Hall*, 2 McCord, Ch. (S. C.) 269; *Farys v. Farys*, 1 Harp. Eq. (S. Car.) 261; *Williams v. Morehouse*, 9 Conn. 470; *Duffee v. Buchanan*, 8 Ala. 27; *Hall v. Pratt*, 5 Ham. (Ohio) 72; *Potter v. Titcomb*, 7 Greenl. (Me.) 302; *Wright v. Lang*, 66 Ala. 389; *Jacobs v. Woodside*, 6 S. Car. 490.

Where one of two administrators was liable as principal to the intestate, who was his surety, his liability to the intestate's estate is assets in the administrator's hands, for which they are both liable. *Bassett v. Granger*, 136 Mass. 175.

If a surety of a defaulting administrator is made his successor, the surety's indebtedness on the bond is assets in his hands with which he and his sureties are chargeable, although the amount has not been fixed by account, or by judgment, or by a charge made by himself. *Choate v. Thorndike*, 138 Mass. 371. See *Jacobs v. Morrow* (Neb.), 31 N. W. Rep. 739.

But the rule is said not to apply to one who is only conditionally liable to the estate. *Shields v. Odell*, 27 Ohio St. 398.

Although under 3 N. Y. Rev. St. (6th ed.) § 14, a debt due the testator's estate from the executor must be inventoried and accounted for as cash, the court may, upon evidence of the inability of the executor to pay, refuse to charge him with it as cash. He is liable, however, to be called upon to render a further account when he shall be able to pay the debt; and he is liable to a proceeding in equity to enforce its payment, and he cannot avail himself of the statute of limitations. *Baucus v. Stover*, 24 Hun (N. Y.), 109. See *Re Hoyt*, 3 Demarest (N. Y.), 610.

An insolvent executor's promissory note held by the estate is an asset, because commissions due him as executor can be applied upon the note. *Freeman v. Freeman*, 4 Redf. (N. Y.) 211.

It is also competent for the executor to show the claim to be unfounded and unjust. *Everts v. Everts*, 62 Barb. (N. Y.) 577.

Debts due from a firm of which the executor is a member are to be treated and accounted for as assets; and it is said that the result would be the same although he and his firm were insolvent at the time he accepted the trust, and although he has

never charged the debts in his account, and an account was accepted in which they were not included, but were mentioned as uncollectible. Nor will the fact that he has resigned, and an administrator *de bonis non* been appointed, relieve him from liability. *Leland v. Felton*, 1 Allen (Mass.), 531. Debts due from a corporation whose officer has been appointed executor or administrator, are assets in his hands. *Eaton v. Walsh*, 42 Mo. 272.

As to the effect of charging himself with the debt in his inventory or account, see *Endicott, J.*, in *Tarbell v. Jewett*, 129 Mass. 457, 461; *Ipswich Mfg. Co. v. Story*, 5 Met. (Mass.) 310; *Stevens v. Gaylord*, 11 Mass. 256; *Winship v. Bass*, 12 Mass. 200; *Baucus v. Stover*, 24 Hun (N. Y.), 109; *United States v. Eggleston*, 4 Sawyer (U. S.), 199.

The appointment *de bonis non* of one who was surety on the bond of his predecessor, does not make a debt due the estate from such predecessor assets in his hands by reason of his suretyship. *Shields v. Odell*, 27 Ohio St. 398.

As to the application of the rule that where a judgment debtor becomes the personal representative of a judgment creditor, see *Charles v. Jacob*, 9 S. C. 295.

As to the rule that the extinguishment of the instrument upon which the indebtedness is founded renders the sums due thereon realized assets, see *Ipswich Mfg. Co. v. Story*, 5 Met. (Mass.) 310; *Tarbell v. Jewett*, 129 Mass. 457; *Freakley v. Fox*, 9 R. & C. (Eng.) 130.

1. This is the modern rule in the absence of evidence that forgiveness of the debt was intended. *Springer's App.* 29 Pa. St. 208; *Hallowell's Est.* 23 Pa. St. 223; *Wms. Exrs.* (7th Eng. ed.) 1303, 1304; *Sorrelle v. Sorrelle*, 5 Ala. 245. See *Hyde v. Neate*, 15 Sim. 554.

As to admissibility of extrinsic evidence to establish such intention, see 2 *Rop. Leg.* (3d ed.) 61; *Chester v. Terwick*, 23 Beav. (Eng.) 404; *Ward v. Coffield*, 1 Dev. Eq. (N. C.) 108; *Perry v. Maxwell*, 2 Dev. Eq. (N. C.) 488.

Where a legatee is indebted to the testator, the executor may retain the legacy, either in part or full satisfaction of the debt by way of set-off. *Jeffer v. Wood*, 2 P. Wms. (Eng.) 130; *Clarke v. Bogardus*, 12 Wend. (N. Y.) 67; *Sims v. Doughty*, 5 Ves. (Eng.) 243.

It has also been held at common law, that where a debt to the estate of a testator may be set off by the executors against a legacy bequeathed by the testator to his debtor, such debt may also be set off against a legacy bequeathed by the testator

c. Chattels Real. — Leases. — Estates on Condition, by Way of Remainder. — Contingent and Executory Interests therein. — Estates pur Autre Vie. — All chattels real,¹ leases for years of lands and tenements,² estates on condition, by way of remainder, contingent and executory interests therein,³ chattel interests in incor-

to the wife of the debtor, subject to her equity, if any, in the legacy. Wms. Exrs. (7th Eng. ed.) 130; McCormick v. Garnett, 2 Sin. & G. (Eng.) 37; McMahon v. Burchell, 5 Hare (Eng.), 325.

Forgiveness may operate *pro tanto*. Thus, where one leaves a legacy, and releases only the principal of an interest-bearing debt, the interest should be treated as assets, and set against the legacy. Halliwell's Est. 23 Pa. St. 223.

1. Schoul. Exrs. & Admrs. § 223, 224; Wms. Exrs. (7th Eng. ed.) 670. Estates by statute, merchant, staple, and by *eligui*, although held *ut liberum tenementum*, are really chattels, and go to the personal representatives.

2. Lewis v. Ringo, Co. Litt. 42 a; 3 A. K. Marsh. (Ky.) 247; Payne v. Harris, 3 Strobb. Eq. (S. C.) 39; Murdock v. Ratcliffe, 7 Ohio, 119.

Any estate which must determine at a period certain and prefixed, by whatever words created, is an estate for years. Such estates have one quality of real property, viz., immobility; but want the other, viz., a sufficient legal indeterminate duration, the utmost for which they can last being fixed and determined. 2 Bl. Com. 386.

A lease for ninety-nine years is only a chattel real, and, on the lessee's death, constitutes assets for administration. Faler v. McRae, 56 Miss. 227.

An estate to a woman, *dum sola fuit durante viduitate, or quamdiu se bene gesserit*, is an estate of freehold. If an estate be limited to A. B. and his assigns during C. D.'s life, it is a freehold interest; but if it be limited to A. B. and his assigns for a certain number of years, if C. D. shall so long live, it is a chattel, and will go to his executors and administrators. Wms. Exrs. (7th Eng. ed.) 675.

Although a lease for years be made to a man and his heirs, or to a sole corporation and his successors, it shall go to his executors. Co. Litt. 46 b; Fulwood's Case, 4 Co. (Eng.) 65 a. See Dollen v. Bott (Eng.), 4 C. B. N. S. 760.

After the analogy of the rule in Shelly as applied to real estate, if a term for years be devised to one for life, and afterwards to the heirs of his body, these words are words of limitation, and the whole vests in the first taker, and is transmissible to his executor. If, however, there appears any other circumstance or clause in the will, to show the intention that these

words should be words of purchase, and not of limitation, the ancestor takes for life only, and his heir will take by purchase, to the exclusion of his executor. Wms. Exrs. (7th Eng. ed.) 678; Fearn, Cont. Rem. 490 *et seq.* (7th ed.); Doe v. Lyde, 1 T. R. (Eng.) 393; *Ex parte Sterne*, 6 Ves. 156. See Theobridge v. Kilburne, 2 Ves. Sr. 233; Garth v. Baldwin, 2 Ves. Sr. 646; Verulam v. Bathurst, 13 Sim. (Eng.) 374.

On the death of a tenant from year to year, his interest in the lease is transmitted to his executor or administrator, and due notice to quit must be given the latter before the lessor or his representative can recover in ejectment. Doe v. Porter, 3 T. R. (Eng.) 13; James v. Dean, 11 Ves. (Eng.) 393; 15 Ves. (Eng.) 241; Parker v. Constable, 3 Wils. (Eng.) 25; Rees v. Parrot, 4 C. & P. (Eng.) 230; Doe v. Wood, 14 M. & W. (Eng.) 682.

Terms specifically devised vest in the personal representative in the first instance, and the devisee has no right to enter without the latter's special assent. Equitable interests form no exception to the rule; and the beneficial interest in a term where the person entitled has no higher interest in the estate, is treated as a chattel, and transmissible to his personal representatives. Wms. Exrs. (7th Eng. ed.) 680. See, as to "Attendant Terms," note to Watk. Convey. 45 *et seq.*, by Messrs. Morley and Coote.

The personal representative cannot refuse a term of years belonging to the estate, although it be worthless, and at the same time retain his office; for renunciation must be *in toto*, or not at all. Billingham v. Spearman, 1 Salk. (Eng.) 297; Ackland v. Pring, 2 M. & Gr. (Eng.) 937. See *ante*.

As to liability for rent and performance of covenants in such case, see *post*, § XV. See also Wms. Exrs. pt. iv. bk. ii. ch. i, § 11.

3. Wms. Exrs. (7th Eng. ed.) 697, 1658.

Thus, if a lease should run to one for life, remainder to his executors for years, such remainder will be assets in the hands of the executor, though it were never in the testator. Went. Off. Ex. (14th ed.) 189. Compare Gravenor v. Parker, Anders. 19; s. c., Lloyd v. Wilkinson, Moore (Eng.), 480.

It is well settled that contingent and executory estates and possibilities in chattels real, accompanied by an interest, are transmissible to the personal representa-

poreal hereditaments, such as leases for years of commons, tithes, fairs, markets, profits of leets, corodies for years, and the like, are assets in the hands of the executor or administrator.¹ The good will of an established business, and the leasehold interest, go often together as valuable assets;² so, also, the good will of a renewal of the lease should, if valuable, be included.³ If the personal representative takes possession, and continues under the terms of the lease, the profits of the land are first applicable to the payment of the rent, and only what remains can constitute assets of the estate.⁴ Estates *pur autre vie*, while in their nature freehold estates, since the passage of Statute 29, Car. II. c. 3, sect. 12, when not devised, and when there is no special occupant, become assets in the hands of the executor or administrator of the grantee.⁵

tive of a person dying before the contingency upon which they depend takes effect. Thus, if a lease for years be bequeathed to A. for life, and after his death to B. for the residue of the term, B.'s interest is transmissible to his representatives in the event of his death. Manning's Case, 8 Co. 95; Lampet's Case, 10 Co. 46. See also Fearn, 554; 2 Saund. 388 n., note (9) to Purefoy v. Rogers; Dunn v. Sargent, 101 Mass. 336, 338; Whitney v. Whitney, 14 Mass. 88; Leverett v. Armstrong, 15 Mass. 26. See also *b*, as to contingent and executory interests in personalty.

"If a man make a lease for life to one, the remainder to his executors for twenty-one years, the term of years shall vest in him; for even as ancestor and heir or *correlativa* as to inheritance (as if an estate for life be made to A., the remainder to B. in tail, the remainder to the right heirs of A., the fee vested in A., as it has been limited to him and his heirs), even so are the testators and executors *correlativa* as to any chattel; and therefore, if a lease for life be made to the testator, the remainder to his executors for years, the chattel shall vest in the lessee himself, as well as if it had been limited to him and his executors." Co. Litt. 54 *b*.

But it has been laid down, that, if the remainder be limited to a man's executors and administrators, then his administrator cannot take as assignee. Sparke v. Sparke, Owen (Eng.), 125; Cro. Eliz. 840, 841.

1. Went. Off. Ex. (14th ed.) 131; Godolph. pt. 2, c. 13, sect. 3.

2. Waley's App. 8 W. & S. (Pa.) 244.

3. Green v. Green, 2 Redf. (N. Y.) 408.

4. Mickle v. Miles, 1 Grant (Pa.), 320.

But under the New York statutes it has been held, that where one dies holding leases upon which arrears of rent are due, and there were also certain sums due him for storage of goods on the leased prem-

ises, the assets are to be applied among the creditors without any preference in favor of the lessor. Harris v. Meyer, 3 Redf. (N. Y.) 450.

5. Wms. Exrs. (7th Eng. ed.) 681-686.

Stat. 14 Geo. II. c. 20, § 9, provides that so much of an estate *pur autre vie* as has not been devised shall be distributed in the same manner as the personal estate.

By 1 Vict. c. 26, § 3, estates *pur autre vie* may be disposed of by will, executed as required by that act, whether there shall, or shall not, be any special occupant, and of whatever tenure they shall be, and whether the same shall be a corporeal or an incorporeal hereditament. See Wms. Exrs. (7th Eng. ed.) 686, 1673-1674.

In Indiana a lease of lands for the lessor's life is a chattel, which, on the death of the lessee, goes to his administrator, who alone can sue for possession. Cunningham v. Baxley, 96 Ind. 367.

Land devised for Payment of Debts.—

At common law, where a man devises land to his executors for the payment of debts, or until his debts are paid, or till a particular sum shall be raised out of the rents and profits, the executors take thereby only a chattel interest,—i.e., an estate for so many years as are necessary to raise the sum required; and the interest determines when the rents or profits would have raised the sum, although the executors may have misapplied them. Cordall's Case, Cro. Eliz. (Eng.) 316; Corbet's Case, 4 Co. 81 b; Manning's Case, 4 Co. 96 a; Co. Litt. 42 a; Wms. Exrs. *640; Ackland v. Lutley, 9 Ad. & El. (Eng.) 879; Carter v. Barnadiston, 1 P. Wms. (Eng.) 509, 519.

By Stat. 1 Vict. c. 26, sect. 30, such devise now passes the fee or other whole estate of the testator, unless a definite term of years, or an estate of freehold, shall thereby be given to him expressly or by implication. Wms. Exrs. (7th Eng. ed.) 670. See subd. 5.

Right of Husband's Executor or Administrator to Wife's Chattels Real, or vice versa.—See HUSBAND AND WIFE.

d. Rights in Action.—(1) *What Actions survive.*—*Actions Ex Contractu.*—*Contracts for Personal Service.*—*Joint Actions.*—*Actions assigned by Deceased.*—*Bankrupt's Choses in Action.*—With respect to such personal actions as are founded upon any obligation, contract, debt, covenant, or other duty, the general rule has been established, from the earliest times, that any right of action upon which the decedent might have sued in his lifetime survives to the personal representative.¹ The latter's right is exclusive, and cannot be transferred to another by any words introduced into the body of the obligation. Thus, the executor or administrator may maintain an action to recover money payable to the decedent without naming his executor or administrator, or payable to the decedent or *his assigns*, or to *his heirs* or executors, without averring that the money was not paid to the heirs.² But if the contract be founded upon personal considerations, as in the case of principal and agent, or master and servant, in the absence of express stipulation, the death of either party terminates the relation.³ No action can be maintained by the personal representative upon an express or implied promise to the deceased, where the damages consist entirely in the personal suffering of the latter, without any injury to his personal estate.⁴ Choses in action of

1. Wms. Exrs. (7th Eng. ed.) 786; 1 Saund. (Eng.) 216 a, note (1) to Wheatley v. Lane.

The right of executors to sue was extended to administrators by Stat. 31 Edw. III. sect. 1, c. 11. See also Holbrook v. White, 13 Wend. (N. Y.) 591; Tobey v. Manufacturers' Nat. Bank, 9 R. I. 236; Allen v. Anderson, 5 Hare (Eng.), 163; Carr v. Roberts, 5 B. & Ad. (Eng.) 78; Owen v. State, 25 Ind. 107; Cust v. Goring, 18 Beav. (Eng.) 383; Went. Off. Ex. (14th ed.) 159; Brannock v. Stocker, 76 Ind. 573.

Actions of account were given to executors by Statute of Westm. 2 (1 Edw. I. c. 5), to executors of executors by Stat. 25 Edw. III. c. 5, and to administrators by Stat. 31 Edw. III. c. 11. At common law no such action lay for the representative on the ground that the account rested in the privacy and knowledge of testator only. Co. Litt. 89 b.

Where property of the estate has been taken away and sold, the executor may maintain an action against the wrong-doer for money had and received, to recover its value. 1 Saund. (Eng.) 217, note (1); 1 Chitty, Pl. (16th Am. ed.) 77; and cases in note (g).

The executor of the assignee of a bail-bond may bring an action upon it, for it is an invested interest which goes to the executor. Com. Dig. Administration, B. 13; Nott v. Stephens, Fortesc. (Eng.) 367.

2. Wms. Exrs. (7th Eng. ed.) 787, 789, 884; Com. Dig. Admin. B. 13; Pease v. Mead, Hob. (Eng.) 7; Went. Off. Ex. (14th ed.) 215; Iremonger v. Newsam, Latch, 261. See also Barford v. Stuckey, 1 Bing. (Eng.) 225; Devon v. Pawlett, 11 Vin. Abr. 133, pl. 27; Carr v. Roberts, 5 B. & Ad. (Eng.) 78.

But the personal representative is only the assignee in law; hence, where one enters into an obligation, conditioned to pay a sum specified to such person as the testator shall appoint by his last will, and the testator makes no appointment, his executors cannot maintain an action for the specified sum, for here the assignee must be an assignee in deed. Wms. Exrs. (7th Eng. ed.) 790.

The legal representative of an intestate estate is the only party who can recover money due on a policy of insurance upon the life of the intestate. Lee v. Chase, 58 Me. 432.

As a general rule, suits on behalf of the estate should not be brought by the representative in his individual name. Tappan v. Tappan, 30 N. H. 50; Austin v. Munro, 47 N. Y. 360; Ferrin v. Myrick, 41 N. Y. 315; Bucklin v. Chapin, 1 Lans. (N. Y.) 443. See *post*, § XVI.

3. Farrow v. Wilson, L. R. 4 C. P. 745, 746.

4. Wms. Exrs. (7th Eng. ed.) 801.

"Executors and administrators are the

a corporation sole, on the death of the occupant, pass to his executors, and not to his successors.¹ The executor of a bankrupt is not entitled to his *choses in action*, as they are vested in his assignees; nor can he take proceedings in bankruptcy for a debt due the testator.² The interest which the decedent had in a *chose in action* jointly with another survives, on his death, to the co-tenant; and no interest therein is transmitted to the personal representative.³ *Choses in action* assigned by the deceased in his lifetime

representatives of the personal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." Lord Ellenborough in *Chamberlain v. Williamson*, 2 Cr. M. & R. (Eng.) 507.

Thus, an action for breach of promise of marriage does not survive the plaintiff's death, unless, perhaps, where some special damage to property, such as would of itself sustain an action, is alleged. *Chamberlain v. Williamson*, 2 Cr. M. & R. (Eng.) 507; *Lattimore v. Simons*, 13 Ser. & R. (Pa.) 183; *Stebbins v. Palmer*, 1 Pick. (Mass.) 171; *Smith v. Sherman*, 4 Cush. (Mass.) 408, 412, 413; *Colt, J.*, in *Kelly v. Riley*, 106 Mass. 341; *Harrison v. Moseley*, 31 Tex. 608; *Gibbs v. Belcher*, 30 Tex. 79; *Wade v. Kalbfleisch*, 16 Abb. Pr. (N. Y.) N. S. 104. *Contra*, *Shuler v. Millsaps*, 71 N. Car. 297.

Generally speaking, no action can be maintained by the personal representative to recover damages for a personal injury caused by a breach of the implied promise by a person employed by the decedent to show proper skill and attention, such actions in substance being founded in tort. Thus, no action survives against physicians for malpractice, or against an attorney through whose unskillful management his client was incarcerated. *Wms. Exrs.* (7th Eng. ed.) 802; 2 M. & Sel. (Eng.) 415, 416; *Knights v. Quarles*, 4 Moore (Eng.), 532.

In the absence of statutory provision, actions for malpractice do not survive against the physician's executors. *Vittum v. Gilman*, 48 N. H. 416.

On the other hand, if the personal representative can show that the damage caused by the breach of the express or implied promise, has accrued to the *personal estate*, as in the case of an attorney failing to investigate a title, or record a mortgage, he may maintain the action. *Knights v. Quarles*, 4 Moore (Eng.), 532. See *Miller v. Wilson*, 24 Pa. St. 114, 122; *Alton v. Midland R. Co.*, 19 C. B. N. S. (Eng.) 242.

As to liability of representative upon purely personal contracts of decedent, see *post*, § XV.

As to statutory changes, see *Actions Ex Delicto*.

1. *Fulwood's Case*, 4 Co. 65 a.

Hence *held*, that a bond given under the statute of distributions to the ordinary, passed on his death to his executor, and not to his successor. *Howley v. Knight*, 14 Q. B. 240.

But in the United States, administration bonds running to the judge of probate pass to his successor in office. See § XI.

In England, exceptions to the general rule are allowed by special custom. 2 Bl. Com. 432; *Byrd v. Wilford*, Cro. Eliz. 464, 682. See also *Atkins v. Gardner*, Cro. Jac. 159.

2. *Wms. Exrs.* (7th Eng. ed.) 844; *Ex parte Goodwin*, 1 Atk. (Eng.) 100. See *ante*.

3. *Southcote v. Hoare*, 3 Taunt. (Eng.) 87.

Where one of two joint obligees or covenantees dies, the action must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately. By the law merchant, an exception has been established in favor of merchants, traders, and all persons engaged in joint undertakings in the nature of trade; and in these cases, although the *right* of the deceased partner devolves on his personal representative, the *remedy* survives to the copartner, who alone can enforce the right by action, and will be liable on recovery to account to the executor or administrator for the share of the deceased. *Wms. Exrs.* (7th Eng. ed.) 650, 843, 1865; *Martin v. Crump*, 2 Salk. (Eng.) 444; 1 Ld. Raym. 340; 2 Saund. 117, note to *Coryton v. Litheby*. See *Lippincott v. Stokes*, 6 N. J. Eq. 122; *Thompson v. Brown*, 4 John. Ch. (N. Y.) 619; *Ely v. Horine*, 5 Dana (Ky.), 398; *Waring v. Waring*, 1 Redf. (N. Y.) Sur. 205.

If the interest of the deceased in the contract or covenant was really several, it makes no difference that the language be joint; and if the interest of the covenantees be joint, the rule of survivorship will prevail, although the covenant be in terms joint and several. *Withers v. Birchham*, 3 B. & C. (Eng.) 254; 1 Saund. (Eng.) 154, note to *Eccleston v. Clipsham*; *Lane v. Drinkwater*, 1 Cr. M. & R. (Eng.) 599.

If the legal interest in the performance

vest, at law, in the executor or administrator; and he only is entitled to bring suit.¹ An action will lie for an executor or administrator upon a promise made to the deceased for the exclusive benefit of a third party.²

Covenants Real.—The right to sue upon covenants real as a covenant of warranty, or an interest in a covenant to levy a fine, in many instances, descends to the heir of the covenantee, or goes to his assignee to the exclusion of the personal representative;³ but if both the *breach* and the *ultimate* and *substantial* damage have occurred in the lifetime of the ancestor, the personal representative only can sue upon the covenant.⁴ If the contract is purely collateral, as a covenant not to fell timber-trees excepted

of the contract be joint, although the beneficial interest belonged exclusively to the decedent, the right of action passes to the survivor, and the executor or administrator can neither be made a party, nor sue separately. *Anderson v. Martindale*, 1 East (Eng.), 497. See *Barford v. Stuckey*, 5 Moore (Eng.), 23; 1 Chitty, Pl. (16th Am. ed.) 21, and notes (c¹) c².

"The rule is the same with respect to remedies in form *ex delicto*, as those in form *ex contractu*; therefore, if one or more of several parties jointly interested in property at the time an injury was committed, is clear, the action must be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately." Wms. Exrs. (7th Eng. ed.) 1867.

1. *Brant v. Heatig*, 2 B. Moore (Eng.), 186, 187.

2. Wms. Exrs. (7th Eng. ed.) 809; *Bofield v. Collard*, Sty. (Eng.) 6; *Aleyn*, 1; *Hall v. Walbridge*, 2 Aik. (Vt.) 215, 219.

An executor may maintain an action on notes made to the testates, and secured by mortgage, though specifically bequeathed by the testator. *Cryst v. Cryst*, 1 Smith (Ind.), 370.

3. 1 Chitty, Pl. (16th Am. ed.) 22, and note (l); 2 Sugd. V. & P. (8th Am. ed.) 577, note (g); *Winter v. D'Evereux*, 3 P. Wms. 189, note (B); Touchst. 175.

A covenant which runs with the land will go to the heir, not only without naming him, but where it is made with the covenantee and *his executors*. *Lougher v. Williams*, 2 Lev. (Eng.) 92. See also *Vivian v. Campion*, 1 Salk. (Eng.) 141; *Holt*, 178; 2 Ld. Raym. (Eng.) 1125.

A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. *Spencer's Case*, 1 Smith's L. Cas. (8th Am. ed.) 145, p. 150. For full discussion of nature of such covenants, see this case and notes.

4. Schoul. Exrs. & Admsrs. § 285; Wms.

Exrs. (7th Eng. ed.) 801; *Grist v. Hodges*, 3 Dev. L. (N. C.) 198; *Kingdom v. Nottle*, 1 M. & S. (Eng.) 355; *King v. Jones*, 5 Taunt. (Eng.) 418; 1 Marsh. (Eng.) 107, affirmed in 4 M. & Sel. (Eng.) 188.

In the last case it was *held*, that though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff. See also *Orme v. Broughton*, 10 Bing. (Eng.) 533; s. c., 4 M. & Scott (Eng.), 417.

Under the older authorities, prior to these decisions, it was *held*, that if such a covenant *had been broken in the lifetime* of the testator or intestate, the right of action vested in the executor or administrator, whether the substantial damage occurred before or after the death. Wms. Exrs. (7th Eng. ed.) 803; Comyns, Dig. tit. "Covenant," B. 1; Went. Off. Ex. (14th ed.) 160. See 1 Chitty, Pl. (16th Am. ed.) 22, note (l); 2 Sugd. V. & P. (8th Am. ed.) 577, note (g).

It is a grave question, whether the position taken by the older authorities is not the more generally received in the United States. In *Watson v. Blaine*, 12 S. & R. (Pa.) 131, it was *held* that an action for damages for the non-performance of a covenant to convey land is to be brought by the personal representative and not by the heir of the covenantee. Many authorities also sustain the position that a covenant against incumbrances is broken immediately by any subsisting incumbrance, and that the grantor or his personal representative may sue upon it. 4 Kent, *472; *Hamilton v. Wilson*, 4 Johns. (N. Y.) 72; *Chapman v. Holmes*, 5 Halst. (N. J.) 20; *Mitchell v. Warner*, 5 Conn. 497; *Garfield v. Williams*, 2 Vt. 327; *Wild, J.*, in *Clark v. Swift*, 3 Met. (Mass.) 390. See also *Burnham v. Lasselle*, 35 Ind. 425; 2 Sugd. V. & P. (8th Am. ed.) 577, note (g); *Logan v. Moulder*, 1 Pike (Ark.), 313.

A right of entry, after condition broken, in the grantor's heirs does not exclude a

out of a demise, the right of action passes to the executor or administrator, and constitutes personal assets.¹

Survival of Actions Ex Delicto.—At common law all actions founded upon any injury to the person or property of another for which damages only could be recovered in satisfaction, where the declaration imputes a tort to the person or property of another, and the plea must have been “not guilty,” died with the person to whom or by whom the wrong was done;² but by the equitable construction placed on the Statute 4 Edw. III. c. 7, an executor or administrator was given the same actions for any injury done to the *personal estate* of the decedent in his lifetime, *whereby it has become less beneficial to the executor or administrator*, as the deceased himself might have had whatever the form of the action may be.³ Hence all actions *ex delicto* lie for an executor or administrator, provided he can show that the damage accrued to the personal estate.⁴ Actions founded upon a purely personal injury, as actions for assault and battery, slander, libel, deceit, malicious

right of action in the grantor's executor or administrator. *Weinreich v. Weinreich*, 18 Mo. App. 364.

1. *Raymond v. Fitch*, 2 Cr. M. & R. (Eng.) 588; 5 Tyrwh. (Eng.) 985; *Knights v. Quarles*, 2 Brod. & B. (Eng.) 102; 4 Moore (Eng.), 532; *Orme v. Fitch*, 2 Cr. M. & R. (Eng.) 588; *Ricketts v. Weaver*, 12 M. & W. (Eng.) 748.

The personal representative's right of action upon such contracts is not confined to cases in which the breach can be stated as a damage to the personal estate, as Lord Ellenborough's language in *Chamberlain v. Williamson*, 2 M. & Sel. (Eng.) 408, would seem to imply; but unless it be a covenant in which the *heir alone* can sue (as in *Kingdom v. Nottle*, 1 M. & Sel. 355, and *King v. Jones*, 2 Lev. (Eng.) 26) for a breach of the covenant in the lifetime of the testator, the executor can sue, except it be a mere personal contract, in which the rule applies *actis personalis moritur cum persona*. *Parke, B., Ricketts v. Weaver*, 12 M. & W. (Eng.) 718.

An executor of a tenant for life may sue for a breach incurred in the testator's lifetime, by his lessee, of a covenant to repair, without averring any damage to the personal estate. *Ricketts v. Weaver*, 12 M. & W. (Eng.) 718.

Wherever the reversion is for years, the personal representative is the only party capable of suing on a covenant made with the lessor, whether it run with the land, or be in gross. An executor of a tenant for years is expressly within the statute of 32 Hen. VIII. c. 34, and may maintain covenant against the assignee of the reversion. *Wms. Exrs.* (7th Eng. ed.) 809; *Roscoe on Actions*, 442; *Schlee v. Wiseman*, 79 Ind. 389; *MacKay v. MacKieth*, 2 Chitt.

Rep. 461. See *Taylor, Landl. & Ten.* § 459.

Few Lease.—In those States in which pews are treated as personal property, the personal representative may before distribution occupy it and let it, and may maintain an action against strangers who interfere with its use, or with his obtaining the rent. *Perrin v. Granger*, 33 Vt. 101; 1 Schoul. Pers. Prop. 158.

2. *Wms. Exrs.* (7th Eng. ed.) 790.

Hence, formerly doubted whether *assumpsit* would lie either for or against an executor because, in form, the action was trespass on the case, and therefore supposed a wrong, and in substance was to recover damages only in satisfaction of the wrong. *Pinchon's Case*, 9 Co. 86 b, 89 a; 1 Saund. 216 a, note (1).

3. *Emerson v. Emerson*, Ventr. (Eng.) 187; *Le Mason v. Dixon*, W. Jones (Eng.), 174; s. c., *Popham* (Eng.), 191; *Berwick v. Andrews*, 2 Ld. Raym. (Eng.) 974; *Wilson v. Knubley*, 7 East (Eng.), 134; 1 Saund. 217, note (1); *Lockeer v. Paterson*, 1 Car. & K. (Eng.) 271. See also *Roberts's Pa. Dig.* 248; *Report of Judges*, 3 Binn. (Pa.) 610; *Morton, J., in Wilbur v. Gilmore*, 21 Pick. (Mass.) 252.

4. *Wms. Exrs.* (7th Eng. ed.) 791.

Hence, an executor or administrator may now have trespass or trover. *Russell's Case*, 5 Co. 27 a; *Rutland v. Rutland*, Cro. Eliz. (Eng.) 377; *Enbanks v. Dobbs*, 4 Ark. 173; *Nettles v. D'Oyley*, 2 Brev. 27; *Coleman v. Woodworth*, 28 Cal. 567; *Kennerly v. Wilson*, 1 Md. 102; *Haight v. Green*, 19 Cal. 113; *Towle v. Lovett*, 6 Mass. 394; *Mannell v. Briggs*, 17 Vt. 176; *Jenney v. Jenney*, 14 Mass. 232; *Sewall v. Patch*, 132 Mass. 326; *Willard v. Hammond*, 1 Fost. N. H.) 382; *Charlt. (Ga.)* 261.

prosecution, a false imprisonment, are not within the equity of the statute.¹ Actions founded on a wrong to the freehold do not survive; and hence an executor or administrator cannot maintain trespass *quare clausum fregit*, nor an action for waste committed in the lifetime of the decedent, nor sue for diverting water-courses,

In suing in trover to recover property of the testator wrongfully converted by a stranger, he need not describe himself as executor. *Trask v. Donoghue*, 2 Aiken (Vt.), 370. See *post*.

Under the statute of Michigan, an executor may sue in trover where the conversion occurred in the lifetime of the testator. *Rogers v. Windoes*, 48 Mich. 628.

In Indiana, an administrator can sue for conversion of the intestate's property occurring since the death, whether before or after the granting of administration. *Gerard v. Jones*, 78 Ind. 378.

If goods of the decedent, taken away during his lifetime, continue in *specie* in the hands of the wrong-doer after his death, replevin and detinue will lie for the representative to recover back the specific things. *Jenney v. Jenney*, 14 Mass. 232; *Reist v. Heilbrenner*, 11 Ser. & R. (Pa.) 131; *Elrod v. Alexander*, 4 Heisk. (Tenn.) 342; 1 Saund. (Eng.) 217 n. (1); *Fisher v. Beall*, 1 Harr. & J. (Md.) 31; *Pitts v. Hale*, 3 Mass. 321.

But when judgment upon a return in an action of replevin is rendered against an executor or administrator, under the Massachusetts statute the goods returned to him shall not be considered as assets in his hands; and if they have been included in the inventory, it shall be sufficient discharge for the executor or administrator to show that they have been returned in pursuance of such judgment. Gen. Stats. Mass. c. 128, § 4.

If the goods have been sold by the wrong-doer, an action for money had and received will lie for the representative to recover their value. *Potter v. Van Vranken*, 36 N. Y. 619.

The personal representative may also maintain an action against the sheriff for a false return in the lifetime of the testator, or for default of his deputy in not returning an execution. *Williams v. Cary*, 1 Salk. (Eng.) 12; *Paine v. Ulmer*, 7 Mass. 317.

Such defaults occasion injury to the estate of the testator rather than to his person. 3 Bac. Abr. 98, Exrs. P. 2.

He may also have an action against the sheriff for suffering a person in his custody in the lifetime of the decedent to escape. *Berwick v. Andrews*, 2 Ld. Raym. (Eng.) 973; s. c., 1 Salk. (Eng.) 314. See *Williams v. Mostyn*, 4 M. & W. (Eng.) 145.

Or debt on a judgment against an executor suggesting a *devastavit*. *Berwick v. Andrews*, 1 Salk. (Eng.) 314.

Or an action for removing goods taken in execution before the decedent (the landlord) was paid a year's rent. *Palgrave v. Wyndham*, 1 Stra. (Eng.) 212.

On the same principle the personal representative of a tennor may maintain ejectment, where the deceased has a lease for years, or from year to year, whether the ouster was before or after his death. *Slade's Case*, 4 Co. 95 a; *Doe v. Porter*, 3 T. R. (Eng.) 13; *Russell v. Pratt*, cited 1 And. (Eng.) 243; *Peytoe's Case*, 9 Co. 78 b.

Exempt Property.—Where goods of the deceased exempt from execution have been taken, and are wrongfully withheld, the executor or administrator is the proper party to sue for them for the benefit of the widow and children. *Staggs v. Ferguson*, 4 Heisk. (Tenn.) 690.

1. Wms. Exrs. (7th Eng. ed.) 793; *Miller v. Umberhower*, 10 S. & R. (Pa.) 31; *McClure v. Miller*, 3 Hawks (N. C.), 133; *Deming v. Taylor*, 1 Day (Conn.), 285; *Nettleton v. Dinehart*, 5 Cush. (Mass.) 543; *Waters v. Mettleton*, 5 Cush. (Mass.) 544; *Long v. Hitchcock*, 3 Ohio, 274; *Brawner v. Sterdevant*, 9 Ga. 69; *Kimbrough v. Mitchell*, 1 Head (Tenn.), 539.

But the rule has been materially altered in many of the United States by statute. Mass. Gen. Stats. c. 128, § 1, provides that all actions which would have survived, if commenced by or against the original party in his lifetime, may be commenced and prosecuted by and against his executors and administrators. It is further provided by statute (Gen. Stats. c. 127, § 1), that, in addition to the actions which survive at common law, actions of replevin, of tort for assault, battery, imprisonment, or other damage to the person, for goods taken and carried away or converted by the defendant to his own use, or for damage done to real or personal estate, and actions against sheriffs for malfeasance or nonfeasance of themselves or their deputies, shall also survive. "The words 'damage to the person' in this statute do not, indeed, extend to torts not directly affecting the person, but only the feelings or reputation. *Smith v. Sherman*, 4 Cush. (Mass.) 408; *Nettleton v. Dinehart*, 5 Cush. (Mass.) 543.

But they do include every action the substantial cause of which is a bodily injury, or, in the words of Chief Justice Shaw, in 4 Cush. (Mass.) 413, "damage of a physical

obstructing lights, or the like.¹ But under the statute 3 & 4 Wm. IV. c. 42, sect. 2, executors may, within a year after the decedent's death, bring an action for any injury to his real estate committed within six months before his death;² and similar provisions exist in many parts of the United States.³

character, whether the connection between the cause and effect is so close as to support an action of trespass, or so indirect as to require an action on the case at common law." *Hollenbeck v. Berkshire R. R. Co.*, 9 Cush. (Mass.) 478; *Demond v. Boston*, 7 Gray (Mass.), 544; *Gray, J.*, in *Norton v. Sewall*, 106 Mass. 143, 145. See *Conly v. Conly*, 121 Mass. 550.

This act does not apply to actions for libel, malicious prosecution, or deceit. *Waters v. Mettleton*, 5 Cush. (Mass.) 544; *Nettleton v. Dinehart*, 5 Cush. (Mass.) 543; *Cutting v. Tower*, 14 Gray (Mass.), 183; *Read v. Hatch*, 19 Pick. (Mass.) 47.

As a general rule, actions of deceit in the sale or exchange of property do not survive. *Coker v. Crozier*, 5 Ala. 369; *Henshaw v. Miller*, 17 How. (U. S.) 212; *Grim v. Carr*, 51 Pa. St. 533; *Newsom v. Jackson*, 29 Ga. 61.

But in New York, by statute, and in North Carolina, actions for deceit in the sale of real or personal estate survive against the personal representative of the guilty party. *Haight v. Hoyt*, 19 N. Y. 464; *Arnold v. Lanier*, 4 Law Rep. (N. C.) 529.

Under the Maine statute, an action for slander survives to the executor. *Nutting v. Goodridge*, 46 Me. 82.

In Vermont and Kentucky it has been held that an action for malicious arrest and imprisonment survives the death of the party injured. *Whitcomb v. Cook*, 38 Vt. 477. See *Huggins v. Toler*, 1 Bush (Ky.), 192.

In Maine, Massachusetts, North Carolina, and Missouri, actions for personal injuries sustained by defective highways, or by neglect in the carriage of passengers on railroads, survive the death of the person injured. *Hooper v. Gorham*, 45 Me. 209; *Demond v. Boston*, 7 Gray (Mass.), 544; *Peeble v. N. C. R. Co.*, 63 N. C. 238; *James v. Christy*, 18 Mo. 162.

Actions for seduction or criminal conversation do not survive. *George v. Van Horn*, 9 Barb. (N. Y.) 523; *Miller v. Umbelower*, 10 Ser. & R. (Pa.) 31; *Brawner v. Sterdevant*, 9 Ga. 69; *McClure v. Miller*, 4 Hawks. (N. C.) 133; *Clarke v. McClelland*, 9 Pa. St. 128.

In Iowa "no cause of action *ex delicto* dies with either or both the parties, but the prosecution thereof may be commenced or continued by or against their personal representatives." Laws of Iowa, Rev. of

1860, c. 138, § 3467. Under this act an action for seduction is held to survive. *Shafer v. Grimes*, 23 Iowa, 550.

Under Miss. Code 1871, §§ 1184, 2162, 2170, if a person liable to an action dies before it is barred, the suit may be brought within one year and six months after the date of letters of administration. This applies to an action for assault and battery committed by the decedent. *Adams v. Williams*, 57 Miss. 38.

1. Wms. Exrs. (7th Eng. ed.) 793; 1 Saund. 217 a, n. 1; Went. Off. Ex. (14th ed.) 163; *Williams v. Breedon*, 1 Bos. & Pul. (Eng.) 329; *Kennerly v. Wilson*, 1 Md. 102.

The executor or administrator cannot maintain an action on the case for overflowing the lands of the decedent during the latter's lifetime. *McLaughlin v. Dorsey*, 1 Har. & M. (Md.) 224; *Chalk v. McAlily*, 10 Rich. (S. C.) 92. See also *Morse v. Clayton*, 13 Sm. & M. (Miss.) 373; *Upper Appomattox Co. v. Hardings*, 11 Gratt. (Va.) 1.

This position leads to curious and refined distinctions, as to when trees, corn, grass, etc., when severed from the freehold, will be deemed personal estate, so as to enable the representative to maintain trespass *de bonis asportatis* for their removal.

By the old law an action lay for destroying or taking away growing corn, but not grass or growing wood, because, though the testator should have died before severance, the corn would have gone to the executor, but the grass and wood to the heir. *Emerson v. Emerson*, 3 Salk. (Eng.) 160; Went. Off. Ex. (14th ed.) 166; *ante* (1).

But if the trespasser had felled the trees, and carried them away as timber, or had mown the grass, and carried it away as hay, the executor might maintain trespass or trover. *Williams v. Breedon*, 1 Bos. & Pul. (Eng.) 330; Went. Off. Ex. (14th ed.) 167.

2. Wms. Exrs. (7th Eng. ed.) 795, 796.

3. Mass. Pub. Sts. c. 165, § 1, *ante*. An action of tort for damages caused by one's milldam may thus survive. *Brown v. Dean*, 123 Mass. 552. But not an action at law for fraudulent representation, inducing one to part with real estate. *Leggate v. Moulton*, 115 Mass. 552. See, as to rule in equity, *Cheney v. Gleason*, 125 Mass. 166.

A similar provision exists in North Carolina. *Howcott v. Warren*, 7 Ired. L. (N. C.) 20.

(2) *Actions for Damages in causing Death.*—At common law the death of a human being affords no ground for an action for damages;¹ but in England, and most of the United States, statutes exist giving a right of action whenever the death of a person shall be caused by a wrongful act, neglect, or default, such as would, if death had not ensued, have entitled the party to maintain an action, and recover damages.² In some States the remedy is by indictment, and the proceeding in form *quasi* criminal; in others the action, though civil in form, should be brought in the name of the State for the benefit of the person entitled to damages; in others the statutes authorize a civil action for damages to be brought by the personal representative for the benefit of the persons entitled, or sometimes confer the right of action directly upon the beneficiaries.³ The right of the representative to sue under such statutes depends upon the common-law right of the injured party to sue if he were living.⁴ Although no legal claim to support need be shown,⁵ it has been held, that, if there is no evidence of actual pecuniary damage, the action will fail.⁶

Such damages, when recovered, belong properly to the personal estate. *Schoul. Exrs. & Admsrs.* § 284; *Wms. Exrs.* (7th Eng. ed.) 796. See *a, n, b, n, c, n.*

1. *Osborn v. Gillett*, L. R. & Ex. (Eng.) 88; *Wyatt v. Williams*, 43 N. H. 102, 105, 106; *State v. Manchester & Lawrence R. Co.*, 52 N. H. 528, 548; *Nickerson v. Hariman*, 38 Me. 279; *State v. R. Co.*, 58 Me. 178; *Richardson v. N. Y. Cent. R. Co.*, 98 Mass. 89; *Hyatt v. Adams*, 16 Mich. 180; *Worley v. Cin. Ham. & Dayt. R. Co.*, 1 Handy (Ohio), 481; *Conn. Mut. L. Ins. Co. v. N. Y. & N. H. R. Co.*, 25 Conn. 265; *Eden v. Lexington & Frankfort R. Co.*, 14 B. Mon. (Ky.) 204; *Hubgh v. N. O. & C. R. Co.*, 6 La. An. 496.

2. Stat. 9 & 10 Vict. c. 93, cited; *Wms. Exrs.* (7th Eng. ed.) 796. See *Mass. Gen. Stats.* c. 166, § 34; *Richardson v. N. Y. Cent. R. Co.*, 98 Mass. 85; *N. Y. Acts of 1847*, c. 450; of 1869, c. 256; *Conn. Gen. Stats.* tit. 7, § 544.

In Pennsylvania, the persons entitled to recover damages for any injury causing death shall be the husband, widow, children or parent of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without any liability to creditors. *Pamph. L.* (1855) 309. See *Pa. R. Co. v. Henderson*, 51 Pa. 315.

3. *State v. Manchester & Lawrence R. Co.*, 52 N. H. 528, 547; *State v. Grand Trunk R. Co.*, 58 Me. 176. See *Corey v. Bath*, 35 N. H. 530; *Commonwealth v. Boston & Worcester R. Co.*, 11 Cush. (Mass.) 512; *Pa. R. Co. v. Henderson*, 51 Pa. St. 315; *Conn. Gen. Stats.* tit. 7, § 544;

Whitford v. Panama R. Co., 23 N. Y. 465; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

4. *Quin v. Moore*, 15 N. Y. 432.

The condition that the action could have been maintained by the deceased if death had not ensued, has reference, not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of. *Pym v. Great Nor. R. Co.*, 2 B. & S. (Eng.) 759; s. c., 4 B. & S. (Eng.) 406; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Yertmore v. Wiswall*, 16 How. Pr. (N. Y.) 8, 12.

Hence if the death was caused by the deceased's own negligence, or if there was contributory negligence, the personal representative cannot maintain the action. *Senior v. Ward*, 1 El. & El. (Eng.) 385; *Waite v. Nor. Eastern R. Co.*, El. Bl. & El. 719; *Wetherby v. Regents' Canal Co.*, 12 C. B. N. S. 2; *Richardson v. N. Y. Cent. R. Co.*, 98 Mass. 85, 90; *Penna. R. Co. v. Henderson*, 51 Pa. St. 315.

In some States it is held that to sustain the action it must appear by pleading and proof that there is a person in being who is entitled to the money when recovered. *Woodward v. Chicago & Nor. West. R. Co.*, 23 Wis. 400.

5. *Illinois Cent. R. Co. v. Barron*, 5 Wal. (U. S.) 90.

6. *Duckworth v. Johnson*, 4 H. & N. (Eng.) 653.

Mental suffering, loss of society or funeral expenses, cannot be considered in estimating the damages. *Dalton v. South*

Damages recovered in such actions are generally exempt from liability for the debts of the deceased, and vest immediately in the beneficiary.¹

(3) *To what Choses in Action the Personal Representative is entitled where the Action accrues after the Death of the Decedent.* — Since the property of personal chattels draws to it the possession, and since, upon the death of the decedent, the legal title to his goods and chattels vests in his personal representative, the latter, whether in actual possession of the property or not before the tort committed, may maintain trespass or trover against a wrongdoer for taking away the goods of the estate, or converting them to his own use, after the death of the testator or intestate; and in such action he may declare either in his individual or representative capacity.² In many cases actions upon contracts which

East. R. Co., 4 C. B. N. S. 296; Blake v. Midland R. Co., 18 Q. B. 93.

But if the beneficiary had a reasonable expectation of pecuniary advantage by the relation remaining alive, that fact may be taken into consideration by the jury, and damages given for the disappointment and probable pecuniary loss thereby occasioned. Franklin v. South-Eastern R. Co., 3 H. & N. (Eng.) 211; Dalton v. South-Eastern R. Co., 4 C. B. N. S. (Eng.) 296; Pym v. Great Nor. R. Co., 2 B. & S. (Eng.) 759; 4 B. & S. (Eng.) 396; Duckworth v. Johnson, 4 H. & N. (Eng.) 653. See also Bradshaw v. Lancashire & Yorkshire R. Co., L. R. 10 C. P. (Eng.) 189; Chapman v. Rothwell, El. Bl. & El. (Eng.) 168; Nickerson v. Harriman, 38 Me. 277.

1. Stat. 9 & 10 Vict. c. 93; Schoul. Exrs. & Admsrs. § 283; Pa. R. Co. v. Henderson, 51 Pa. St. 315.

In Illinois damages recovered in favor of minor children for death of mother should be paid over to the guardian of their estate. Perry v. Carmichael, 95 Ill. 519.

But in Arkansas the amount recovered by an administrator for the negligent killing of his intestate becomes a part of the personal assets of the deceased. Little Rock & Fort Smith Ry. Co. v. Townsend, 41 Ark. 382.

Extra Territorial Force of such Statutes.

— The right of action created by such statutes is wholly distinct from, and not a revivor of, the cause of action, which, if he had survived, the deceased would have had for his bodily injury, and is not a right of property passing as assets of the deceased, but a specific power to sue created by local law, and does not pass to an executor or administrator appointed in another jurisdiction. Richardson v. N. Y. Cent. R. Co., 98 Mass. 85.

Nor can an executor or administrator appointed within the jurisdiction, maintain the

action when the injury was committed in a foreign country; and it does not vary the case that the negligence was that of a corporation chartered by the State (under whose statute the right of action is conferred) for the purpose of operating the railroad in the foreign country, and that the contract for conveyance over such road was also made within the jurisdiction. Whitford v. Panama R. Co., 23 N. Y. 465. See also Needham v. Grand Trunk R. Co., 38 Vt. 294; Woodward v. Michigan Southern and Northern Ind. R. Co., 10 Ohio St. 121.

In Kansas it has been held, that an administrator appointed in another State or Territory can maintain an action in that State under the Kansas statute. Kansas Pac. R. Co. v. Cutter (Kans.), 3 Cent. L. Jour. 526 (1876). A similar decision was also made in Indiana. Jeffersonville, etc., R. Co. v. Hendricks, 41 Ind. 49.

In Connecticut it has been held, that where a person killed in Connecticut was domiciled in another State, and had no property in Connecticut, his administrator appointed in the State of the domicile was entitled as a matter of right to an ancillary administration in Connecticut or the purpose of there prosecuting the suit, and that it was enough for the probate court in granting such administration to be satisfied that there was an apparent claim, and a bona fide intention to prosecute it. Hartford, etc., R. Co. v. Andrews, 36 Conn. 213.

2. Wms. Exrs. (7th Eng. ed.) 876; 2 Saund. 47 n, note to Wilbraham v. Snow; Hollis v. Smith, 10 East (Eng.), 295; 1 Chitty, Pl. (16 Am. ed.) 171; Adams v. Cheverel, Cro. Jac. (Eng.) 113; Bollard v. Spencer, 7 T. R. (Eng.) 358; Grimstead v. Shirley, 2 Taunt. (Eng.) 117; Jenkins v. Plombe, 6 Mod. (Eng.) 181; Hudson v. Hudson, Latch, 214. See also Gage v. Johnson, 20 Me. 437; Ikelheimer v. Chapman, 32 Ala. 676; Sims v. Boynton, 32

have not matured during the lifetime of the decedent accrue to the executor or administrator. Thus if A. covenant to grant a lease to I. S. and his assigns by Christmas, and I. S. dies before that time, and before the grant of the lease, it must be made to his executors as his assigns, or they may bring covenant.¹ Likewise, rights of action which never existed in the testator or intestate may accrue to the executor or administrator by remainder, or by reason of a condition made to the deceased.² The executor or administrator may also maintain an action upon a contract made with himself in his representative character after the death of the decedent.³

What Actions commenced by the Decedent may be continued by the Personal Representative.—See § XVI. ABATEMENT, CERTIORARI, SCIRE FACIAS, WRITS OF ERROR. Am. & Eng. Enc. of Law.

Rights of Executor or Administrator to Choses in Action as respects the relation of Husband and Wife.—See HUSBAND AND WIFE.

e. Title to Real Estate.—*Interests vested in Executor or Administrator as Trustee or Donee of a Power.*—*Effect of Direction to convert.*—*Lands held by Firm of Deceased Partner.*—*Lands purchased with Trust Funds.*—*Rents.*—*Damages for Right of Way.*—*Insurance.*—*Contracts to convey.*—*Lands fraudulently conveyed.*—In the absence of express statutory provision, the personal representative, by virtue of his office, takes no interest in the real estate of the decedent;⁴ but in some instances he may be

Ala. 353; *Holbrook v. White*, 13 Wend. (N. Y.) 591; *Carlisle v. Burley*, 3 Greenl. (Me.) 250; *Valentine v. Jackson*, 9 Wend. (N. Y.) 302; *Fraser v. Swansea Canal Co.*, 1 Ad. & El. (Eng.) 354; s. c., 3 Nev. & M. (Eng.) 391; *Stewart v. Richey*, 2 Harr. (Md.) 164.

An executor or administrator may declare in trover for a conversion before the death of the testator or intestate, and add a count for a conversion after the death. *French v. Merrill*, 6 N. H. 465; *Towle v. Lovett*, 6 Mass. 394; *Kirby v. Clark*, 1 Root (Conn.), 389.

There may be trespass for wasting and destroying as well as for carrying away the goods of the decedent. *Snider v. Croy*, 2 Johns. (N. Y.) 227. Replevin may also be maintained by the representative upon the same principle. *Branch v. Branch*, 6 Fla. 314.

As to when suit to be brought in representative's own name, and when as executor or administrator, see § XVI.

1. Wms. Exrs. (7th Eng. ed.) 789, 884; Went. Off. Ex. (14th ed.) 188, 215; *Chapman v. Dalton*, Plowd. (Eng.) 286, 288.

So where one was bound to stand to the award of two arbitrators, who awarded that the party should pay to a stranger or his assigns £200 before such a day, and the

stranger died before the time appointed, it was held that the money should be paid to his administrator as assignee in law. *Anon. Leon.* (Eng.) 316.

But where the condition of an obligation was, that if the obligor pay £20 to such a person as the obligee, by his last will in writing, shall appoint it to be paid, and the obligee after making his last will, and appointing executors, dies without appointing any one to receive the sum, it shall not be paid to his executors; for the money in this case was to have been paid to an assignee in deed to be used by the obligee by his appointment, and not to an assignee in law, and the law will never seek out an assignee in law when there may be an assignee in fact. *Pease v. Head*, Hob. (Eng.) 9, 10; Co. Litt. 210 a, note (1) from Lord Nottingham's MSS.; *Goodall's Case*, 5 Co. 97 a.

2. Wms. Exrs. (7th Eng. ed.) 697, 886; Went. Off. Ex. (14th ed.) 181, 189; *ante*, b, and c.

3. Wms. Exrs. (7th Eng. ed.) 878. As to when suit to be brought in his own name, see § XVI.

4. *Hillman v. Stephens*, 16 N. Y. 278; *Bridgewater v. Brookfield*, 3 Cowen (N. Y.), 299; *Willcox v. Smith*, 26 Barb. (N. Y.) 316; *Smith v. McConnell*, 17 Ill. 135;

seized of such real property as trustee, or be *ex officio* invested

Phelps v. Funkhouser, 39 Ill. 401; *Hathaway v. Valentine*, 14 Mass. 50; *Gibson v. Farley*, 16 Mass. 280; *Palmer v. Palmer*, 13 Gray (Mass.), 328; *Brown v. Kelsey*, 2 Cush. (Mass.) 243, 251; *Almy v. Crapo*, 100 Mass. 218, 220, 221; *Compere v. Randall*, 4 Ind. 55; *Vance v. Fisher*, 10 Humph. (Penn.) 211; *McLean, J.*, in *Brush v. Ware*, 15 Peters, 111, 112.

Where the administrator is guardian of the heir, his management of the real estate is on the guardianship account. *Foteaux v. Lepige*, 6 Iowa, 123.

A debt for money loaned by an administrator under a power in a will secured by mortgage on real estate is in equity regarded as personal assets. *Dunham v. Milhous*, 70 Ala. 596.

Where one dies, having an interest in the proceeds of mortgaged land sold under proceedings in partition, such interest, being vested, is not real but personal estate, as between his heirs and executor. *Jacobus v. Jacobus*, 37 N. J. Eq. 17.

An executor, as such, has no authority to take possession of the real estate of his testator, or to receive the rents and profits thereof, in the absence of an express provision of the will authorizing him to do so. The only exception to this rule is where there is no heir or devisee of the testator present at the time of his death to take possession of such real estate. *Hendrix v. Hendrix*, 65 Ind. 329.

The personal representative cannot, without authority, dedicate land of the estate to public uses; nor can he use the assets of the estate for the erection of a house on land belonging to the estate; nor can he charge the estate with money borrowed for the purpose. *Rolfson v. Cannon*, 3 Utah, 232; *Kaine v. Hart*, 73 Mo. 316.

The fact that the decedent had agreed to make improvements, does not warrant the personal representative in so applying the assets. *Cobb v. Muzzey*, 13 Gray (Mass.), 57.

Otherwise in South Carolina, if the expenses were necessary, or improvements such as owner would have authorized. *Myers v. Myers*, 1 Bailey (S. C.), Eq. 306; *Palmer v. Miller*, 2 Hill, Ch. (S. C.) 215, 217.

Nor can he make outlay to strengthen the title. *Brackett v. Tillotson*, 4 N. H. 208.

An administrator, the land of whose intestate has been partitioned between the heir and a co-tenant, is not liable for a breach of the heir's implied warranty of the title of the land allotted to his co-tenant. *Clayton v. Boyce*, 62 Miss. 390.

Taxes assessed on the land since the

owner's death, insurance, repairs and improvements, do not belong properly to the accounts of administration. *Lucy v. Lucy*, 55 N. H. 9; *Kimball v. Sumner*, 62 Me. 305.

The administrator cannot grant an easement or right of way over the land. *Hankins v. Kimball*, 57 Ind. 42.

Nor bring ejectment, or sue for trespass, where the right originates after the decedent's death. *Wms. Exrs.* (7th Eng. ed.) 632, 792; 2 Root (Conn.), 438; *Aubuchon v. Lory*, 23 Mo. 99. See also *Drinkwater v. Drinkwater*, 4 Mass. 354.

He has no inherent authority to make leases of the real estate belonging to his decedent. *Lee v. Lee*, 74 N. C. 70; *Bank v. Dudley*, 2 Pet. (U. S. C. C.) 492; *Taylor, Landl. & Ten.* § 133; 4 Bush (Ky.), 27. Otherwise in California. *Doolan v. McCanley*, 66 Cal. 476. As to underletting, see § XIII.

His conveyance leaves the title in the heirs and devisees. *King v. Whiton*, 15 Wis. 756; *Hankins v. Kimball*, 57 Ind. 42; *Thompson v. Gaillard*, 3 Rich. 418; *Fay v. Fay*, 1 Cush. (Mass.) 93, 105.

Land sold by the representative without an order of court, and without authority from the will, may be resold to pay the debts of the decedent. *Duncan v. Gainey* (Ind.), 9 N. E. Rep. 470.

But heirs who have expressly authorized the sale will be estopped from claiming the land under a decision. *Du Bose v. Ball*, 64 Ga. 350.

The representatives of an executor who has sold the lands of his decedent, and received the proceeds,—the estate of which he was executor electing to affirm the sale,—are estopped, in an action against his estate for the proceeds, from asserting that he had no power under the will to make the sale. *McDonough v. Hanifan*, 7 Ill. App. 50.

But where, by special agreement with the executor and widow, the money paid by the purchaser at the unauthorized sale was applied on debts against the estate, such purchaser is entitled to be subrogated to all the rights of the original holders of such claims; but he is not entitled to a prior lien therefor over other debts of the same class. *Duncan v. Gainey* (Ind.), 9 N. E. Rep. 470.

The executor or administrator cannot mortgage the decedent's lands. *Black v. Dressel*, 20 Kan. 153. See *Wetherill v. Harris*, 67 Ind. 452; *Smith v. Hutchinson*, 108 Ill. 662. Nor rescind an executory contract for the purchase of land. *Cotham v. Britt*, 10 Heisk. (Tenn.) 469; *Matthews v. Dowling*, 54 Ala. 202.

In Kansas, the rule that an administrator

cannot mortgage the lands of his intestate, is enforced, although directed so to do by the probate court in order to borrow money to pay for land whereon the intestate had settled, but died before final entry, and the heirs are not stopped to plead the invalidity of the mortgage by the benefits resulting to them from the purchase of the land. *Black v. Dressell*, 20 Kan. 153.

But in most States, when ordered by the court, or authorized by the will, an executor or administrator may sell or mortgage the real estate of his decedent. *Griffin v. Johnson*, 37 Mich. 87; *Gafney v. Kenison* (N. H.), 10 Atl. Rep. 706; *Sparrow v. Kelso*, 92 Ind. 514; *Starr v. Moulton*, 97 Ill. 525; *Mut. L. Ins. Co. v. Shipman* (N. Y.), 15 N. E. Rep. 58.

When so directed by the will, he may even sell without license, and at private sale. *Gafney v. Kenison* (N. H.), 10 Atl. Rep. 706.

But an executor of a will which authorizes him to sell land, coming into court to have it construed, and giving bond to perform the orders of the court as to the land and proceeds, becomes a commissioner of the court; and no payment by him in the premises is good unless sanctioned by the order of the court. *Brandon v. Mason*, 1 Lea (Tenn.), 615.

A sale or mortgage under a license is not avoided by mere irregularities; and the truth of the facts upon which the license was granted cannot be called in question collaterally. *Griffin v. Johnson*, 37 Mich. 87.

As to what defects render such sale or mortgage void, see "Debts of Decedents," "Judicial Sales," Am. & Eng. Ency. of Law.

An administrator who sells without taking security required by statute, will be personally liable. *Sparrow v. Kelso*, 92 Ind. 514.

As to judicial sales of personalty, see § XIII. 1 (note).

Effect of Insolvency.—The insolvency of the estate merely gives personal representative, under local statutes, the right to sell the land for the payment of debts, but, until sold, does not affect the title of the heir. *Gibson v. Farley*, 16 Mass. 283; *Towle v. Swasey*, 106 Mass. 100; *Stearns v. Stearns*, 1 Pick. (Mass.) 157; *Stinson v. Stinson*, 38 Me. 593; *Kimball v. Sumner*, 62 Me. 305; *Wells, J., in Alden v. Stebbins*, 99 Mass. 616, 617; *Schwartz's Est.* 14 Pa. St. 42; *Rapp v. Matthias*, 35 Ind. 332; *Dougherty's Succession*, 32 La. An. 412; **DEBTS OF DECEDENTS.**

The administrator has no interest in such lands, but only a naked authority to sell them on license to pay the debts where the personal estate is insufficient. Since the administrator's authority to sell under

license cannot be defeated by any alienation of the heir, and exists whether the lands are in the possession of the heir, his alienee, or disseisor, the administrator has no cause to recover the possession by a suit at law, and cannot maintain an action for that purpose.

Drinkwater v. Drinkwater, 4 Mass. 354, 358, 359. See *Dean v. Dean*, 3 Mass. 258, 260, 261; *Lobdell v. Hayes*, 12 Gray (Mass.), 236, 238; *Crocker v. Smith*, 32 Me. 244; *Gladson v. Whitney*, 9 Iowa, 267; *Stillman v. Young*, 16 Ill. 318; *Pinson v. Williams*, 23 Miss. 64; *Bank of Charleston v. Inglesby, Spear's Eq.* (S. C.) 399. See also *Lockwood v. Lockwood*, 2 Root (Conn.), 409; *Thayer v. Lane*, 1 Walker (Mich.), 200; *Sargent, J., in Lane v. Thompson*, 43 N. H. 320, 325, 326.

Thus, if it becomes necessary for an administrator to sell real estate to pay debts, he cannot file a bill in equity to perfect the title, or relieve it of any burden; but he must sell it as he finds it. *Le Moyne v. Quimby*, 70 Ill. 399; *Sebastian v. Johnson*, 72 Ill. 282.

Under the Mississippi statute, only such debts are charged upon the realty as were created by the decedent. *Moore v. Ware*, 51 Miss. 206. As to power of administrator over real estate in Mississippi, see *Hardee v. Cheatham*, 52 Miss. 41.

As to sales of real estate to pay legacies. *Greville v. Brown*, 7 H. L. Cas. 689; *Bench v. Biles*, 4 Madd. (Eng.) 187; *Gibbons v. Curtis*, 8 Gray (Mass.), 392; Mass. Gen. Stats. c. 102, § 19; *Poulson v. Johnson*, 2 Stew. 259; *Corwine v. Corwine*, 24 N. J. Eq. 579; *Miller v. Sandford*, 31 N. J. Eq. 427.

As to title to "Lands Devised to pay Debts," see § 3, c, n.

Effect of Statutes in Various States.—

In some States, both the real and personal estate remains in the possession of the administrator until the estate is settled or a decree of distribution made, and a suit in relation thereto is properly brought in his name. *Logan v. Caldwell*, 23 Mo. 373; *Atkison v. Henry*, 80 Mo. 670; *Harwood v. Marye*, 8 Cal. 580; *Curtis v. Sutter*, 15 Cal. 259; *Curtis v. Herrick*, 14 Cal. 117; *Soto v. Kroder*, 19 Cal. 87; *Meeks v. Hadn*, 20 Cal. 620; *Thompson v. Duncan*, 1 Tex. 485; *Easterling v. Blythe*, 7 Tex. 210; *Edwards v. Evans*, 16 Wis. 193; *Flood v. Pilgrim*, 32 Wis. 377; *Menfee v. Menfee*, 8 Ark. 9; *Carnall v. Wilson*, 21 Ark. 62; *Cofer v. Thurmand*, 1 Ga. 538; *Sorrell v. Ham*, 9 Ga. 55; *Williams v. Rawlins*, 10 Ga. 491; *Mont. Rev. Stats. Div. 2*, §§ 127, 225; *Black v. Story*, 14 Pac. Rep. 703; U. S. Dig. 1st series, *Executors and Administrators*, 1272, 1278.

In Arkansas and California, the real as well as the personal estate of the intestate is assets in the hands of the administrator,

but neither species of property can be sold without an order from the probate court. *Tate v. Norton*, 94 U. S. 746; *Meeks v. Vassault*, 3 Sawyer, 206.

In Arkansas, after all debts have been discharged, and the administration is practically closed, the administrator is to be regarded as having no contingent interest in the realty, even though no formal order discharging him has been entered. *Reed v. Ash*, 30 Ark. 775.

In California an administrator has no power to bring a suit to enforce a trust, and to compel a conveyance of land to himself. *Janes v. Throckmorton*, 57 Cal. 368.

1 Nev. Comp. L. 596, § 116, provides that "the executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled, or until delivered over by order of the probate court to the heirs or devisees." *Held*, that where there are no debts outstanding against the estate, nor existing equity in favor of the administrator, the heirs have the right of possession, and may bring ejectment in their own name to recover any property belonging to the estate. [Disapproving *Meeks v. Kirby*, 47 Cal. 170.] *Gossage v. Crown Point, etc., Mining Co.*, 3 Nev. 153.

In Michigan an executor or administrator is authorized by statute to take possession of the real estate of the deceased, and to receive the rents pending the settlement; but the land is not assets, and cannot be sold by him. *Streeter v. Paton*, 7 Mich. 341; *Kline v. Moulton*, 11 Mich. 370.

In New Hampshire the administrator of an insolvent estate takes a special and limited interest in the real estate of the decedent, which continues until determined by a valid sale under license from the probate court, or until final settlement, if a sale should not be necessary. During the interval, he is entitled to rents and profits, must keep the estate in repair, and account for the net proceeds. *Bergin v. McFarland*, 26 N. H. 533, 537.

As to Vermont, see *McFarland v. Stone*, 17 Vt. 165; *Aldis v. Burdick*, 8 Vt. 21.

As to working plantations, see *Black v. Candor*, 40 Miss. 711, 760; *Henderson v. Simmons*, 33 Ala. 291; *Johnson v. Parnell*, 60 Ga. 661.

Where a statute gives a right to the possession of the realty to the personal representative, he may maintain a possessory action to recover it. *Oury v. Duffield*, 1 Ariz. 509.

Under Minn. Gen. St. 1878, ch. 52, § 6, providing that "the executor or administrator has a right to the possession of all real as well as personal estate of the de-

ceased," the right of possession is in the heirs to whom the land descends, as at common law, until the personal representative takes possession; but, having taken possession, the latter can maintain an action for a trespass committed after the death of the deceased, although before the taking of possession. [Gilfillan, C. J., dissenting.] *Noon v. Finnegan*, 29 Minn. 418; s. c., 32 Minn. 81.

Under Florida laws, ch. 1732, an administrator has, during the settlement of his intestate's estate, the right of entry into the real estate, and the right of possession thereof, and can maintain ejectment without making the heirs plaintiffs. *Sanchez v. Hart*, 17 Fla. 507.

In Maine, to enable the administrator to maintain an action of trespass to realty, he must show that the estate is actually insolvent. *McNichol v. Eaton*, 77 Me. 246.

Lands set off on Execution, or foreclosed on Mortgage.—An executor or administrator may maintain an action for lands which have been set off to him upon an execution recovered by him on a debt due to his decedent. *Boylston v. Carver*, 4 Mass. 598. See *Foster v. Huntington*, 5 N. H. 108.

So an executor or administrator who has foreclosed a mortgage of his decedent, is entitled to retain possession of the property so recovered until his functions touching it are performed. *Parker, J., in Boylston v. Carver*, 4 Mass. 598, 610; *Richardson v. Hildreth*, 8 Cush. (Mass.) 225; *Palmer v. Stevens*, 11 Cush. (Mass.) 147.

In such case the land is treated as personal property which he has a right to sell and convey without license. *Valentine v. Belden*, 20 Hun (N. Y.), 537. See also *Stevenson v. Polk* (Iowa), 32 N. W. Rep. 340; *Columbus Ins. & Banking Co. v. Humphries* (Miss.), 1 So. Rep. 232.

In Massachusetts real estate recovered on execution or foreclosed on mortgage by personal representative is held to the use of the heirs, and can only be sold under license to pay debts, legacies, and charges in the same way as real estate of which decedent died seized.

But a conveyance without license is good until avoided by the heirs, and, if confirmed by them, is good absolutely. *Thomas v. Le Baron*, 10 Met. (Mass.) 403; *Boylston v. Carver*, 4 Mass. 598, 610. See Mass. Gen. Stats. c. 96, § 13.

But until the settlement of the estate in the probate court, the legal title is in the personal representative, and neither widow nor heir can have any right of entry, or maintain any action for its possession. *Boylston v. Carver*, 4 Mass. 598, 610; *Richardson v. Hildreth*, 8 Cush. (Mass.) 225; *Dean v. Dean*, 3 Mass. 258; *Taft v. Stevens*, 3 Gray (Mass.), 504, 507; *Baldwin v. Timmins*, 3 Gray (Mass.), 302. See also

with a power of disposing of it.¹ In determining whether the executors, under the provisions of the will, take a fee-simple

Terry *v.* Ferguson, 8 Porter (Ala.), 500; Harper *v.* Archer, 28 Miss. 212.

In Michigan real property conveyed to an administrator in settlement of an action brought by him for the benefit of the estate in which he attached the property, is not subject to the provisions of How. St. Mich. §§ 5881-5883, relating to the disposal of real estate bid in by an administrator on foreclosure or execution sale, which require the license of the probate court for a conveyance by the administrator of property thus purchased. Williams *v.* Towle (Mich.), 31 N. W. Rep. 835.

1. Wms. Exrs. (7th Eng. ed.) 654.

Under what circumstances an executor qualified by the laws of one State may, by virtue of such power, sell lands in another State, see Crusoe *v.* Butler, 36 Miss. 150; Newton *v.* Bronson, 13 N. Y. 587.

Money received by an executor as proceeds of a sale of real estate under a power in the will, whether the power was duly executed or not, is assets, and the sureties are liable for its misappropriation. Dix *v.* Morris, 1 Mo. App. 93. See Glacius *v.* Fogel, 88 N. Y. 434.

Executors empowered by will to sell land after the death or remarriage of the widow, it being devised to her until then, have no control of the land before such death or remarriage, nor is it assets in their hands. James *v.* Beesly, 4 Redf. (N. Y.) 236.

Where an executor is clothed by will with discretionary power to sell unproductive property, and to make the same productive by improving it, the power conferred being without limit, and the testator's wish appearing to be that the estate shall be kept intact and rendered productive, as far as possible, the executor may raise money on mortgage for that purpose. Starr *v.* Moulton, 97 Ill. 525; Mutual L. Ins. Co. *v.* Shipman (N. Y.), 15 N. E. Rep. 58.

But a power of sale out and out, having an object beyond the raising of a particular charge, does not authorize a mortgage. Stronghill *v.* Anstey, 1 De G. M. & G. (Eng.) 635.

Under a will authorizing the executors to sell certain lands of testator "at such time and in such manner as they shall deem expedient," there is nothing wrong or illegal in partitioning property of the deceased, which had been held in common by him, by giving a deed of a certain portion, and receiving a release of the balance, according to the amount owned by the testator; and such deeds are properly admissible as evidence. King *v.* Merritt (Mich.), 34 N. W. Rep. 689.

At common law a power to sell land given by will to an executor did not devolve upon an administrator with the will annexed. Evans *v.* Chew, 71 Pa. St. 47, 50; Brown *v.* Hobson, 3 A. K. Marsh. (Ky.) 380; McDonald *v.* King, 1 N. J. Law, 432; Hester *v.* Hester, 2 Ired. Eq. (N. C.) 330, 339; Smith *v.* McCrary, 3 Ired. Eq. (N. C.) 204; Owens *v.* Cowan, 7 B. Mon. (Ky.) 156; Dominick *v.* Michael, 4 Sandf. (N. Y.) 374; Conklin *v.* Egerton, 21 Wend. (N. Y.) 430, 440; s. c., 25 Wend. (N. Y.) 224, 232. See also Gilchrist *v.* Rea, 9 Paige (N. Y.), 66; Roome *v.* Phillips, 27 N. Y. 357, 363; Commonwealth *v.* Ferney, 3 W. & S. (Pa.) 356; Ross *v.* Barclay, 18 Pa. St. 179; Moody *v.* Fulmer, 3 Grant (Pa.), 17; Moody *v.* Van Dyke, 4 Binn. (Pa.) 31; Tainter *v.* Clark, 13 Met. (Mass.) 220; Treadwell *v.* Cordis, 5 Gray (Mass.), 341; Ashburn *v.* Ashburn, 16 Ga. 213; Smith *v.* McConnell, 17 Ill. 135; Greenough *v.* Welles, 10 Cush. (Mass.) 571; Drury *v.* Natick, 10 Allen (Mass.), 169; Dunning *v.* Nat. Bank, 6 Lans. (N. Y.) 296; Larned *v.* Bridge, 17 Pick. (Mass.) 339; Wills *v.* Cowper, 2 Ohio, 124; Kidwell *v.* Brumagin, 32 Cal. 436; Hall *v.* Irwin, 7 Ill. 176, 180; Knight *v.* Loomis, 30 Me. 204, 209; Vardemar *v.* Ross, 36 Tex. 111. See also Lucas *v.* Doe, 4 Ala. 679; Anderson *v.* McGowan, 42 Ala. 280.

In Pennsylvania, North Carolina, Virginia, Kentucky, Missouri, and other States, the rule has been altered or modified by statute. Keefer *v.* Schwartz, 47 Pa. St. 503; Waters *v.* Margerum, 60 Pa. St. 39; Hester *v.* Hester, 2 Ired. Eq. (N. C.) 330; Brown *v.* Armistead, 6 Rand. (Va.) 594; Bailey *v.* Brown, 9 R. I. 79; Shields *v.* Smith, 8 Bush (Ky.), 601; Gulley *v.* Prather, 7 Bush (Ky.), 167; Dilworth *v.* Rice, 48 Mo. 124; Dorr *v.* Wainwright, 13 Pick. (Mass.) 532; Gibbons *v.* Riley, 7 Gill (Md.), 81; Hester *v.* Hester, 2 Ired. Eq. (N. C.) 330, 339.

Under these statutes, trust annexed to the office of executor devolves upon the administrator *de bonis non with the will annexed*. Evans *v.* Chew, 71 Pa. St. 49, 50; Tainter *v.* Clark, 13 Met. (Mass.) 220; Buttrick *v.* King, 7 Met. (Mass.) 20, 23; Hall *v.* Cushing, 9 Pick. (Mass.) 395; Saunderson *v.* Stearns, 6 Mass. 37; Bailey *v.* Brown, 9 R. I. 79; Towne *v.* Ammidown, 20 Pick. (Mass.) 535; Dorr *v.* Wainwright, 13 Pick. (Mass.) 328, 332, 333; King *v.* Talbert, 36 Miss. 367; *In re* Van Wyck, 1 Barb. Ch. (N. Y.) 565; Conklin *v.* Egerton, 21 Wend. (N. Y.) 430, 440; s. c., 25 Wend. (N. Y.) 224, 232; Lott *v.* Meacham, 4 Fla. 144; Jones *v.* Jones, 2 Dev. Eq. (N. C.)

in trust to sell, or are invested merely with a naked power of disposition, the established distinction appears to be that a devise of land *to executors to sell* passes the interest in it; but a devise *that executors shall sell the land, or that lands shall be sold by the executors*, gives them but a naked power.¹ A power in a will to sell or mortgage without naming a donee, vests in the executor by implication, if the fund is distributable by him for the payment of debts or legacies.² Under the principle of

387; Wilson's Est. 2 Pa. St. 325; Olwine's App. 4 W. & S. (Pa.) 492; Anderson v. McGowan, 42 Ala. 280; Williams' App. 7 Pa. St. 259; Hassinger's App. 10 Pa. St. 454; Royer's Exrs. v. Meixell, 19 Pa. St. 240; Knight v. Loomis, 30 Me. 209. See Davis v. Hoover (Ind.), 14 N. E. Rep. 468; Dunning v. Ocean Nat. Bank, 6 Lans. (N. Y.) 296, 298, 299.

Under what circumstances a power or trust will be considered annexed to the office of executor. See § VIII. 4, n., § X. n.

1. Wms. Exrs. (7th Eng. ed.) 654. See 1 Sugd. on Powers (6th ed.), 128, 133; Co. Litt. 113 a; Powell on Devises (3d ed.), vol. 1, p. 245; Dabney v. Manning, 3 Ham. (Ohio) 321; Dunn v. Keeling, 2 Dev. (N. C.) 283; Blount v. Johnson, Can. & N. (N. C.) 551; Robertson v. Gaines, 2 Humph. (Tenn.) 367; Haskell v. House, 3 Brev. (S. C.) 242; Knocker v. Banbury, 6 Bing. (Eng.) N. C. 306.

In Pennsylvania a power to sell real estate given to executors by will passes the interest in the property to them as fully as if devised to them to be sold. Shippen v. Clapp, 36 Pa. St. 89.

Where a naked power of sale is vested in executors, and the land is not devised to them, the title is in the heirs until the sale. Romaine v. Hendrickson, 24 N. J. Eq. 231; Herbert v. Tuthill, 1 Sax. (N. J.) Eq. 141; Marsh v. Wheeler, 2 Edw. Ch. (N. Y.) 156; Martin v. Martin, 43 Bail. (N. Y.) 172; Scott v. Morrell, 1 Redf. Sur. (N. Y.) 431.

An executor having no interest in the land but the power to sell, cannot maintain an action for trespass committed since the death of the testator. Aubuchon v. Lory, 23 Mo. 99.

2. 1 Sugd. on Powers (6th ed.), 238; Preston on Abstracts, 264. See also Curtis v. Fulbrook, 8 Hare (Eng.), 278; Tainter v. Clark, 13 Met. (Mass.) 220, 228; Jones's App. 3 Grant (Pa.), 169; 4 Kent, *326; Davone v. Fanning, 2 John. Ch. (N. Y.) 254; Walker v. Murphy, 34 Ala. 591; Pratt v. Rice, 7 Cush. (Mass.) 209; Magruder v. Peter, 11 Gill & J. (Md.) 217; Davis v. Horver (Ind.), 14 N. E. Rep. 468.

If the proceeds of the real estate are blended with the personal, the power to sell will vest in the executors by implica-

tion. Tylden v. Hyde, 2 Sim. & Stu. (Eng.) 238. See also Robinson v. Lowater, 17 Beav. (Eng.) 592; s. c., 5 De G. M. & G. 272 (Am. ed.), note (2); Wrigley v. Sykes, 20 Jur. (Eng.) 78; Houck v. Houck, 5 Pa. St. 273; Gray v. Henderson, 71 Pa. St. 368; Dorland v. Dorland, 2 Barb. (N. Y.) 63; Bogert v. Hertell, 4 Hill (N. Y.), 492; Putnam Free School v. Fisher, 30 Me. 523; Peter v. Beverly, 10 Peters (U. S.), 532; Lockhart v. Worthington, 1 Sneed (Tenn.), 318.

As to whether it is essential to the vesting of such power in the executor that the proceeds of the sale should be distributable by him, see Bentham v. Wiltshire, 4 Madd. (Eng.) 44; Patton v. Randall, 1 Jac. & W. (Eng.) 189; 1 Sugd. on Pow. (6th ed.) 138, 139; Allum v. Fryer, 3 Q. B. 442, 446; Forbes v. Peacock, 12 Sim. (Eng.) 528, 536; Haydon v. Wood, 8 Hare (Eng.), 279, note (a); Curtis v. Fulbrook, 8 Hare (Eng.), 278; Waller v. Logan, 5 B. Mon. (Ky.) 516.

"If a testator, having a right to dispose of his real estate, directs that to be done by his executor, which necessarily implies that the estate is first to be sold, a power is given by this implication to the executor to make such sale and execute the requisite deeds of conveyance." Shaw, C. J., in Going v. Emery, 16 Pick. (Mass.) 111, 112. See Lockhart v. Worthington, 1 Sneed (Tenn.), 318; Livingston v. Murray, 39 How. Pr. (N. Y.) 102.

It was formerly held that the effect of charging real estate with debts was to give the executors an implied power of sale, but doubts have been cast upon the principle by the case of Doe v. Hughes, 6 Ex. (Eng.) 223. See, however, Robinson v. Lowater, 17 Beav. (Eng.) 601; s. c., 5 De G. M. & G. (Eng.) 272; Wrigley v. Sykes, 21 Beav. (Eng.) 337; Sabin v. Heape, 27 Beav. (Eng.) 553; Cook v. Dawson, 29 Beav. (Eng.) 123, 126; s. c., on appeal, 3 De G. F. & J. (Eng.) 127, 128. Compare Den v. Allen, 2 N. J. L. 45; Dunn v. Keeling, 2 Dev. (N. C.) 283; Matter of Fox's Will, 52 N. Y. 530.

But if the direction that the debts shall be paid is coupled with the direction that they are to be paid by the executor, no power of sale is implied, for in such case it is assumed that the testator meant that the

equitable conversion, money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and its subsequent devolution and disposition will be governed by the rules applicable to that species of property.¹

debts should be paid only out of the property which passes to the executor. *Cook v. Dawson*, 29 Beav. (Eng.) 126, 127; s. c., 3 De G. F. & J. 127.

When the estate is devised to another charged with the payment of debts, the doctrine of an implied power of sale in the executor has no application, for the obvious intent of the testator is, that the money shall be raised by a sale by the devisee, and he only can make title. *Colyer v. Finch*, 5 H. L. Cas. (Eng.) 905. See also *Hodkinson v. Quinn*, 1 Johns. & H. (Eng.) 303.

These principles have been embodied in the 22 & 23 Vict. c. 35, sects. 14, 16, which confer the power to sell upon executors where the testator has not charged his real estate with the payment of debts or legacies, and has not devised the hereditaments so charged to trustees.

Where there are several co-executors, the power may be exercised by the survivor or survivors; and where the claim remains unbroken, and the executor of an executor represents the original testator, it will pass to the executor's executor. *Wms. Exrs.* (7th Eng. ed.) 655; *Sugd. on Pow.* (6th ed.) 138; *Forbes v. Peacock*, 11 M. & W. (Eng.) 630; *Magruder v. Peter*, 11 Gill & J. (Md.) 217; *Tainter v. Clark*, 13 Met. (Mass.) 220, 225-228; *Anderson v. Turner*, 3 A. K. Marsh. (Ky.) 131; *Jenkins v. Storiffer*, 3 Yeates (Pa.), 163; *Houck v. Houck*, 5 Pa. St. 273.

It would seem that while a purely naked power must be executed by all the executors named in the will, and, if one of them dies, does not survive to the others, and although the power *per se* is merely a naked power, yet if in other parts of the will there are trusts and duties imposed upon the executors, which require a sale to be made in order to effectuate the intent of the testator, the power survives. *Franklin v. Osgood*, 14 Johns. (N. Y.) 527. See *Jackson v. Given*, 16 Johns. (N. Y.) 167; *Jackson v. Burtis*, 4 Johns. (N. Y.) 391.

1. *Fletcher v. Ashburner*, 1 Bro. C. C. (Eng.) 497; 1 L. C. Eq. (4th Am. ed.) 1118; 2 Powell, Dev. (Jarman's ed.) 61; 1 Jarman on Wills (3d Eng. ed.), 675 *et seq.*

When it is the intention of the testator that his real estate shall be converted into a pecuniary fund, to be held by trustees for purposes indicated by the will, it is deemed to be personalty from the time of the testa-

tor's death; nor is the change prevented by the death of the person entitled to the proceeds before the execution of the power. *Gourley v. Campbell*, 13 S. C. (N. Y.) 218; *Bramhall v. Ferris*, 14 N. Y. 41, 46; *White v. Howard*, 46 N. Y. 144; *Clay v. Hart*, 7 Dana (Ky.), 1; *Evans v. Kingsberry*, 2 Rand. (Va.) 120; *Brearley v. Brearley*, 1 Stockt. (N. J.) 21; *Taylor v. Benham*, 5 How. (U. S.) 233. See *Anewalt's App.* 12 Pa. St. 414; *Holland v. Cruft*, 3 Gray (Mass.), 162, 180.

Where the person to whom the proceeds of the sale are bequeathed survives the testator, but dies before the sale, the property devolves upon his personal representative. *Elliott v. Fisher*, 12 Sim. (Eng.) 505; 1 Jarman (Eng.), 550. See *In re Delancey*, L. R. 4 Ex. (Eng.) 345.

But if the testator merely directs land to be sold, and the proceeds to be invested in other lands, such proceeds are to be regarded as land in the settlement of the estate, although they have not been actually re-invested. 1 Jarman on Wills (3d Eng. ed.), 551; *In re Pedder's Settlement*, 5 De G. M. & G. 890; *Pearson v. Lane*, 17 Ves. (Eng.) 101; *Haggard v. Rout*, 6 B. Mon. (Ky.) 247.

As to what does or does not amount to a direction to convert, see *Brickenden v. Williams*, L. R. 7 Eq. Cas. 310; *In re Ibbitson's Est.* L. R. 7 Eq. Cas. 226; *Greenway v. Greenway*, 2 De G. & J. (Eng.) 128; *Lucas v. Brandreth*, 28 Beav. (Eng.) 273; *Griesbach v. Freemantle*, 17 Beav. (Eng.) 314; *In re Taylor's Settlement*, 9 Hare (Eng.), 596; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524; *Cormick v. Pearce*, 7 Hare (Eng.), 477; *Ward v. Arch*, 15 Sim. (Eng.) 389; *Polley v. Seymour*, 2 Y. & Coll. Ex. (Eng.) 709; *Grieverson v. Kirsopp*, 2 Keen (Eng.), 653; *Elliott v. Fisher*, 12 Sim. (Eng.) 515; *Simpson v. Ashworth*, 6 Beav. (Eng.) 412. See also *Sugden's Law of Property*, 460; 1 Jarman, Wills, 561-564. For a full discussion of the doctrine of conversion, see also *Wms. Exrs.* (7th Eng. ed.) 658 *et seq.*, and Perkins' notes, "Equitable Conversion," 5th Am. & Eng. Enc. of Law; Notes to *Fletcher v. Ashburner*, 1 L. Cas. Eq. (4th Am. ed.) 1118.

In conclusion, it should be observed that where lands are devised to executors to be sold for the payment of debts and legacies, the money arising from the sale is to be considered equitable and not legal assets.

Rents accruing after the death of the decedent belong to the heir as an incident of the reversion; ¹ and although, by the terms.

Wms. Exrs. (7th Eng. ed.) 658; Attorney-Gen. v. Brunning, 8 H. L. Cas. (Eng.) 243; In Matter of Will of Fox, 52 N. Y. 530, 537. But see Hood v. Hood, 85 N. Y. 561.

As to distinction between legal and equitable assets, see "Debts of Decedents."

When a testator gives real and personal estate to his executor in trust to sell, and invest the proceeds for the purposes of the trusts specified, under the doctrine of equitable conversion, the real estate is to be considered as personalty, and the executor is bound to account before the surrogate for the proceeds arising from such sales as well as for the rents and profits. Hood v. Hood, 85 N. Y. 561.

Land Purchased with Partnership Funds.

— Real estate purchased with partnership funds for partnership purposes as between the real and personal representatives of a deceased partner, has the quality of personal property. Phillips v. Phillips, 1 My. & K. (Eng.) 649; Brown v. Brown, 3 My. & K. (Eng.) 443; Darby v. Darby, 3 Drew. (Eng.) 495. See also Piatt v. Oliver, 3 McLean (U. S.), 27; Lang v. Waring, 25 Ala. 625; Sigourney v. Munn, 7 Conn. 11; Nicoll v. Ogden, 29 Ill. 323; Matlock v. Matlock, 5 Ind. 403; Lane v. Tyler, 49 Me. 252; Buffum v. Buffum, 49 Me. 108; Cilley v. Huse, 40 N. H. 358; Benson v. Ela, 35 N. H. 402; Jarvis v. Brooks, 29 N. H. 66; Hill v. Beach, 12 N. J. Eq. 31; Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336; Delmonico v. Guillaume, 2 Sandf. Ch. (N. Y.) 366; Abbott's App. 50 Pa. St. 234; Winslow v. Chiffelle, 1 Harp. (S. C.) Ch. 25; Fowler v. Bailey, 14 Wis. 125; Dyer v. Clark, 5 Met. (Mass.) 562; Howard v. Priest, 5 Met. (Mass.) 582, 585; Deveney v. Mahoney, 8 C. E. Green. 247; Bank of England's Case, 3 De G. F. & J. (Am. ed.) 645, 658, 659, and cases in notes; Parson's Partn. (1st ed.) 363 *et seq.* 373, 374; Collyer, Partn. (5th Am. ed.) § 135 *et seq.* Compare Rowley v. Adams, 7 Beav. (Eng.) 548; Randall v. Randall, 7 Sim. (Eng.) 271; Cookson v. Cookson, 8 Sim. (Eng.) 529; Houghton v. Houghton, 11 Sim. (Eng.) 491. See also "Partnership," Am. & Eng. Enc. of Law.

Land purchased with Trust Funds.

— Land purchased by a trustee, guardian, or committee of a lunatic, with trust funds, on the death of the ward, *cestui que trust*, or lunatic, is taken as personal estate, and will not go to his heir. Gilson v. Scudamore, 1 Dick. (Eng.) 45; Lord Winchelsea v. Norcliffe, 1 Vern. (Eng.) 435; s. c., 2 Freem. (Eng.) 95; Witter v. Witter, 3 P. Wms. (Eng.) 99; Awdley v. Awdley, 2 Vern. (Eng.) 192; Lord Plymouth's Case, 2 Freem. (Eng.) 114. See also Lloyd v.

Hart, 2 Pa. St. 473; Oxenden v. Lord Crompton, 2 Ves. Jr. (Eng.) 69; *In re* Leeming, 3 De G. F. & J. (Eng.) 43.

As to length of time such equitable conversion is to continue, see Grider v. M'Clay, 11 Ser. & R. (Pa.) 224; Biggett v. Biggett, 7 W. (Pa.) 563; Dyer v. Cornell, 4 Pa. St. 359; Pennell's App. 20 Pa. St. 515; Bogert v. Furman, 10 Paige (N. Y.), 496; Horton v. M'Coy, 47 N. Y. 21; Foreman v. Foreman, 7 Barb. (N. Y.) 215; Davidson v. DeFreest, 3 Sandf. Ch. (N. Y.) 456; Wms. Exrs. (7th Eng. ed.) 658, note (h).

The administrator of a deceased ward is not entitled to recover in an action against the administrator of the deceased guardian, moneys which came into the guardian's hands as proceeds of real estate belonging to the ward sold under a decree of court for partition. The heirs-at-law of the deceased ward are necessary parties to the action. State v. Robinson, 78 N. Car. 222.

The character of property, whether real or personal, so far as administrators are concerned, is that which it bears at the death of their intestate, and does not change by subsequent conversion. Hamer v. Bethea, 11 S. C. 416.

1. Wms. Exrs. (7th Eng. ed.) 817; Crawford v. Ginn, 35 Iowa, 543; Flemming v. Chunn, 4 Jones, Eq. 422; Sparhawk v. Allen, 25 N. H. 261; Forteau v. Lepage, 6 Iowa, 123; Haslage v. Krugh, 25 Pa. St. 97; Kohler v. Knapp, 1 Bradf. Sur. (N. Y.) 241; Fay v. Holloran, 35 Barb. (N. Y.) 295; Stinson v. Stinson, 38 Me. 593; Mills v. Merryman, 49 Me. 65; Gibson v. Farley, 16 Mass. 280; Sohier v. Eldredge, 103 Mass. 345, 351; King v. Anderson, 20 Ind. 385; Foltz v. Prouse, 17 Ill. 487; Terry v. Bale, 1 Demarest (N. Y.), 452. See also Co. Litt. 47 a; Drake v. Munday, Cro. Car. (Eng.) 207. Compare Lord Hatherton v. Bradburne, 13 Sim. (Eng.) 599; Wadsworth v. Allcott, 6 N. Y. 64; Cobel v. Cobel, 8 Pa. St. 343.

"The heir takes the estate according to the well-known rule of inheritance, at the time of the decease of the ancestor, subject only to be divested by a sale, pursuant to law, conducted in the manner prescribed by statute. All the legal consequences of this relation are held to follow. The heir is the owner till he is divested; he has the exclusive possession and right of possession; he may take the rents and profits to his own use and without account." Shaw, C. J., in Boynton v. Peterborough & Shirley R. Co., 4 Cush. (Mass.) 467, 469. See Welles v. Cowles, 4 Conn. 182; Upper Appomattox Co. v. Harding, 11 Gratt. (Va.) 1.

of the lease, the rent should be expressly received to the lessor, his executor and assigns, without naming the heir, the executors cannot have it, being strangers to the reversion, which is an inheritance.¹ On the other hand, if the reversion itself be but a

The probate court does not necessarily have any jurisdiction over the rents. The administrator neither has the right against the consent of the heirs, nor is he required, to occupy the estate or collect the rents therefrom. He may receive the income of the real estate by the request of the heirs, or with their acquiescence. He would not be regarded as a trespasser in so doing, unless done in opposition to their interests, or in defiance of their wishes. It is often convenient, and sometimes of decided advantage, for him to do so: as where the heirs are minors without guardians; or are abroad, or unacquainted with the management of affairs; and where the administrator may be himself an heir, or have intimate business or family relations with the estate, and in other cases. In many cases, there is an understanding or agreement, that the administrator shall take the rents, and account for them as assets for the benefit of the estate, where such a course may save a sale of the real estate for debts, or where the heirs get the advantage of them in the general distribution. In such case the administrator would account in the probate court for such rents with the general assets according to such agreement, but not necessarily by force of any requirements of the statute. Such we believe to be a somewhat common practice. *Peters, J., in Kimball v. Sumner*, 62 Me. 305, 310. See also *Stearns v. Stearns*, 1 Pick. (Mass.) 157; *Shaw, C. J., in Wilson v. Shearer*, 9 Met. (Mass.) 507; *Newcomb v. Stebbins*, 9 Met. (Mass.) 540; *Palmer v. Palmer*, 13 Gray (Mass.), 328; *Gibson v. Farley*, 16 Mass. 280; *Almy v. Crapo*, 100 Mass. 218, 221; *Taylor, Landl. & Ten.* § 390; *Griswold v. Chandler*, 5 N. H. 492; *Jones's Appeal*, 3 Grant (Pa.), 250; *Conger v. Atwood*, 28 Ohio St. 134.

Payment of such rents to the administrator is a mispayment, and will be no discharge as against the heir. *Haslage v. Krugh*, 25 Pa. St. 97. See *Kimball v. Sumner*, 62 Me. 305, 309, 310; *Palmer v. Palmer*, 13 Gray (Mass.), 326, 328.

The fact that the estate is insolvent, or the land mortgaged, does not affect the right of the heirs to rent and profits, until the land is sold for the payment of debts or entry by mortgagee. *Gibson v. Farley*, 16 Mass. 283; *Towle v. Swasey*, 106 Mass. 100; *Boynton v. Peterborough & Shirley R. Co.*, 4 Cush. (Mass.) 467, 469; *Lobdell v. Hayes*, 12 Gray (Mass.), 236; *Palmer v. Palmer*, 13 Gray (Mass.), 326; *Stearns v.*

Stearns, 1 Pick. (Mass.) 157; *Newcomb v. Stebbins*, 9 Met. (Mass.) 540; *Alden v. Stebbins*, 99 Mass. 616, 617; *Kimball v. Sumner*, 62 Me. 305; *Stinson v. Stinson*, 38 Me. 593; *Schwartz's Est.* 14 Pa. St. 42.

As to effect of insolvency in New Hampshire, see *Bergin v. McFarland*, 26 N. H. 533; *Lucy v. Lucy*, 55 N. H. 9, 10. See also *ante*, 1, n.

An administrator or executor who collects the rents and profits of the real estate of the decedent, holds them for the heirs, and not for the creditors; and his account concerning them is not to be settled in the probate court. *Griswold v. Chandler*, 5 N. H. 492; *Conger v. Atwood*, 28 Ohio St. 134; *McCoy v. Scott*, 2 Rawle (Pa.), 222; *Terry v. Bale*, 1 Demarest (N. Y.), 452.

If the personal representative is himself the heir, he holds them for his own use, and not as assets. *Schwartz's Estate*, 14 Pa. St. 42.

But in Missouri an executor or administrator may become liable on his bond for the rents and profits of real estate of which he has taken charge, and also for a failure to pay the taxes and make necessary repairs. *Lewis v. Carson*, 16 Mo. App. 342. See also *Eppinger v. Canepa*, 20 Fla. 262.

Where executors having a mere power in trust to sell lands, collected the rents, under the impression that they were entitled to receive them, as executors they were held accountable for them to the heirs. *Campbell v. Johnson*, 1 Sandf. Ch. (N. Y.) 148.

But where a will authorizes and empowers executors to prevent the sale of real estate for a specified time,—except for the payment of debts, and then only so much as may be necessary for that purpose,—the executors are trustees of the realty, first for the payment of debts, and then for the discharge of the legacies, and should make such disposition of the rents, issues, and profits, as the will directs. *Jones*, App. 3 Grant (Pa.), 250.

Money received by an administrator by a sale of his intestate's lands under an agreement with the heirs that the administrator might make the sale, is assets in his hands. *Stiver v. Stiver*, 8 Ohio, 217.

1. Co. Litt. 47 a.

Whether the rent determines or goes to the heir, when not mentioned in the limitation, does not appear to be settled. *Sacheverell v. Frogatt*, 2 Saund. (Eng.)

chattel interest, as if a lessee for years makes an under lease, reserving rent;¹ or if there is no reversion left in the lessor, and the rent is expressly reserved to his executors, administrators, and assigns, — it will go to the personal representative, and not to the heir.²

Rents in arrear which have accrued and become payable in the lifetime of the decedent constitute a personal obligation, and belong to the executor or administrator as a part of the personal estate.³ Upon the same principle, damages assessed in compen-

367 *b*, notes (2) and (3). See *Dolben v. Bath*, 4 C. B. N. S. 760. But if the rent be reserved *during the term* to the lessor, his executors, administrators, and assigns, the heir or devisee shall have it. 2 Saund. (Eng.) 367 *b*.

1. 2 Saund. (Eng.) 371, note (7) to *Sacheverell v. Frogatt*.

If the personal representative sues the under lessee for rent due since the decedent's death, he must allege that he has a chattel interest, otherwise it will be presumed that he was seized in fee, and the rents belong to the heir. *Norris v. Elsworth*, 1 Freem. (Eng.) 463.

If a lessee for years makes an under lease for a longer period than that for which he himself holds, and the under lessee covenants to pay rent to such lessee, his executor may sue the under lessee for rent accruing during the continuance of the lessee's term. *Baker v. Gostling*, 1 Bing. N. R. (Eng.) 19; s. c., 4 M. & Scott (Eng.), 539.

2. 3 Cruise's Dig. (3d ed.) 321; Wms. Exrs. (7th Eng. ed.) 819; *Jennison v. Lord Lexington*, 1 P. Wms. (Eng.) 555.

Severance. — If a man seized of land in fee, makes a lease for years, reserving rent, and afterwards devises the rent to a stranger and dies, and the stranger is seized of the rent and dies, in such case the rent is severed from the reversion, and goes to the stranger's executors, and not to his heirs. *Knolle's Case*, *Dyer* (Eng.), 5 *b*; *Ards v. Watkins*, Cro. Eliz. (Eng.) 637, 651.

Nomine Pœnæ. — The heir, when entitled to the rent, is also entitled to a *nomine pœnæ*, or penalty to compel its punctual payment, because whoever has the right to the rent should also have the means to compel its payment. But for arrears of a *nomine pœnæ*, the executor may maintain an action of debt at common law. *Gilb. Rents*, 144; Co. Litt. 162 *b*.

3. Wms. Exrs. (7th Eng. ed.) 820. See Cases 89, n. (1).

"The executors or administrators of tenant for life of a rent charge, and of tenant *pur autre vie*, after the death of *cestui que vie* might bring debt to recover the arrears of such rent by the common law, although they could not formerly distrain

for them; but before the statute 32 Hen. VIII. c. 37, the executor or administrators of a man seized of a rent service, rent charge, rent seck, or fee farm in fee simple or fee tail, had no remedy for the arrears incurred in the lifetime of the testator or intestate. By that statute a double remedy is provided for them; viz., either to distrain or have an action of debt. The statute also gives in terms the same double remedy to the executors of tenant for term of life of rent charges, etc., from which, at first view, it might be inferred that the executors of tenant for life could not bring debt at common law. But these words have, by the best authorities, been considered to refer only to tenants *pur autre vie* so long as *cestui que vie* lives." Wms. Exrs. (7th Eng. ed.) 820; Co. Litt. 162 *a*, 162 *b*; *Hargrave's notes*, 1 Saund. (Eng.) 282, note (1) to *Duppa v. Mayo*. See § XIII. 6.

When Rent is due. — Although the time of sunset is the time appointed by law to demand rent, to take advantage of a condition of re-entry, or to tender it to save a forfeiture, yet the rent is not due till *midnight* of the rent-day. If the lessor dies after sunset, and before midnight, the rent belongs to the heir; for, the lessor dying before it was completely due, the personal representative can take no title to it. If, however, the tenant had voluntarily paid the rent on the rent-day, and then after it was paid, and before midnight, the lessor had died, such payment would be a good satisfaction against the heir or remainderman, and the executor would not be liable to refund to him. Wms. Exrs. (7th Eng. ed.) 823. See also *Lord Kenyon's judgment in Leftley v. Mills*, 4 T. R. (Eng.) 173; *Blackstone, J.*, in *Cutting v. Derby*, 2 W. Bl. (Eng.) 1077; *Clem's Case*, 10 Co. 127 *b*; *Duppa v. Mayo*, 1 Saund. (Eng.) 287, 288 *c*, note (17); *Norris v. Harrison*, 2 Madd. (Eng.) 268; *Rockingham v. Penrice*, 1 P. Wms. 277; s. c., 1 Salk. (Eng.) 578.

If, by the terms of the lease, the rent is due at a specified time, as Christmas, or the feast of St. Michael, or *within one month after*, it is not deemed to be due till the end of the month; and if the lessor dies before that time, it shall go to the heir as

sation for land taken for public purposes, during the owner's lifetime, although not payable until a future day, which occurred after his death, are assets in the hands of his executor; but if the land had not been taken until after his death, the injury then being to the reversion, the damages would belong to the heir.¹

an incident of the reversion. *Blunden's Case*, Cro. Eliz. (Eng.) 565; *Thompson v. Field*, Cro. Jac. (Eng.) 500; *Josselin v. Josselin*, 4 Leon. (Eng.) 19; *Pilkington v. Dalton*, Cro. Eliz. (Eng.) 575.

Where upon a lease for fifty years, if the lessor should so long live, rent was reserved, payable at the four usual feasts, or within thirteen weeks after; and after Lady Day, but within thirteen weeks, the lessor died, — it was *held* that the executor could not maintain debt against the lessee for rent due at Lady Day, because it was not due at the time of the testator's death. *Clem's Case*, 10 Co. 127 a.

Where rent was reserved at the feast of St. John and at Christmas, or fourteen days after, the first payment to be made at Christmas next after date, it was *held* that the tenant had fourteen days after the first Christmas, as well as any other, to pay his rent in. *Anon.* 2 Show. (Eng.) 77.

Apportionment. — At common law, rent could not be apportioned with respect to time. Hence, if a tenant for life made a lease for years, reserving rent, and died between two rent-days, the accrued rent was lost, both to the executor and the remainder-man, or reversioner, however great the fractional portion of the year might be since the last day of payment, and could not be recovered either in law or equity. *Jenner v. Morgan*, 1 P. Wms. (Eng.) 392; *Hay v. Palmer*, 2 P. Wms. (Eng.) 502; 3 Kent, *471. See also *Cutter v. Powell*, 6 T. R. (Eng.) 320; *Stillwell v. Doughty*, 3 Bradf. (N. Y.) 359; *Marshall v. Moseley*, 21 N. Y. 280.

The ground for the position appears to have been, that, under a lease with a periodical reservation of rent, the contract for the payment of each portion is distinct and entire, and that an entire contract cannot be apportioned. 3 Cruise, Dig. tit. xxvii. ch. iii. s. 44 n.; *Ex parte Smyth*, 1 Swanst. (Eng.) 338, note (a); *Perry v. Aldrich*, 13 N. H. 343.

The same principle has also been applied to annuities, contracts for labor and service, and dividends or moneys invested in stock. Bro. Abr. tit. "Apportionment," pl. 13, 22, 26; *Countess of Plymouth v. Throgmorton*, 1 Salk. (Eng.) 65; *Parker, C. J.*, in *Britton v. Turner*, 6 N. H. 481; 2 Greenl. Evid. sect. 136 a; *Wilson v. Harmer*, 2 Ves. (Eng.) 672; *Rasleigh v. Master*, 3 Bro. C. C. (Eng.) 99.

But the old rule has been so far relaxed

that wages may be apportioned upon the principle that such is the reasonable construction of contract of hiring. *Lawrence, J.*, in *Cutter v. Powell*, 6 T. R. (Eng.) 326; *McClure v. Pyatt*, 4 M'Cord (S. C.), 26; *Bacot v. Parnell*, 2 Bailey (S. C.), 424.

It has also been *held* independent by statutory provision, that if an annuitant dies within the quarter, or year, as the case may be, and the annuity was given for maintenance in infancy, or for the separate maintenance of a *feme covert*, equity would apportion the annuity up to the day of the annuitant's death, on the principle that the allowance was necessary. *Hay v. Palmer*, 2 P. Wms. (Eng.) 501; *Pearly v. Smith*, 3 Atk. (Eng.) 260; *Howell v. Hanworth*, 2 Wm. Bl. (Eng.) 843; *Gheen v. Osborn*, 17 Ser. & R. (Pa.) 173; *Blight v. Blight*, 51 Pa. St. 420.

But no such apportionment was allowed at law. The Queen v. Lords of the Treasury, 16 Q. B. 357, 363.

This exception, however, arose from necessity, and did not extend to an annuity for the separate use of a married woman, living with her husband and maintained by him. *Anderson v. Dwyer*, 1 Schoales & Lefr. (Eng.) 301.

The statute of 11 Geo. II. c. 19, § 15, allowed rent to be apportioned in respect of time when the lease determined on the death of the tenant for life; and the statute 4 William IV. c. 22, in amendment, declared that all rents service, rents charge, and other rents, annuities, dividends, and *all other payments* of every description, made payable at fixed periods, should be apportioned, and provided for the recovery of the apportioned parts from the last period of payment. 3 Kent, *471 n. See, as to the law in New York, N. Y. Rev. Stat. 1747, sect. 22.

1. *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Welles v. Cowles*, 4 Conn. 182; *Webster v. Lowell*, 139 Mass. 172; *Goodwin v. Milton*, 25 N. H. 458; *Neal v. Knox R. Co.*, 61 Me. 298; *Hankins v. Kimball*, 57 Ind. 42.

An executor has no power as such to execute to a railroad company a right of way over lands belonging to his testator's estate, and cannot be held liable as such for money received by him for such release, in an action against him by the devisee. Money so received by the executor is no part of the assets of the estate. *Hankins v. Kimball*, 57 Ind. 42.

Insurance money paid on a fire-insurance policy on the decedent's real estate vests in the heirs as realty, if the buildings have been burned after his death.¹

A contract for the sale of land as between the personal and real representatives of the vendor belongs to the former as a part of the personal estate; but the interest of the vendee in the performance of the contract, being deemed in equity an estate in the land, descends to his heirs as real estate.² Real estate fraudulently conveyed may be reached by the executor or administrator by bill in equity when necessary for the payment of debts.³

Under what Circumstances Heir may compel Execution by Personal Representative of Covenant to lay out Money in Land. — See DEBTS OF DECEDENTS.

Sales of Real Estate by Personal Representative to pay Debts. — See DEBTS OF DECEDENTS and JUDICIAL SALES.

XIII. Powers. — I. Power to Sue.⁴ XII. 3, d, § XVI.

1. Wyman v. Wyman, 26 N. Y. 253; Harrison v. Harrison, 4 Leigh (Va.), 371.

2. Moore v. Burrows, 34 Barb. (N. Y.) 173; Champion v. Brown, 6 John. Ch. (N. Y.) 398.

Unpaid purchase-money due on a contract for sale of realty is assets, although its payment may be secured by mortgage or otherwise. Loring v. Cunningham, 9 Cush. (Mass.) 87; Sutter v. Ling, 25 Pa. St. 466; Henson v. Ott, 7 Ind. 512; Matter of Everit, 2 Edw. (N. Y.) 597.

Where a testator devises land to which he still holds the legal title, but which he has sold, giving to the purchaser a bond for a deed, the purchase-money, when paid by the purchaser, will belong to the devisee. Wright v. Minshall, 72 Ill. 584.

Where a deed to real estate, executed by the vendor, is held by some third person as an escrow, to be delivered on the payment of an unpaid balance of the purchase-money, the death, meantime, of the vendor will cause the estate to descend to the heir, subject to the vendee's equitable right to a conveyance. Teneick v. Flagg, 29 N. J. L. 25.

When the purchaser of land dies without having paid the purchase-price or received a conveyance, and the executors pay the money, and take the deed to themselves "as executors in trust for heirs," they take a legal title on which they can maintain ejectment; but they hold only as trustees, and their title does not pass to their successors in administration. Wells v. Elliott, 68 Ala. 183. See § XIII. 10, n.

3. Wms. Exrs. (7th Eng. ed.) 1679, 1680; 2 Sugden, V. & P. (8th Am. ed.) 714, note (1st); Schoul. Exrs. & Adms. § 220. See Shears v. Rogers, 3 B. & Ad. (Eng.) 362.

In Massachusetts, lands fraudulently con-

veyed by the deceased may be recovered by an executor duly licensed to sell them. If, after the sale and payment of debts, a surplus remains, one to whom the land had been conveyed by the decedent for valuable consideration, though in fraud of creditors, is entitled to it as against the heirs of the intestate. Allen v. Ashley School Fund, 102 Mass. 262, 266, 267; 2 Sugden, V. & P. (8th Am. ed.) 714, note (1st); Tenney v. Poor, 14 Gray (Mass.), 500.

Wis. Rev. Stats. § 3835, to reach real estate or other assets of a decedent not included in his inventory, etc., includes in its operation actions to subject real estate conveyed by the decedent in his lifetime in fraud of creditors. German Bank v. Leyer, 50 Wis. 258.

But the personal representative can only institute such proceedings for the benefit of creditors: the heirs must institute proceedings in their own interests. Richards v. Sweetland, 6 Cush. (Mass.) 324, per Metcalf, J. See Shuman v. Dodge, 28 Vt. 26; Ford v. Exempt Fire Co., 50 Cal. 299.

But in the absence of fraud, an administrator cannot avoid a voluntary deed of his intestate, nor can he take advantage of a fraudulent conveyance made by him. Eads v. Mason, 16 Ill. App. 545.

4. The executor or administrator cannot enter upon proceedings to annul his decedent's marriage. He does not represent the deceased for any such purpose. Statutes which sanction such proceedings, usually only authorize relatives of the deceased, interested in contesting the validity of the marriage, to petition that it may be annulled. - Pingree v. Goodrich, 41 Vt. 47; Schoul. Hus. & Wife, § 13.

It is within the discretion of the New York surrogate to limit the powers conferred upon the administrator. Martin v.

2. *Power to waive Statute of Limitations.* — The executor or administrator is not bound to plead the general statute of limitations in bar of an action to recover a debt otherwise justly due,¹

Dry Dock, East Broadway R. Co., 92 N. Y. 70.

Acting Executor. — An "acting executor" is clothed with all the powers of the executorship, as to the personal estate of the testator. *Columbus Ins. & Banking Co. v. Humphries* (Miss.), 1 So. Rep. 232.

Where there are several executors, they must all join in the prosecution of a suit, even though some renounce. A suit in the name of A. B. as *acting* executor cannot be maintained. *Bodle v. Hulse*, 5 Wend. (N. Y.) 313. See *Creswick v. Woolhead*, 4 Man. & Gr. (Eng.) 811; *Brooks v. Stroud*, 1 Salk. (Eng.) 31. On summons to those who will not join, there will be a judgment of severance; and the others may proceed and recover in their own name. *Bodle v. Hulse*, 5 Wend. (N. Y.) 313.

But actions against the estate may properly be brought against those who have proved the will, or actually administered. Went. Off. Ex. (14th ed.) 96.

1. Wms. Exrs. (7th Eng. ed.) 1803; 2 Kent, 416, note (c); *Fritz v. Thomas*, 1 Wh. (Pa.) 66; *M'Farland's Est.* Kennedy's App. 4 Pa. St. 149; *Biddle v. Moore*, 3 Pa. St. 161; *Steel v. Steel*, 12 Pa. St. 67; *Smith's Est.* 1 Ashm. (Pa.) 352; *Miller v. Dorsey*, 9 Md. 317; *Chambers v. Fennemore*, 4 Harr. (Del.) 368; *Semmes v. Magruder*, 10 Md. 242; *Barnawell v. Smith*, 5 Jones, Eq. (N. C.) 168; *Leigh v. Smith*, 3 Ired. Eq. (N. C.) 442; *Batson v. Murrell*, 10 Humph. (Tenn.) 301; *Tunstall v. Pollard*, 11 Leigh (Va.), 1; *Pollard v. Sears*, 28 Ala. 484; *Walter v. Radcliffe*, 2 Desaus. (S. C.) 577; *Thayer v. Hollis*, 3 Met. (Mass.) 369; *Emerson v. Thompson*, 16 Mass. 429; *Hodgdon v. White*, 11 N. H. 208; *Amoskeag Mfg. Co. v. Barnes*, 48 N. H. 25, 29. See also *Williamson v. Naylor*, 3 Y. & Coll. (Eng.) 211, note (a) by Lord Lyndhurst; *McCulloch v. Dawes*, 9 Dowl. & Ryl. (Eng.) 43; *Hill v. Walker*, 4 Kay & J. (Eng.) 166. Compare *Wiggins v. Lovering*, 9 Mo. 262; *Woods v. Elliott*, 49 Miss. 168; *West v. Smith*, 8 How. (U. S.) 402, 411.

Payment of such a debt is not a *devastavit*. *Norton v. Frecker*, 1 Atk. (Eng.) 526; *Stahlschmidt v. Lett*, 1 Sm. & G. (Eng.) 415; *Parker, C. J.*, in *Hodgdon v. White*, 11 N. H. 208, 214, 215; *Scott v. Hancock*, 13 Mass. 164; *Ritter's App.* 23 Pa. St. 95; *Broome v. Van Hook*, 1 Redf. (N. Y.) Sur. 444.

In some States it has been held that the executor or administrator cannot legally pay a claim which was barred before the

grant of administration. *Trotter v. Trotter*, 40 Miss. 704; *Byrd v. Welles*, 40 Miss. 711.

In others he cannot revive against the estate a debt barred by the statute before the death of the decedent. *Moore v. Porcher*, 1 Bailey, Ch. (S. C.) 195; *Dickson v. Compton*, 14 La. An. 83. See also *Patterson v. Cobb*, 4 Florida, 48; *Rogers v. Wilson*, 13 Ark. 507; *Rector v. Conway*, 20 Ark. 79.

These distinctions, however, do not appear to have been generally recognized. *Lewis v. Rumney*, L. R. 4 Eq. Cas. (Eng.) 451; *Hill v. Walker*, 4 K. & G. (Eng.) 166; *Payne v. Pusey*, 8 Bush (Ky.), 564; *Hodgdon v. White*, 11 N. H. 208; *Ritter's App.* 23 Pa. St. 95.

Testator may expressly direct his executor to disregard the statute. *Campbell v. Shotwell*, 51 Tex. 27.

In England a barred claim paid by the personal representative has been allowed as against devisees upon whom other debts were in consequence thrown. *Lewis v. Rumney*, L. R. 4 Eq. Cas. (Eng.) 451. See *Payne v. Pusey*, 8 Bush (Ky.), 564.

Under the English equity rule, residuary legatees and distributees can neither compel the personal representative to plead the statute, nor set it up themselves, unless the proceedings are in such form that they are essentially parties to the suit. *Sherrin v. Vandenhurst*, 1 Russ. & My. (Eng.) 347; 2 Russ. & My. (Eng.) 75; Wms. Exrs. (7th Eng. ed.) 1804; *Briggs v. Wilson*, 5 De G. M. & G. (Eng.) 12. See *Leigh v. Smith*, 3 Ired. (N. C.) 442.

But where a bill is brought to charge real estate of the deceased with the payment of debts, the heir or devisee, residuary legatee, or any person interested therein, may interpose the statute. *Wood, Limitations*, § 188; *Partridge v. Mitchell*, 3 Edw. Ch. (N. Y.) 180; *Warren v. Paff*, 4 Bradf. Sur. (N. Y.) 260; *Bond v. Smith*, 2 Ala. 666; *Steele v. Steele*, 64 Ala. 438. See *Woodyard v. Polsley*, 14 W. Va. 211. *Contra*, *Hodgdon v. White*, 11 N. H. 208.

In Pennsylvania, creditors, legatees, distributees, and others interested in the estate, whose claim may be diminished by the allowance of the barred debt, may plead the statute; but where they stand by, making no inquiry into the affairs of the estate, and permit the executor or administrator to pay a claim to which the statute is applicable, without giving notice of their objection, they are bound by his payment. The right to interpose depends upon whether the party's interest

and an express promise by him to pay such debt has been generally held sufficient to avoid its effect.¹ But the special statute of limitations, otherwise termed the statute of non-claim, which

would be affected by the payment. *Ritter's App.* 23 Pa. St. 95.

1. *Briggs v. Wilson*, 5 De G. M. & G. (Eng.) 12; *Browning v. Paris*, 5 M. & W. (Eng.) 120; *Semmes v. Magruder*, 10 Md. 242; *Northcut v. Wilkinson*, 12 B. Mon. (Ky.) 408; *Brewster v. Brewster*, 52 N. H. 52; *Johnson v. Beardslee*, 15 John. (N. Y.) 3; *Hodgdon v. White*, 11 N. H. 208, 211; *Baxter v. Penniman*, 8 Mass. 133; *Brown v. Anderson*, 13 Mass. 201, 203; *Emerson v. Thompson*, 16 Mass. 429. As to characteristics of such promise, see § XV. 2.

The rule operates as well in an action against an administrator *de bonis non* as against the original executor or administrator who made the promise. *Emerson v. Thompson*, 16 Mass. 429.

In *Foster v. Starkey*, 12 Cush. (Mass.) 324, part payment by the personal representative was held to be a sufficient acknowledgment. But the better opinion is, that there must be an express promise. *Thompson v. Peter*, 12 Wheat. (U. S.) 565; *Peck v. Bottsford*, 7 Conn. 177; *Head v. Manners*, 5 J. J. Marsh. (Ky.) 257; *Oakes v. Mitchell*, 15 Me. 360; *Cayuga Bank v. Bennett*, 5 Hill (N. Y.), 240; *Tulloch v. Dunn*, *Ryan & M. Eng.* 417; *Hammon v. Huntley*, 4 Cowen (N. Y.), 493; *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558; *Oakes v. Mitchell*, 15 Me. 360; *McIntire v. Morris*, 14 Wend. (N. Y.) 90. But see *McWhirter v. Jackson*, 10 Humph. (Tenn.) 209; *F. & M. Bank v. Leath*, 11 Humph. (Tenn.) 515; *Buchanan v. Buchanan*, 4 Strobb. (S. C.) 63; *Chambers v. Fennemore*, 4 Harring. (Del.) 368; *Deyo v. Jones*, 19 Wend. (N. Y.) 491; *Townes v. Ferguson*, 20 Ala. 147.

As to mere admission by the representative of the existence of the debt or part payment, see *Akkins v. Tredgold*, 2 B. & C. (Eng.) 28; *Abbott, C. J.*; *Knox v. McCall*, 1 Brevard (S. C.), 531; *Moore v. Porcher*, 1 Bailey, Eq. (S. C.) 195; *Hale v. Roberts*, cited in *Buswell v. Roby*, 8 N. H. 468; *Hodgdon v. White*, 11 N. H. 211; *Foster, J.*, in *Brewster v. Brewster*, 52 N. H. 52, 60.

In New Jersey, one of two or more executors may bind the estate by such promise; but it does not make the representatives personally liable. *Shreve v. Joyce*, 7 Vroom (N. J.), 44.

But in *Tulloch v. Dunn*, *Ryan & M. (Eng.)* 417, it was held that there must be an express promise by all the executors. See *Scoley v. Walton*, 12 M. & W. (Eng.)

510; *Head v. Manners*, 5 J. J. Marsh. (Ky.) 257; *Hard v. Lee*, 2 Monroe (Ky.), 131; *McCann v. Sloan*, 25 Md. 575; *Emerson v. Thompson*, 16 Mass. 429; *Johnson v. Beardslee*, 15 John. (N. Y.) 3; *Northcut v. Wilkinson*, 12 Mon. (Ky.) 408; *McCulloch v. Dawes*, 9 Dowl. & Ryl. (Eng.) 43; *Tulloch v. Dunn*, Ry. & Mod. (Eng.) 416; *Briggs v. Wilson*, 5 De G. M. & G. (Eng.) 12.

But in Pennsylvania an executor or administrator sued in his representative character for a debt due by the decedent, may plead the statute of limitations as a bar to the action, although such executor or administrator may have made such acknowledgment of the debt, as, in the case of a person sued for his own debt, would be sufficient to take the case out of the statute. *Fritz v. Thomas*, 1 Wh. (Pa.) 66; *Reynolds v. Hamilton*, 7 Watts (Pa.), 420; *Clark v. McGuire*, 35 Pa. St. 259.

It is immaterial whether the debt was, or was not, barred at the time the promise was made. *Steel v. Steel*, 12 Pa. St. 64, 66. But compare *Forney v. Benedict*, 5 Pa. St. 225.

A similar view appears to have been entertained in North and South Carolina. *Oates v. Lilly*, 84 N. C. 643; *McGrath v. Barnes*, 3 S. C. 328; 36 Am. Rep. 687. See *Moore v. Porcher*, 1 Bailey, Eq. (S. C.) 195, 199; *Knox v. McCall*, 1 Brev. (S. C.) 531.

In Kansas an agreement by an administrator with a creditor to keep open indefinitely the prosecution and determination of his demand, does not bind the estate. *Collamore v. Wilder*, 19 Kan. 67.

In some States it is held that the acknowledgment of the debt by the personal representative will not remove the bar after it has once operated upon the debt, though it will suspend its operation if made before the bar is completed. *Foster v. Starkey*, 12 Cush. (Mass.) 324; *McLaren v. McMartin*, 36 N. Y. 88; *Wood on Limitations*, § 190.

Such promises, however, will bind the administrator personally if made in writing and founded on sufficient consideration or on the possession of assets. *Oates v. Lilly*, 84 N. Car. 643; *McGrath v. Barnes*, 13 S. Car. 328; 36 Am. Rep. 687.

An administrator cannot appropriate the share of a distributee of the estate to the payment of a debt due to the estate from such distributee, but which has been barred by the statute of limitations. *Richardson v. Keel*, 9 Lea (Tenn.), 74.

limits the time within which an action can be brought against him in his official character, is imperative, and cannot be waived.¹

3. *Power to release, compromise, and submit Claims to Arbitration, and bind the Estate by Admissions.*—If an executor or administrator releases a debt due the estate *prima facie*, the release is valid as an exercise of the power of disposition,² but shall charge him with the amount of the debt, whether he actually received it or not. It is a *devastavit* for the personal representative to release a cause of action founded on a tort accruing either in the lifetime of the decedent, or in his own time, in right of the deceased.³

1. *Waltham Bank v. Wright*, 8 Allen (Mass.), 122; *Heath v. Wells*, 5 Pick. (Mass.) 140; *Scott v. Hancock*, 13 Mass. 162; *Emerson v. Thompson*, 16 Mass. 429; *Hodgdon v. White*, 11 N. H. 208; *Amoskeag Mfg. Co. v. Barnes*, 48 N. H. 25; *Hall v. Woodman*, 49 N. H. 295; *Sugar River Bank v. Fairbank*, 49 N. H. 131; *Wiggins v. Lovering*, 9 Mo. 262.

If he neglect to plead it, and judgment issues against him, it will not bind the estate. Levy and execution thereon against the real estate will be void as to all persons except the executor or administrator who allowed it to issue, against whom it would operate by way of estoppel. *Thayer v. Hollis*, 3 Met. (Mass.) 369; *Sargeant, J., in Amoskeag Mfg. Co. v. Barnes*, 48 N. H. 25, 29, 30. See *Hodgdon v. White*, 11 N. H. 216; *Stillman v. Young*, 16 Ill. 318.

No license can be granted to sell real estate to pay debts barred by this statute. *Lamson v. Schutt*, 4 Allen (Mass.), 359; *Nowell v. Nowell*, 8 Greenl. (Me.) 220; *Ex parte Allen*, Petitioner, 15 Mass. 57; *Tarbell v. Parker*, 106 Mass. 347; *Robinson v. Hodge*, 117 Mass. 222, 225; *Hall v. Woodman*, 49 N. H. 295; *Ferguson v. Scott*, 49 Miss. 500.

As to whether such license, if granted, would be void *ipso facto*, or require to be vacated by a direct proceeding, see *Merrick, J., in Lamson v. Schutt*, 4 Allen (Mass.) 359, 361; *Thompson v. Brown*, 16 Mass. 172; *Tarbell v. Parker*, 106 Mass. 347; *Hall v. Woodman*, 49 N. H. 295; *Moors v. White*, 6 John. Ch. (N. Y.) 360; *Jackson v. Robinson*, 4 Wend. (N. Y.) 436.

As to validity of judicial orders to sell real estate until avoided, see DEBTS OF DECEDENTS.

If the representative afterwards refuses to pay a judgment obtained, on a claim which would have been barred had the statute been pleaded, his sureties cannot be held liable for the amount by the creditor. *Dawes v. Shed*, 15 Mass. 6; *Robinson v. Hodge*, 117 Mass. 222.

For further discussion of nature of

those statutes, see DEBTS OF DECEDENTS, Am. & Eng. Enc. of Law, and Wms. Exrs. (7th Eng. ed.) 194, note u¹; Schoul. Exrs. & Admsrs. §§ 389, 390; Wood on Limitations of Actions, §§ 188-199; "Limitations," Am. & Eng. Enc. of Law. See *Parker v. Grant*, 91 N. C. 338.

2. *Davenport v. First Cong. Soc.* 33 Wis. 387.

The release by the executor is valid, and binds the estate until it is shown that he is unable to make good the debt out of his own property, and that the release must operate as a misapplication of the assets; and the burden of proving these facts rests upon him who would attack its validity. *Davenport v. First Cong. Soc.* 33 Wis. 387, 390. See *Butler v. Gazzam* (Ala.), 1 So. Rep. 16; *Latta v. Miller* (Ind.), 10 N. E. Rep. 100.

3. Went. Off. Ex. (14th ed.) 303, 304; Wms. Exrs. (7th Eng. ed.) 1799; *Cocke v. Jennor*, Hob. (Eng.) 66; Com. Dig. Admon. I. 1; Bac. Abr. Exrs. L. 1; *De Dieman v. Van Wagenen*, 7 John. (N. Y.) 404; *Davenport v. First Cong. Soc.*, 33 Wis. 387; Mass. Pub. Sts. c. 142, §§ 13-16; *People v. Pleas*, 2 Johns. Cas. (N. Y.) 376.

"If an executor doth release an account, and it is not certain what he shall recover, it is not assets; but if it can appear, or be proved, that so much was due, it is assets. For the law presumeth that he hath received so much as he doth release." *Periam, J., in Brightley v. Krichley*, Cro. Eliz. 43.

But neither a receipt for so much due on the bond as the executor receives, nor a parol agreement not to sue for more, nor the delivery of the bond into another hand that it may not be sued, constitutes *per se* a *devastavit* for the residue. Went. Off. Ex. (14th ed.) 303; Com. Dig. Admon. I. 2; *De Dieman v. Van Wagenen*, 7 John (N. Y.) 404.

Under Mass. Gen. Sts. c. 101, § 11, the courts of probate may authorize executors and administrators to release and discharge upon such terms and conditions as appear proper, any vested, contingent, or possible right or interest, belonging to the persons or estates represented by them, in or to any real or personal estate, whenever it

Executors and administrators have full authority to compromise claims,¹ or submit any disputed matter relating to the estate to arbitration,² but, in the absence of express statutory authority, are personally liable for any damage resulting to the estate from an injudicious use of the power.³ Admissions of an executor

appears to be for the benefit of the persons or estates in trust.

1. *Bacon v. Crandon*, 15 Pick. (Mass.) 79; *Chadbourn v. Chadbourn*, 9 Allen (Mass.), 173, 174; *Chanteau v. Suydan*, 21 N. Y. 179; *Chase v. Bradley*, 26 Me. 531; *Wyman's App.* 13 N. H. 18, 20; *Woolfork v. Sullivan*, 23 Ala. 548; *Pusey v. Clemson*, 9 Ser. & R. (Pa.) 204; *Boyd v. Oglesby*, 23 Gratt. (Va.) 674; *Berry v. Parkes*, 3 Sm. & M. (Miss.) 625; *Fridge v. Buhler*, 6 La. Ann. 272; *Potter v. Cummings*, 18 Me. 55; *Patten's Case*, 1 Tuck. N. Y. Sur. 56; *Wilkes v. Black* (Ark.), 4 S. W. Rep. 766; *Alexander v. Kelso*, 59 Tenn. 311.

In Louisiana it is held that an administrator exceeds his proper functions when he enters into an agreement with the debtors of an estate to extend the time of payment beyond that fixed by the original contract. *Landry v. Delas*, 25 La. Ann. 181.

So when he agrees to accept Confederate money as a novation of a liability due the estate. *Scott v. Atchison*, 36 Tex. 76.

2. *Went. Off. Ex.* (14th ed.) 304; *Yard v. Allard*, 1 Ld. Raym. (Eng.) 369; *Woodin v. Bayley*, 13 Wend. (N. Y.) 453; *Tracy v. Suydam*, 30 Barb. (N. Y.) 110; *White v. Story*, 43 Barb. (N. Y.) 124; *Bucklin v. Chapin*, 53 Barb. (N. Y.) 488; *Brockert v. Bush*, 18 Abb. Pr. (N. Y.) 337; *Adarene v. Marlow*, 33 Vt. 558; *McDaniels v. McDaniels*, 40 Vt. 340; *Barker v. Belknap*, 39 Vt. 168; *Reed v. Wiley*, 5 Sm. & M. (Miss.) 394; *Green v. Creighton*, 7 Sm. & M. (Miss.) 197; *Regan v. Stone*, 7 Sm. & M. (Miss.) 104; *Wills v. Ram*, 41 Ala. 198; *Clark v. Bomford*, 20 Ark. 440; *Childs v. Updyke*, 9 Ohio St. 333; *Anderson v. Baker*, 15 Ohio St. 173; *Swincard v. Wilson*, 2 Mill (S. C.), *Comst.* 218; *Alling v. Munson*, 2 Conn. 691; *Jones v. Deyer*, 16 Ala. 221; *Wills v. Rand*, 41 Ala. 198; *Overly v. Overly*, 1 Metc. (Ky.) 117; *Merchants' Bank v. Rawls*, 21 Ga. 289; *Nelson v. Cornwell*, 11 Gratt. (Va.) 724; *Peters' App.* 38 Pa. St. 239; *Dickinson v. Dutcher*, *Brayt.* (Vt.) 104.

In Maine, executors and administrators have power to submit to referees contested personal claims touching the estates under their care, as an incident of the power to sue. *Eaton v. Cole*, 1 Fairf. (Me.) 137; *Weston v. Stewart*, 3 Fairf. (Me.) 326; *Wells, J.*, in *Kendall v. Bates*, 35 Me. 357, 358.

In New York, the reference provided by statute does not apply to claims made by

the executor or administrator against other parties, and in favor of the estate, except those made strictly in the way of set-off. *Akely v. Akely*, 17 How. Pr. (N. Y.) 21.

In Illinois, an executor has no power to submit a claim against his testator's estate to arbitration. *Reitzell v. Miller*, 25 Ill. 67.

In Texas, it is held to be improper to submit a rejected claim. *Yarborough v. Leggett*, 14 Tex. 677. Compare *McDaniels v. McDaniels*, 40 Vt. 340; *Ponce v. Wiley*, 62 Ga. 118; *U. S. Digest*, 1st Series, "Executors and Administrators," 2057-2080.

Under the New York statute, a claim for a tort—the conversion of personal property—may be referred. *Brockert v. Bush*, 18 Abb. Pr. (N. Y.) 337.

Under 2 N. Y. Rev. Stat. 90, only those claims against the estate of the decedent are referable which accrued during his life, or would have accrued against him if he had lived. *Godding v. Porter*, 17 Abb. N. Y. Pr. 374. But see *McDaniels v. McDaniels*, 40 Vt. 340.

The Maryland statute refers only to claims against the estate, asserted against the administrator in his fiduciary character, and does not apply to such as are contracted by him in his individual character, and only bind him personally. *Browne v. Preston*, 38 Md. 373.

As to authority of executors and administrators to submit claims to arbitration, under Massachusetts statutes, see *Mass. Gen. Stats. c. 101, § 10*; *Mass. Stat. 1861, c. 174, § 1*; *Mass. Stat. 1864, c. 173, § 1*.

A claim of a creditor against an insolvent estate, disallowed by commissioners of insolvency, may, after appeal, be submitted to arbitrators, under a rule of the probate court. *Mass. Gen. Stats. c. 79, § 11*. See *Gilmore v. Hubbard*, 12 Cush. (Mass.) 220.

Disputed claims of the personal representative against the deceased may be submitted to arbitrators, under a rule of the probate court. *Mass. Gen. Stats. c. 97, §§ 26, 27*. See *Wiley v. Thompson*, 9 Met. (Mass.) 329; *Dana v. Prescott*, 1 Mass. 200.

3. *Wms. Exrs.* (7th Eng. ed.) 1800; *Went. Off. Ex.* (14th ed.) 304; *Anon.* 3 Leon. (Eng.) 53; *Com. Dig. Admon. I. 1*; *Yard v. Allard*, 1 Ld. Raym. (Eng.) 369; *Wiles v. Gresham*, 5 De G. M. & G. (Eng.) 770; *Pennington v. Healey*, 1 Cr. & My. (Eng.) 402; 3 Tyrwh. (Eng.) 319; *Blue v. Marshall*, 3 P. Wms. (Eng.) 381; *Pusey v.*

or administrator as to his own acts after he became clothed with

Clemson, 9 Ser. & R. (Pa.) 204; Wyman's App. 13 N. H. 18, 20; Chadbourn v. Chadbourn, 9 Allen (Mass.), 173, 174; Coffin v. Cottle, 4 Pick. (Mass.) 154; Bean v. Farnam, 6 Pick. (Mass.) 269; Potter v. Cummings, 18 Me. 55; Patten's Case, 1 Tuck. (N. Y.) Sur. 56; Kee v. Kee, 2 Gratt. (Va.) 116; Berry v. Parkes, 3 Sm. & M. (Miss.) 625; Woolfork v. Sullivan, 23 Ala. 548; Nelson v. Cornwell, 11 Gratt. (Va.) 724; Boyd v. Oglesby, 23 Gratt. (Va.) 674; De Dieman v. Van Wagenen, 7 John. (N. Y.) 404.

"If an objection was taken, the burden of proof lay upon him to show that he had acted judiciously, and that the estate had not been prejudiced by the compromise; and if he failed in this, he might be made chargeable with the difference." Parker, C. J., in Wyman's App. 13 N. H. 18, 20.

It would also appear that money agreed to be paid by the compromise is to be deemed assets in the hands of the personal representative from the time of the agreement. Thus, if he agrees with an executor *de son tort*, and accepts his covenant for payment, he will be liable for so much, though nothing be paid. Com. Dig. Admon. I. 1. Also, if an executor brings suit in his representative capacity, and afterwards covenants with the defendant to accept a specific sum at a future day as a compensation, he will be answerable for the money as assets immediately. Norden v. Levitt, 2 Lev. (Eng.) 189; s. c., T. Jones (Eng.), 88; Jenkins v. Plombe, 6 Mod. (Eng.) 94. See Stark v. Hunton, 3 N. J. Eq. 300.

If an executor takes land in payment of a debt due to his testator, he is chargeable with the price allowed by him for the lands, unless those entitled to the estate elect to take the land. Weir v. Tate, 4 Ired. Eq. (N. C.) 264.

The taking of an obligation in his own name by the executor for a debt due by simple contract to the testator, shall charge him as much as if he had received the money; for the new security extinguished the old one, and is a *quasi* payment. Goring v. Goring, Velv. (Eng.) 10. Compare Armitage v. Metcalfe, 1 Chanc. Cas. (Eng.) 74.

Upon the same principle, if the personal representative submits a debt due the decedent to arbitration, either the propriety of the submission might be called in question, or the finding of the arbitrators revised or set aside by those interested in the estate; and if less had been awarded than was due, he was liable for the full value as assets. Went. Off. Ex. (14th ed.) 304; Yard v. Allard, 1 Ld. Raym. (Eng.) 369, by Holt, C. J. See Chadbourn v.

Chadbourn, 9 Allen (Mass.), 173, 174; Bacon v. Crandon, 15 Pick. (Mass.) 79.

In many States statutes exist authorizing executors and administrators, with the approbation of the probate court, to compromise and discharge doubtful claims. These statutes provide a mode by which the administrator may compromise with the debtor with perfect safety; but the common-law right to compromise, which existed prior to the passage of the statute, is not taken away, and may still be exercised, subject to the same risks and limitations. Moulton v. Holmes, 57 Cal. 337; Wyman's App. 13 N. H. 18, 20; Chouteau v. Suydam, 21 N. Y. 179; Re Scott, 1 Redf. (N. Y.) 234; Howell v. Blodgett, 1 Redf. (N. Y.) Sur. 323; Chase v. Bradley, 26 Me. 531; Chadbourn v. Chadbourn, 9 Allen (Mass.), 173, 174; Laws of Iowa Revis. 1860, p. 411, § 2368; Wilkes v. Black (Ark.), 4 S. W. Rep. 766.

If a party in interest means to attack a particular compromise obtained under probate sanction for fraud, he should bring a bill in equity, or proceed specially. Henry County v. Taylor, 36 Iowa, 259. Compare language of 23 & 24 Vict. c. 145, § 30, cited in Wms. Exrs. (7th Eng. ed.) 1801.

In Kansas an administrator has no power to compromise any claim, debt, or demand belonging to the estate, and accruing in the lifetime of the deceased, so as to bind the estate, without the consent of the probate court. Aetna Life Ins. Co. v. Swayze, 30 Kan. 118.

In South Carolina a compromise which the court would have sanctioned, if application had been made beforehand for that purpose, will be sustained. S. C. Gen. St. 58, § 9, does not apply to such a case. Geiger v. Kaigler, 9 S. Car. 401.

A settlement recommended by the will, and applied for by the executors in good faith, may be properly authorized by the court. Ilse v. Ilse (Ky.), 6 S. W. Rep. 120.

Under 3 N. Y. Rev. St. (6th ed.) 95, § 35, the power of the surrogate to authorize executors and administrators to compromise debts and claims due the estate, is not limited to demands against insolvent debtors only: such authority may be granted where there is doubt as to the liability of the debtor. Shepard v. Saltus, 4 Redf. (N. Y.) 232.

Such a statute does not sanction a composition deed giving a long term of payment. Matter of Loper, 2 Redf. (N. Y.) 545.

Compromising Claims.—When an administrator, under the amendment of 1881 to N. Y. Code, § 2667, has given modified security, being unable to give full security, and has been prohibited from compromis-

the trust, are evidence against the estate, but not as to statements made to him by the decedent during his lifetime.¹

4. *Power to force Locks.* — In order to remove the goods of the deceased, it is proper for the personal representative to enter a house descended to the heir, provided he can do so without violence. He cannot justify forcing open a chamber-door to obtain goods of the deceased in the room, or breaking a desk to take papers relative to the personal estate.²

5. *Power to enter for Condition broken.* — Estates upon condition in chattels real and personal being vested in the executor or administrator, he is the proper person to enter upon breach or non-performance of the condition, after the grantor's death, and the chattel will thereby be reduced to possession, and become assets in his hands.³

6. *Power to distrain for Rent Arrear.* — If the reversion is of a chattel interest, as where lessee for years underlets land, and dies, there being no severance, the personal representative can distrain at common law for rents in arrear which have accrued in the lifetime of the decedent.⁴ If the reversion is in fee, in tail for life, or *pur autre vie*, although in such case it descends to the heirs, under the stat. 32 Hen. VIII. c. 37, the personal representative may distrain for arrearages of rent which accrued in the lifetime of the lessor or owner of the rent in all cases in which the lessor himself could have done so had he been living.⁵

ing a pending suit, he cannot, upon its becoming desirable to compromise the suit, have additional letters. He must give satisfactory additional security, and apply for a revocation of the restriction. *Re Malloy*, 1 Demarest (N. Y.), 421.

A similar construction has been placed upon statutes authorizing executors and administrators, with approval of probate court, to submit doubtful demands to arbitration. *Chadbourn v. Chadbourn*, 9 Allen (Mass.), 173, 176; *Coffin v. Cottle*, 4 Pick. (Mass.) 383; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Bacon v. Crandon*, 15 Pick. (Mass.) 79.

Hence, held that an award will not be set aside because of non-compliance with a statutory method of submission. *Wamsley v. Wamsley*, 2 W. Va. 45.

1. *Sample v. Liscomb*, 18 Ga. 687; *Godbee v. Sapp*, 53 Ga. 283.

The executor or administrator may also release witnesses from liability to the estate. *Neal v. Lamar*, 18 Ga. 746.

2. *Wms. Exrs.* (7th Eng. ed.) 926; *Went. Off. Ex.* (14th ed.) 202.

If he find the chamber-door or the chest unlocked, or the key in it, he may take the goods and papers. But if he cannot take possession of the goods without force, he must desist, and resort to his action. On the other hand, if he be remiss in removing

the effects within a reasonable time, the heir may distrain them as *damage feasant*. *Went. Off. Ex.* (14th ed.) 81, 202; *Toller* (Eng.), 255.

A late writer is of opinion that as against all persons except the heir the personal representative would in modern practice be sustained in breaking locks to obtain possession of the effects. *Schoul. Exrs. & Admsrs.* § 272.

3. *Wms. Exrs.* (7th Eng. ed.) 1660; *Went. Off. Ex.* (14th ed.) 181.

As to redemption of property pledged or mortgaged, see § XII. 3, a.

As to title of representative to estates upon condition, contingent and executory interests in personality and chattels real, see § XII. 3, b, and c.

4. *Wade v. Marsh*, 1 Roll. Abr. 672; *Wms. Exrs.* (7th Eng. ed.) 927.

5. *Wms. Exrs.* (7th Eng. ed.) 928-932.

At common law, the executors or administrators of a man seized of a rent service, rent charge, rent seek, or fee farm in fee simple or fee tail, or for his own life or *pur autre vie*, could not distrain for the arrears incurred in the lifetime of the testator or intestate. *Co. Litt.* 162 a; *Bagwell v. Jamison*, 1 Cheves (S. C.), 249.

The stat. 32 Hen. VIII. c. 37 enacts "that the executors and administrators of every such person or persons unto whom

7. *Power to dispose of the Assets. — Power to sell Pledge and Mortgage. — Warranty and Fraudulent Representation. — Power to assign and underlet Leaseholds. — When suspended by Court of Equity.* — The executor or administrator, having absolute power of disposition over the personal effects,¹ may sell, pledge, or

any such rent or fee farm is or shall be due, and not paid at the time of his death, shall and may have an action of debt for all such arrearages, against the tenant or tenants, that ought to have paid the said rent or fee farms so being behind in the lifetime of their testator, or against the executors or administrators of the said tenants; and also, furthermore, it shall be lawful to every such executor and administrator of any such person or persons unto whom such rent or fee farm is or shall be due, and not paid at the time of his death, as aforesaid, to *distrain* for the arrearages of all such rents or fee farms, upon the lands, tenements, and other hereditaments which were charged with the payment of such rents or fee farms, and chargeable to the distress of the said testator, so long as the said lands, tenements, or hereditaments continue, remain, and be in seizin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee farm so being behind, to the said testator in his life, or in the seizin or possession of any other person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant by purchase, gift, or descent, in like manner and form as their said testator might or ought to have done in his lifetime; and the executors and administrators shall, for the same distress, lawfully make avowry upon their matter aforesaid."

By section 4, the same remedies are extended to executors and administrators of tenant *pur autre vie*.

The executor of a tenant for life is within the statute, although he had a remedy by action of debt at common law. *Hool v. Bell*, 1 Ld. Raym. (Eng.) 172; Co. Litt. 162 a, 162 b, and Hargrave's notes (298), (299).

Under the statute the executor's right to distrain is dependent upon that of the owner of the rent if he had lived. If, therefore, the rent be in arrear, and the owner grants away his interest, and dies, his personal representative has no remedy for these arrearages. The statute gives the power of distress upon the lands out of which the rent is reserved, so long as they continue in the hands of him from whom the rent is due, or of any person representing or claiming title through or under him, by purchase, gift, or descent *ad infinitum*. But they cannot be distrained for such rent if they be in the

hands of one claiming paramount to him; and therefore, if the lord enter upon the grantor for an escheat, the land shall not be distrained upon for arrears of rent. So where a man makes a lease for life, rendering rent, remainder for life, remainder in fee, and after the accruing of rent from the first tenant for life the lord dies, and then the tenant for life dies, the executors cannot distrain upon the remainder-man, because he claims not by or from the tenant for life. Co. Litt. 162 b; Wms. Exrs. (7th Eng. ed.) 930; Ognell's Case, 4 Co. 50 b.

Work-days, or any corporal service or the like, and arrears of a *nomine pæne*, are not within the statute. Co. Litt. 162 b.

The statute extends to leases for lives, or a gift in tail. Co. Litt. 162 b.

But not to a demise for a term, or at will. *Jones v. Jones*, 3 B. & Ad. (Eng.) 967. Therefore, by 3 & 4 W. IV. c. 42, §§ 37, 38, it was enacted that it shall be lawful for the executors or administrators to distrain upon lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime; and that such distress may be made at any time within six calendar months after the determination of the lease, provided the tenant, from whom such arrears are due, continues in possession.

If an administrator makes an under lease of a term of years of the deceased, reserving a rent to himself, his executors, etc., it has been held that his executors, and not the administrator *de bonis non*, shall have the rent, but they cannot distrain for it; because the reversion is in the administrator *de bonis non*, and a reversion is necessary to found the remedy by distress. Wms. Exrs. (7th Eng. ed.) 932; *Drue v. Bayley*, 1 Freem. 392, 404; *Brawley v. Wade*, 1 McClel. (Eng.) 664; *Burne v. Richardson*, 4 Taun. (Eng.) 726; *Pluck v. Digges*, 2 Dow. & Cl. (Eng.) 180; *Preece v. Carrie*, 5 Bing (Eng.) 24.

1. Wms. Exrs. (7th Eng. ed.) 643, 932; *Hertell v. Bogert*, 9 Paige (N. Y.), 37; *Raynor v. Pearsall*, 3 John. Ch. (N. Y.) 578; *Fieto v. Schieffelin*, 7 John. Ch. (N. Y.) 155; *Bond v. Zeigler*, 1 Kelley (Ga.), 324; *Hunter v. Lawrence*, 11 Gratt. (Va.) 111; *Yerga v. Jones*, 16 How. (U. S.) 37; *Mead v. Byington*, 10 Vt. 116; *Tyrrell v. Morris*, 1 Dev. & B. Eq. (N. C.) 559.

The power of disposition is said to ex-

mortgage the assets; ¹ and, in the absence of collusion, they can-

tend to chattels specifically bequeathed. *Ewer v. Corbet*, 2 P. Wms. (Eng.) 149; *Burting v. Stonard*, 2 P. Wms. (Eng.) 160; *Langley v. Oxford*, Amb. (Eng.) 17; *Garnett v. Macon*, 6 Call (Va.), 308; *Hertell v. Bogert*, 9 Paige (N. Y.), 52; *McMullen v. O'Reilly*, 15 Ir. Ch. 251. Compare *Sugden*, V. & P. vol. 2, p. 56 (9th ed.); *Coote on Mortgages*, 178, note (e).

One who purchases a chattel specifically bequeathed, knowing that it was thus bequeathed, and that there are no debts, will take his title subject to the bequest. *Garnett v. Macon*, 6 Call (Va.), 308.

The personal representative, by virtue of his office, has power to transfer notes due his decedent, and the securities held for their payment. *Wells, J.*, in *Clark v. Blackington*, 110 Mass. 369, 375; *Makepiece v. Moore*, 10 Ill. 474; *Harrick v. Craven*, 39 Ind. 241; *Hough v. Bailey*, 32 Conn. 288; *Bradshaw v. Simpson*, 6 Ired. Eq. (N. C.) 243; *Gray v. Armistead*, 6 Ired. Eq. (N. C.) 74; *Marshall County v. Hanna*, 57 Iowa, 372; *Nelson v. Stollenwerck*, 60 Ala. 140. As to effect of indorsement, see 8.

Under the Georgia statute, an administrator cannot, without an order from the ordinary, legally sell a promissory note payable to his intestate which has come to his hands as assets. By selling without such order, he renders himself liable for the conversion. If he exchanges the note for one more valuable, he becomes liable, at the election of the beneficiaries of the estate, for the value of the latter in lieu of his liability for the former. Such dealing, however, will not render him liable as a guarantor of either not beyond its actual value. *Thompson v. Thompson* (Ga.), 3 S. E. Rep. 261.

The executor or administrator of a mortgagee may assign the mortgage. *Crooker v. Jewell*, 31 Me. 306; *Clark v. Blackington*, 110 Mass. 369, 374, 375; *Burt v. Ricker*, 6 Allen (Mass.), 77; *Ladd v. Wiggin*, 35 N. H. 421; *Neil v. Newbern*, 1 Murph. (Tenn.) 133; *Williams v. Ely*, 13 Wis. 1; *Shoalbred v. Drayton*, 2 Desaus. (S. C.) 246; *Clapp v. Beardsley*, 1 Vt. 167.

One of the executors may assign a mortgage belonging to the testator's estate. *George v. Baker*, 3 Allen (Mass.), 326, note.

One who is administrator of two estates may elect and determine to which of the two certain property belongs. But the act manifesting his determination must be clear and definite to estop him from afterwards asserting title. *McLane v. Spence*, 11 Ala. 172; *Daughon v. French*, 4 Port. (Ala.) 352. But he cannot give the assets away, although he may consider them worthless.

In re Radovich's Est. (Cal.) 16 Pac. Rep. 321.

Executors and administrators who sell the property of the deceased for an inadequate price may be held responsible for the actual value at the time of sale. *Matter of Saltus*, 3 Abb. (N. Y.) App. Dec. 243. If the sale be on credit, the personal representative should take security; and if a loss results from his failure to do so, it falls on him personally. *Bowen v. Shay*, 105 Ill. 132. Compare *Sparrow v. Kelso*, 92 Ind. 514.

The power to sell is an incident of the office of the personal representative, and determines with the office: hence a sale made after the official title has become divested by removal, or otherwise, confers no title on the purchaser. *Whorton v. Moragne*, 62 Ala. 201.

But a sale made while in office is not invalidated by the representative's subsequent removal, resignation, or discharge. *Price v. Nesbit*, 1 Hill (S. C.), Ch. 445; *Benson v. Rice*, 2 Nott. & M. (S. C.) 577. See *Soye v. McCallister*, 187 Ex. 80.

1. *Whale v. Booth*, 4 T. R. (Eng.) 625, note to *Farr v. Newman*; *Coote on Mort.* 179; *Mead v. Oury*, 3 Atk. (Eng.) 239; *Scott v. Tyler*, 2 Dick. (Eng.) 720; *McLeod v. Drummond*, 17 Ves. (Eng.) 154; *Vane v. Rigdon*, L. R. 5 Ch. 663; *Shaw v. Spencer*, 100 Mass. 382; *Carter v. Manufacturers' Bank*, 71 Me. 448; *Smith v. Ayer*, 101 U. S. 320; *Wood's App.* 92 Pa. St. 379; *Goodwin v. American Bank*, 48 Conn. 550. Compare *Ford v. Russell*, 1 Freem. (Miss.) Ch. 42, and remarks of Lord Loughborough in *Andrew v. Wrigley*, 4 Bro. C. C. (Eng.) 138; *Petrie v. Clark*, 11 Ser. & R. (Pa.) 377; *Lothrop v. Wightman*, 41 Pa. St. 297. The mortgage may be either of legal or equitable assets or of mere *choses in action*, and may be by actual assignment or deposit, and may properly give the mortgagee a power of sale. *Nugent v. Giffard*, 1 Atk. (Eng.) 463; *Coote on Mort.* 180; *Scott v. Tyler*, 2 Dick. (Eng.) 724; *Vane v. Rigdon*, L. R. 5 Ch. App. 667.

It would seem also that a pledgee may sell the things pledged, if not redeemed within the proper time. *Russell v. Plaice*, 18 Beav. (Eng.) 28, 29.

Sale under Judicial Order.—In some States, executors and administrators are required by statute to sell the personal estate of the deceased at public auction, or in such manner as the court having jurisdiction may order. *Fambro v. Gantt*, 12 Ala. 295; *Baines v. McGee*, 1 Sm. & M. (Miss.) 208; *Joslin v. Caughlin*, 26 Miss. 134; *Saxon v. Barksdale*, 4 Desaus. (S. C.)

not be followed by creditors or legatees, either general or specific,

526; *Bond v. Zeigler*, 1 Kelly (Ga.), 324. See also *Bogan v. Camp*, 30 Ala. 276; *McArthur v. Carrie*, 32 Ala. 75; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Gaines v. De LaCroix*, 6 Wall. (U. S.) 719; *Butler v. Butler*, 10 R. I. 501; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *In re Sanderson* (Cal.), 13 Pac. Rep. 497; Mass. Pub. Stats. (1882) c. 133, §§ 3, 4, 5; 2 N. Y. Rev. Stats. 87, § 25; *Redfield's* (N. Y.) Sur. Pract. 236; *Gary's Probate Pract.* § 334; *Wisc. Stats.* § 3837; *Gen. Stat. Minn.* c. 54, § 4. Under the Wisconsin act, it is held that the representative must not sell without an order of court for less than the appraised value of the property. *Munteith v. Rahn*, 14 Wis. 210.

In some States, stocks cannot be sold without license, unless the representative assumes the whole inventory of the estate at the appraised value. *French v. Currier*, 47 N. H. 88.

Under Miss. Code, 1871, § 1146, providing that goods of a decedent may be disposed of by the administrator "at private sale, the terms and conditions of said sale being first made known to and approved by the court," held, that an administrator was not authorized to sell the goods in the usual course of decedent's business. *Tell City Furniture Company v. Stiles*, 60 Miss. 849.

In Georgia an executor will be enjoined from selling an estate for the purpose of distribution when it can be divided in kind as well, and the ordinary fails to take the proper steps to bring this about. *McCook v. Pond*, 72 Ga. 150.

In Louisiana the universal legatee of a succession, who has accepted the same, and who has also qualified as executrix, may, in her capacity as owner, make a valid sale of the property of the succession without an order of court authorizing her to act. *Wells v. Wells*, 30 La. Ann. part ii. 935.

The power to order such sales being statutory, the statute conferring the power must be strictly pursued. *Hall v. Chapman*, 35 Ala. 553.

See, as to object of such sale as set forth by petition, *Ikelheimer v. Chapman*, 32 Ala. 676.

Under what circumstances delays attending the settlement of the estate will justify such order on representative's application. *Crawford v. Blackburn*, 19 Md. 40.

As to notice of intended sale, see *Halleck v. Moss*, 17 Cal. 339; *Butler v. Butler*, 10 R. I. 501.

As to postponement of sale, see *Lamb v. Lamb, Spear* (S. C.), ch. 289.

A sale made under a void judicial order,

and dependent on a judicial order for its validity, is absolutely void. *Beene v. Coltenberger*, 38 Ala. 647; *Succession of Michel*, 20 La. An. 233. See *Libby v. Christy*, 1 Redf. (N. Y.) 465.

But mere irregularities in pursuing an order of sale may be cured by confirmation. *Jacobs' App.* 23 Pa. St. 477. See principle illustrated as to sales of real estate by executors to pay debt, *Debts of Decedents*. Some statutory formalities are merely directory, and not imperative. *Martin v. McConnell*, 29 Ga. 204.

Where the sale is invalid by reason of irregularity, another sale may be made without getting a new order to sell from the probate court. *Robbins v. Wolcott*, 27 Conn. 234.

The purchaser at the representative's sale should, on discovery of irregularity, elect promptly whether to repudiate the transaction or not, and act consistently with his election. *Joslin v. Caughlin*, 30 Miss. 502.

A sale by the personal representative under judicial order carries the legal title, and will be presumed to have been made in good faith unless the contrary is shown; consequently the transfer by the purchaser of his own title will be good. *Price v. Nesbit*, 1 Hill (S. C.), Ch. 445; *Knight v. Yarborough*, 4 Rand. (Va.) 566; *Pulliam v. Byrd*, 2 Strobb. Eq. (S. C.) 134.

Mass. Pub. Stats. c. 133, §§ 4, 5, further provides, that for the purpose of closing the settlement of the estate, a probate court may, upon petition of the executor or administrator, and notice to the interested parties, license a sale and assignment of any outstanding debts and claims which cannot be collected without inconvenient delay; and any suit for the recovery of a debt or claim thus sold and assigned shall be brought in the name of the purchaser, and the personal representative shall not be liable for costs.

A similar authority is exercised by the probate court in Louisiana practice. *Succession of Pool*, 14 La. Ann. 677.

Such statutes, as a general rule, do not affect the personal representative's common-law power of disposition. *Smith, Prob. Pract.* (Mass.) 110; *Harth v. Heddlestone*, 2 Bay (S. C.), 321; *Mead v. Byington*, 10 Vt. 116; *Sherman v. Willett*, 42 N. Y. 146. But see *Saxon v. Barksdale*, 4 Desaus. (S. C.) 522, 527; *Bogan v. Camp*, 30 Ala. 276; *Gaines v. De La Croix*, 6 Wall. (U. S.) 719; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Butler v. Butler*, 10 R. I. 501.

The subsequent approval of the court appears equivalent to a previous order, but the executor or administrator makes the sale at his own risk where such order

into the hands of the alienee,¹ nor is it incumbent upon the purchaser or mortgagee to see the money obtained properly applied, although he may know that he is dealing with an executor.² To

has not been previously obtained. If he sell on his own responsibility, he will be held liable in some States for the appraised value of the property; whereas by complying with the terms of the order, he may limit his liability to duly accounting for the actual proceeds. 4 Smith, Prob.-Pract. 110; Redf. (N. Y.) Surr. Pract. 237; Williams v. Ely, 13 Wis. 1; Munteith v. Rahn, 14 Wis. 210. Compare Lothrop v. Wightman, 41 Pa. St. 297, 302, by Hand, C. J.

In some States it has been held to be incumbent upon the purchaser to see that the sale is made according to the statute or order. Fambro v. Gantt, 12 Ala. 305.

Sale under a Power.—The representative's general power of disposition may be confirmed or enlarged by a power of sale expressly conferred by the will. Durham's Estate, 49 Cal. 491; Smith v. Taylor, 21 Ill. 296; Dugan v. Hollins, 11 Md. 41.

Whether the representative's power of disposition over the personal estate can be restrained by the will, is a question. In Evans v. Exrs. of Evans, 1 Desaus. (S. C.) 515, 520, it was held that where the sale was made against the testator's directions, and without absolute necessity, the executor became personally responsible for any bad debts resulting; but the sale itself appears to have conferred a good title.

The fact that the testator has created a particular fund for the payment of his debts, of which the property sold does not form a part, and that the purchaser has notice of the will, does not affect the validity of the sale. Tyrrell v. Morris, 1 N. C. 559.

A. bequeathed the income of certain shares of stock to B. for her life, to her husband after her death, and to her children until they should become of age, when said shares were to become their property absolutely; and, if B. and her husband left no children, then they were to become a part of the residuum of A.'s estate. The will contained no provision for the appointment of a trustee to hold said shares, and pay over the income as directed. Held, that under Me. Rev. St. ch. 77, § 5, cl. 7, the court had power to authorize the executor to sell said shares, and re-invest the proceeds. Richardson v. Knight, 69 Me. 285.

1. Whale v. Booth, 4 T. R. (Eng.) 625, note to Farr v. Newman; Nugent v. Giffard, 1 Atk. (Eng.) 463. See also Wolverhampton Bank v. Marston, 7 H. & N. (Eng.) 148; Spackman v. Timbrell, 8 Sim. (Eng.) 260; Dilkes v. Broadmead, 2 De G. F. & J. (Eng.) 566; Griswold v. Chandler, 5 N. H. 492; Polk v. Robinson, 7 Ired. Eq. (N. C.) 235; Wilson v. Doster, 7 Ired. Eq. (N. C.)

231; Thomas v. Reuster, 3 Ind. 369; Speelman v. Culbertson, 15 Ind. 441; Makepeace v. Moore, 10 Ill. 474; Walker v. Craig, 18 Ill. 116; Hough v. Bailey, 32 Conn. 288; Overfield v. Bullitt, 1 Mo. 749; Leitch v. Wells, 48 N. Y. 585; Lothrop v. Wightman, 41 Pa. St. 297; Jones v. Clark, 25 Gratt. (Va.) 642.

In Tennessee, a sale of personal property by an executor, before he is required to settle his accounts, to a *bona fide* purchaser for value, passes a good title, although the executor has no right to sell it. Hadley v. Kendrick, 10 Lea (Tenn.), 525.

Goods sold by a temporary administrator cannot be followed into the hands of the vendees, unless the transaction be fraudulent, as where an administrator *durante minore aetate* sold East India stock, and the buyer had full notice that it was the stock of the infant. Chandler v. Thompson, Hob. (Eng.) 266; Munn v. Dunkin, Finch. R. (Eng.) 298.

The reason for the position is, that in many instances the personal representative must sell in order to perform the duties of his office, and no one would deal with him if liable to be called to account. Lord Mansfield in Whale v. Booth, 4 T. R. (Eng.) 625, note to Farr v. Newman. See Griswold v. Chandler, 5 N. H. 492.

Hence, while it might be perilous to buy trust funds or loan money on their pledge, where notice of the trust accompanied the transaction, a sale or pledge by the personal representative will stand because it is presumed that he had a right to transfer. Smith v. Ayer, 101 U. S. 320, 327. Per Field, J.

Letters of administration or letters testamentary are sufficient evidence of authority to transfer stock or registered bonds, or assign and collect bank deposits, because all such transfers, assignments, or collections are within the line of the personal representative's duty; not so plainly, however, with trustee's letters. Bayard v. Farmers' Bank, 52 Pa. St. 232; Duncan v. Jaudon, 15 Wall. (U. S.) 165.

2. Macleod v. Drummond, 17 Ves. (Eng.) 154.

"It is of great consequence that no rule should be laid down here which may impede executors in their administration, or render their disposition of their testator's effects unsafe or uncertain to the purchaser. His title is complete by sale and delivery: what becomes of the price is of no concern to him. This observation applies equally to mortgages or pledges, and even to the present instances where assignable bonds

establish collusion it must appear that the purchaser or mortgagee participated in the *devastavit*,¹ or that the sale or mortgage was

were merely pledged without assignment." Lord Thurlow in *Scott v. Tyler*, 2 Dick. (Eng.) 725. See also *Ashton v. Atlantic Bank*, 3 Allen (Mass.), 217; *Huthins v. State Bank*, 12 Met. (Mass.) 421; *Shaw v. Spencer*, 100 Mass. 382; *Walworth, Ch.*, in *Hertell v. Bogert*, 9 Paige (N. Y.), 52; *Dillaye v. Com. Bank*, 51 N. Y. 345; *Creighton v. Pringle*, 3 S. Car. 77; *Smith v. Ayer*, 101 U. S. 320, 327.

Under what circumstances a purchaser from an executor or trustee is bound to see to the application of the purchase-money, see *Colyer v. Finch*, 5 H. L. Cas. (Eng.) 923; *Stronghill v. Austey*, 1 De G. M. & G. (Am. ed.) 635, and note (2); *Andrews v. Sparhawk*, 13 Pick. (Mass.) 393; *Gardner v. Gardner*, 3 Mason (U. S. C. C.), 178; *Wormley v. Wormley*, 8 Wheat. (U. S.) 421, 442, 443; *Duffy v. Calvert*, 6 Gill (Md.), 487; *Hauser v. Shore*, 5 Ired. Eq. (N. C.) 357; *Laurens v. Lucas*, 6 Rich. Eq. (S. C.) 217; *Cadbury v. Duval*, 10 Pa. St. 265, 267.

1. *Wms. Exrs.* (7th Eng. ed.) 936; *Whale v. Booth*, 4 T. R. (Eng.) 625, note. See *Dodson v. Simpson*, 2 Rand. (Va.) 294; *Sherburne v. Goodwin*, 44 N. H. 271, 279; *Ashton v. Atlantic Bank*, 3 Allen (Mass.), 217; *Shaw v. Spencer*, 100 Mass. 382; *Tyrrell v. Morris*, 1 Dev. & Bat. Eq. (N. C.) 559.

Where it appears that the purchaser, pawnee, or mortgagee knew that the money was obtained for purposes foreign to the executor's duty, the transaction is to be considered as collusive. *Petrie v. Clark*, 11 S. & R. (Pa.) 377; *Salmon v. Clagett*, 3 Bland (Md.), 125; *Colt v. Lesnier*, 9 Cowen (N. Y.), 320; *Parker v. Gilliam*, 10 Yerger (Tenn.), 394; *Wilson v. Doster*, 7 Ired. Eq. (N. C.) 231; *Rogers v. Zook*, 86 Ind. 237; *Atcheson v. Scott*, 51 Tex. 213.

Thus, where the directors of a bank knew that the executor was pledging the assets of the estate to secure a loan for the business of a commercial house, of which he was a member, they are bound to look into his authority, and are held to a knowledge of all the limitations which the will as well as the law puts thereon. *Smith v. Ayer*, 101 U. S. 320, 328. See *Le Baron v. Long Island Bank*, 53 How. (N. Y.) Pr. 286.

On the other hand, where a bank in good faith lent money to an executor upon his individual note, secured by a pledge of stock belonging to the estate, and upon his statement that the loan was for the purposes of the estate, the pledge was held valid, so that the stock could not be recovered without refunding the loan. *Carter v. Manufacturers' Bank*, 71 Me. 448.

Knowledge of the representative's fraud in procuring the loan is not to be inferred from his desire to renew and continue it for nearly four years. *Goodwin v. American Bank*, 48 Conn. 550.

In *Wood's App.* 92 Pa. St. 379, the executor pledged stock to his broker to secure his individual indebtedness, and delivered the certificates, accompanied by a blank bill of sale and irrevocable power of attorney. The broker pledged the certificates to a third person, who advanced money on them, believing *bona fide* the stock to have been sold to the broker. On a bill filed by the remaining executors to recover the stock, held that there could be no recovery until the advances had been paid, because by commercial usage a certificate of stock accompanied by an irrevocable power of attorney, filled up or in blank, is in the hands of a third party presumptive evidence of ownership in the holder; and the executor having by this means invested the broker with apparent ownership, his co-executors, as against the *bona fide* pledge, could not assert title. "The fact that the legal title to the stock was known to have previously been in the executor, and that the title of the holder appeared on its face to have been derived from him in his representative capacity, will not raise a suspicion, or put a purchaser on inquiry, for the reason that it is the executor's primary duty to dispose of the assets, and settle the estate." "The same principle which applies in the case of an absolute owner applies in the case of an executor who invests the holder with apparent ownership." *Grimkey, J. P.*, 392, 393. See also *Trull v. Trull*, 13 Allen (Mass.), 407; *Colt v. Lesnier*, 9 Cow. (N. Y.) 320; *Collinson v. Lister*, 7 De G. M. & G. (Eng.) 633; *Hutchins v. State Bank*, 12 Met. (Mass.) 421; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 250, per Kent, Ch.; *Miller v. Williamson*, 5 Md. 219; *Yerga v. Jones*, 16 How. (U. S.) 30; *Lowry v. Commercial Bank*, Taney, C. C. 310; *Graff v. Castleman*, 5 Rand. (Va.) 195; *Barwick v. White*, 2 Del. Ch. 284.

The fact that the goods were sold at a gross undervalue is strong evidence of collusion, which, taken in connection with other circumstances, may afford good ground for setting the sale aside. *Scott v. Tyler*, 2 Dick. (Eng.) 725; *Heath v. Allin*, 1 A. K. Marsh. (Ky.) 442; *Joyner v. Congers*, 6 Jones, Eq. (N. C.) 78; *Skrine v. Simmons*, 11 Ga. 401; *McMullen v. O'Reilly*, 15 Ir. Ch. 251.

Thus, a sale by an administrator to his brother and copartner was set aside, it

made by the personal representative as security for, or in payment of, his individual debt. In the latter case the transaction itself gives the purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the *devastavit*.¹

Where such collusion exists as to avoid the transaction, the assets may be followed by creditors and legatees, either general

appearing to the court from the evidence that the sale was made at an undervalue so gross that it ought to be deemed fraudulent and void. *Rice v. Gordon*, 11 Beav. (Eng.) 265. See further as to what circumstances will establish collusion, or affect the purchaser, pledgee, or mortgagee with notice that the money is being obtained by the personal representative for purposes foreign to his trust, *Scott v. Tyler*, 2 Dick. (Eng.) 725, by Lord Thurlow; *Doe v. Fallows*, 2 Cr. & Jerv. (Eng.) 481; *Collinson v. Lister*, 7 De G. M. & G. (Eng.) 634; *Field v. Schieffelin*, 7 John. Ch. (N. Y.) 250; *Sacia v. Berthoud*, 17 Barb. (N. Y.) 15; *Garnett v. Macon*, 6 Call (Va.), 308; *Dodson v. Simpson*, 2 Rand. (Va.) 294; *Graff v. Castleman*, 5 Rand. (Va.) 195; *Parker v. Gillian*, 10 Yerg. (Tenn.) 394; *Williamson v. Morton*, 2 Md. Ch. 94; *Saxon v. Barksdale*, 4 Desaus. (S. C.) 526; *Johnson v. Johnson*, 2 Hill, Ch. (S. C.) 277; *Williamson v. Branch Bank*, 7 Ala. 906; *Swink v. Snodgrass*, 17 Ala. 653; *Baines v. McGee*, 1 Sm. & M. (Miss.) 208; *McNair's App.* 4 Rawle (Pa.), 155; *Petrie v. Clark*, 11 Ser. & R. (Pa.) 377; *Garrard v. R. Co.*, 29 Pa. St. 154.

1. Wms. Exrs. (7th Eng. ed.) 938.

This is the established rule in equity at the present time. *Bonney v. Ridgard*, 1 Cox (Eng.), 145, 148; *Scott v. Tyler*, 2 Dick. (Eng.) 724; 2 Bro. C. C. 433; *Andrew v. Wrigley*, 4 Bro. C. C. 136; *M'Leod v. Drummond*, 154, 170, by Lord Eldon; *Keane v. Robarts*, 4 Madd. (Eng.) 357, 358; *Watkins v. Cheek*, 2 Sim. & Stu. (Eng.) 205; *Cubbridge v. Bradwright*, 1 Russ. Chanc. Cas. (Eng.) 549; *Wilson v. Moore*, 1 My. & K. (Eng.) 337; *Eland v. Eland*, 4 Myl. & Cr. (Eng.) 427; *Pannell v. Hurley*, 2 Coll. 241; *Cole v. Muddle*, 10 Hare (Eng.), 186; *Haynes v. Foreshaw*, 11 Hare (Eng.), 99. See also *Miller v. Helm*, 2 Sm. & M. (Miss.) 687; *Sherburne v. Goodwin*, 44 N. H. 271, 279, 280; *Carter v. Manufacturers' Bank*, 71 Me. 448; *Scott v. Seales*, 15 Miss. 498; *Smartt v. Waterhouse*, 6 Humph. (Tenn.) 158; *Green v. Sargeant*, 23 Vt. 466; *Jaudon v. Nat. Bank*, 8 Blatchf. (U. S. C. C.) 430; *Duncan v. Jaudon*, 15 Wallace (U. S.), 142; *Field v. Schieffelin*, 7 John. Ch. (N. Y.) 250; *Wilson v. Doster*, 7 Ired. Eq. 231; *Miller v. Williamson*, 5 Md. 219; *Pendleton v. Fay*, 2 Paige (N. Y.), 202; *Austin v. Willson*, 21 Ind. 252; *Williamson v. Branch Bank*, 7 Ala. 906; *Dodson v. Simpson*, 2

Rand. (Va.) 294; *Graff v. Castleman*, 5 Rand. (Va.) 195; *Gray v. Armistead*, 6 Ired. Eq. (N. C.) 74; *Bradshaw v. Simpson*, 6 Ired. Eq. (N. C.) 243; *Shaw v. Spencer*, 100 Mass. 382; *Petrie v. Clark*, 11 Ser. & R. (Pa.) 377. Compare *Garrard v. R. Co.*, 29 Pa. St. 154, 159; *Miles v. Dumford*, 2 De G. M. & G. (Eng.) 641; *Cowgill v. Linville*, 20 Mo. App. 138.

It is immaterial whether the debtor believed the executor to be solvent or not. *Grant v. Bell*, 87 N. C. 34.

At common law, in the absence of positive fraud, it has been held that the personal representative may make a valid sale of the effects in satisfaction of his own private debt, although the purchaser knew that the goods sold were the goods of the decedent. *Whale v. Booth*, 4 T. R. (Eng.) 625, note; *Farr v. Newman*, 4 T. R. 642, 645.

But in *Whale v. Booth*, Lord Mansfield intimated, that, if the purchaser knew the debts were unpaid, it would be a fraud, and vitiate the sale. See also *Bayley, B.*, in *Doe v. Fallows*, 2 Cr. & Jerv. (Eng.) 483; 2 Tyrwh. (Eng.) 462.

A somewhat similar view appears to have been taken in some early cases in equity; but the principle, as stated in the text, may now be considered firmly established. *Nugent v. Gifford*, 1 Atk. (Eng.) 463; *Mead v. Lord Orrery*, 3 Atk. (Eng.) 235; *Ithell v. Beane*, 1 Ves. Sen. 215; Wms. Exrs. (7th Eng. ed.) 938.

Though the representative may give his own note as a voucher for money obtained for a legitimate purpose connected with a *bona fide* administration, and pledge assets to secure it; yet, if he give it for some private debt of his own, created before or during his trust, but independently of it, and due the pledgee, the pledge transaction cannot stand. *Virgin, J.*, in *Carter v. Manufacturers' Bank*, 71 Me. 448.

On the same principle, if the pledgee knows that the executor is pledging the assets to raise a loan for a firm of which he is a member, he is affected with notice of breach of trust. *Smith v. Ayer*, 101 U. S. 327.

A sale which allows the purchaser to credit the price in liquidation of the representative's private debt, has been considered, if not avoided, as leaving the purchaser still responsible to the estate for the purchase-money. *Chandler v. Schoonover*, 14 Ind. 324.

or specific, provided they take measures to enforce their right within a reasonable time.¹ The personal representative cannot be permitted, either immediately or by means of a trustee, to purchase from himself any part of the assets;² but in the absence of positive fraud, the preponderance of American authorities hold that such purchase is not absolutely void, but voidable only at the election of the parties in interest, provided they have neither sanctioned nor acquiesced in the transaction, nor been guilty of such *laches* and delay as would warrant the presumption of acqui-

1. *Hill v. Simpson*, 7 Ves. (Eng.) 152; *M'Leod v. Drummond*, 17 Ves. (Eng.) 152, 169; *Wilson v. Moore*, 1 N. Y. & K. (Eng.) 337; *Elliott v. Merriman*, 2 Atk. (Eng.) 41; *C. Barnard*, Ch. Rep. 82; *Andrew v. Rigley*, 4 Bro. C. C. (Eng.) 125; *Grant v. Bell*, 87 N. C. 34.

Where an administrator improperly pledged notes of the estate, *held*, that he was not estopped from recovering the notes, or their proceeds. *State v. Berning*, 74 Mo. 87.

A surrender by an administrator, of notes belonging to the estate, in payment of the administrator's individual debt, passes no title to the notes; and the administrator *de bonis non* may sue on them, regardless of the transaction. *Cowgill v. Linville*, 20 Mo. App. 138.

2. *Wms. Exrs.* (7th Eng. ed.) 938; *Hall v. Hallett*, 1 Cox, C. C. (Eng.) 134; *Watson v. Toone*, 6 Madd. (Eng.) 153; 2 Sud. V. & P. (8th Am. ed.) 688 note (m¹), 692 note; *Michoud v. Girod*, 4 How. (U. S.) 504; *Bostwick v. Atkins*, 1 Const. (N. Y.) 53; *Davoue v. Fanning*, 2 John. Ch. (N. Y.) 252; *Drysdale's App.* 14 Pa. St. 531; *Beeson v. Beeson*, 9 Pa. St. 279; *Lothrop v. Wightman*, 41 Pa. St. 297; *Smith v. Drake*, 8 C. E. Green (N. J.), 302; *Lyon v. Lyon*, 8 Ired. (N. C.) Eq. 201; *Clark v. Blackington*, 110 Mass. 369, 376; *Arnold v. Brown*, 24 Pick. (Mass.) 99; *Blood v. Hayman*, 13 Met. (Mass.) 231; *Yeackel v. Litchfield*, 13 Allen (Mass.), 417; *Davis v. Simpson*, 5 Harr. & J. (Md.) 147; *Grider v. Payne*, 9 Dana (Ky.), 188, 190; *Johnson v. Blackman*, 11 Conn. 343, 357; *Moore v. Hilton*, 12 Leigh (Va.), 1; *Shine v. Redwine*, 30 Ga. 780; *Boyd v. Blankman*, 29 Cal. 19; *Stronach v. Stronach*, 20 Wis. 129; *Mead v. Bynington*, 10 Vt. 116; *Miles v. Wheeler*, 43 Ill. 123; *McCartney v. Calhoun*, 17 Ala. 301.

The rule applies equally, whether the subject of the sale be personal property or real estate sold under a power in the will, or by order of court, or under an execution. *Skillman v. Skillman*, 15 N. J. Eq. 388; *Froneberger v. Lewis*, 70 N. C. 456; *Coat v. Coat*, 63 Ill. 73; *Rafferty v. Mallory*, 3 Biss. 362; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377; *Culverhouse v. Shirey*, 519.

42 Ark. 25; *Marshall v. Casson*, 38 N. J. Eq. 250; s. c., 48 Am. Rep. 319; *McGowan v. McGowan*, 48 Miss. 553; *Prindle v. Beveridge*, 7 Lans. (N. Y.) 225; *Glass v. Greathouse*, 20 Ohio, 503; *Newton v. Roe*, 33 Ga. 163; *Anderson v. Green*, 46 Ga. 361; *Frazer v. Lee*, 42 Ala. 25; 2 Sugd. V. & P. (8th Am. ed.) 688, note (m¹), and cases cited.

Buying in legacies is culpable in a representative. *Goodwin v. Goodwin*, 48 Ind. 584. As to assignments of stock to the representative personally, see *Whitby v. Alexander*, 73 N. C. 444, 460. An executor cannot purchase a claim for less than its face, and then have it allowed for the full amount. *Wolf v. Banks*, 41 Ark. 104.

Executors who are also second mortgagees cannot purchase property of their testator at a sale under the first mortgage. *Succession of Stanbrough*, 37 La. Ann. 275.

Whether the purchase be made directly by the personal representative or his authorized agent, or the property is bought by a third person without any collusion with the administrator, and subsequently transferred to the latter, upon the assumption by him of the bid, or held for his use and benefit, the rule applies. *Davoue v. Fanning*, 2 John. Ch. (N. Y.) 252; *Paul v. Squibb*, 12 Pa. St. 296; *Woodruff v. Cook*, 2 Edw. Ch. (N. Y.) 259; *Buckles v. Lafferty*, 2 Rob. (Va.) 292; *Hunt v. Bass*, 2 Dev. Eq. (N. C.) 292; *Caldwell v. Caldwell*, 12 (Ohio) West. Rep. 857.

To warrant the application of the rule, the relation must be one in which knowledge, by reason of the confidence reposed, might be acquired, or power exists to affect injuriously the interests of the *cestuis que trustent*, or advance that of the trustee. Hence, an executor may purchase at a sheriff's sale the personal property of his testator seized under execution. *Prevost v. Gratz*, Peters (C. C. Rep.), 364; *Chorpenning's App.* 32 Pa. St. 315, 317.

An administrator may be a purchaser at any sale of the real estate of his intestate, except a sale conducted by himself as administrator. *Dillinger v. Kelly*, 84 Mo. 561. See *Welch v. McGrath*, 59 Iowa, 519.

escence.¹ A sale by the executor or administrator of a deceased partner of his decedent's interest in the firm, if made *bona fide*,

1. *Harrington v. Brown*, 5 Pick. (Mass.) 519; *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 8; *Ives v. Ashley*, 97 Mass. 198; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 253; *Boraem v. Wells*, 19 N. J. Eq. 87; *Lytle v. Beveridge*, 58 N. Y. 593; *Gilbert's App.* 78 Pa. St. 266; *Mercer v. Newson*, 23 Ga. 151; *Flanders v. Flanders*, 23 Ga. 249; *Mead v. Byington*, 10 Vt. 116; *Green v. Sargeant*, 23 Vt. 466; *Torrey v. Bank of Orleans*, 9 Paige (N. Y.), 649. See also *Musselmen v. Eshleman*, 10 Pa. St. 401; *Moore v. Hilton*, 12 Leigh (Va.), 1; *Shine v. Redwine*, 30 Ga. 780; *Boyd v. Blankman*, 29 Cal. 19; *Anderson v. Green*, 46 Ga. 361; *Grubbs v. McGlawn*, 39 Ga. 672; *Williams v. Marshall*, 4 Gill & J. (Md.) 376; *Lyon v. Lyon*, 8 Ired. (N. C.) 24; *Blount v. Davis*, 2 Dev. (N. C.) 19; *Chaffe v. Farmer*, 34 La. An. 1017.

Under the older authorities, such purchase was absolutely void. *Hall v. Hallett*, 1 Cox (Eng.), 134; *Watson v. Toone*, 6 Madd. (Eng.) 153; *Michoud v. Girod*, 4 How. (U. S.) 503, 557. See also *Miles v. Wheeler*, 43 Ill. 123; *Ely v. Horine*, 5 Dana, 398; *Sheldon v. Rice*, 30 Mich. 296.

But the better opinion at the present time is, that "where the transaction is accompanied by actual fraud, it is absolutely void, and is incapable of subsequent ratification; but a purchase by a trustee at his own sale, *bona fide*, and for a full price, is but a legal fraud: it is voidable only, and may be confirmed by the parties in interest, upon full knowledge of all the circumstances, after a deliberate examination. What may be subsequently ratified, may, of course, be previously authorized; and an act done by such previous authority needs no subsequent ratification." *Grim's App.* 105 Pa. St. 375, 383. The transaction is voidable without regard to the question of actual fraud. *Grim's App.* 105 Pa. St. 375, 382. But in some States a purchase by an executor or administrator of the assets of the estate will be sustained when made in good faith, and for the advantage of the estate. *McKey v. Young*, 4 Hen. & Mun. (Va.) 430; *Julian v. Reynolds*, 8 Ala. 680; *McCartney v. Calhoun*, 17 Ala. 301; *McLane v. Spence*, 6 Ala. 894.

Such a purchase will be treated as good until avoided, and may become absolutely binding by the delay or acquiescence of those interested. *Trimmer v. Trail*, 2 Bailey (S. C.), 480; 2 Sugd. V. & P. (8th Am. ed.) note (a); *Dunlap v. Mitchell*, 10 Ohio; 117; *Lyon v. Lyon*, 8 Ired. (N. C.) Eq. 201; *Williams v. Marshall*, 4 Gill & J. (Md.) 376; *Todd v. Moore*, 1 Leigh (Va.), 457;

Mosely v. Lloyd, 31 Ga. 564; *Brown v. Weaver*, 28 Ga. 377; *Moffat v. Loughridge*, 51 Miss. 211; *Raines v. Raines*, 51 Ala. 237.

Hence when land is bought at an administrator's sale for the administrator's benefit, an estate passes to the grantee by the conveyance; and if it is afterwards sold and conveyed for a full and valuable consideration to a *bona fide* purchaser without notice, such purchaser will hold it against the heirs of the intestate. *Blood v. Hayman*, 13 Met. (Mass.) 231; *Robbins v. Bates*, 4 Cush. (Mass.) 104.

Where the heir permitted the personal representative to buy and make valuable improvements, see *Potter v. Smith*, 36 Ind. 231; *Smith v. Drake*, 23 N. J. Eq. 302.

In Arkansas, if parties in interest neglect to make objection in the probate court to the settlement, in which the personal representative charges himself with the amount of his bid at a trust sale, their right to object is waived and lost. *Jones v. Graham*, 36 Ark. 383.

One of several parties interested may apply to have the purchase set aside, although others are content with it. *Davone v. Fanning*, 2 John. Ch. (N. Y.) 252; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23, 31.

A stranger cannot avoid it, nor the personal representative himself, nor his administrator *de bonis non*, unless specially authorized by statute to do what otherwise creditors, legatees, or distributees could alone have done, nor a creditor of one of the heirs, for he is to be considered a stranger. *Richardson v. Jones*, 3 Gill & J. (Md.) 164, 184; *Harrington v. Brown*, 5 Pick. (Mass.) 519; *Jackson v. Vandolisen*, 5 John. (N. Y.) 43, 48; 2 Sugd. V. & P. (8th Am. ed.) 687, note (a); *Stronach v. Stronach*, 20 Wis. 129, 133; *Hagthorp v. Neale*, 7 G. & J. (Md.) 13; *Herron v. Marshall*, 5 Humph. (Tenn.) 443; *Lothrop v. Wightman*, 41 Pa. St. 297.

The remedy is by bill in equity. *McLeod v. Drummond*, 17 Ves. 153; *Thomas v. White*, 3 Littell, 180; *Dodson v. Simpson*, 2 Rand. (Va.) 294; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 250; *Riddle v. Mandeville*, 5 Cranch (U. S. C. C.), 322; *Bean v. Smith*, 2 Mason (U. S. C. C.), 252.

In Ohio, relief should be sought in the court of common pleas, and not in the probate court. *Caldwell v. Caldwell* (Ohio), 12 West. Rep. 857.

The personal representative is in equity considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by

is good both in law and equity, though such transactions are closely scrutinized.¹

In sales by executors and administrators of the personal property of the deceased, there is no implied warranty of title.² An express warranty of either the deceased's title or the soundness of the article sold binds the representative personally,³ but not the estate.⁴ But in every sale by an executor or administrator of the personal property of the deceased, there is an implied representation that he is the legal representative, and has authority to make

him of the subject so purchased. *Watson v. Toone*, 6 Madd. (Eng.) 153. See *Sherman's App.* 3 Cas. (Pa.) 66; *Gilbert's App.* 78 Pa. St. 266; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377; *Huston v. Cassidy*, 14 N. J. Eq. 320; *Evertson v. Tappen*, 5 John. Ch. (N. Y.) 497; *Case v. Abeel*, 1 Paige (N. Y.), 393; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Hawley v. Cramer*, 4 Cowen (N. Y.), 717; *Richardson v. Spencer*, 18 B. Mon. 450; *Van Epps v. Van Epps*, 9 Paige (N. Y.), 237; *Jones v. Graham*, 36 Ark. 383. As to resale. *Davone v. Fanning*, 2 John. Ch. (N. Y.) 252.

In New Hampshire the personal representative buying at public auction is charged with the appraised value. *Griswold v. Chandler*, 5 N. H. 492.

The object of the rule is to place the beneficiaries in the same position they would have been in at the time of the filing of the bill for relief, if the trust had been properly administered; and hence the return of the specific property or fund purchased is unimportant. *Hall v. Hallett*, 1 Cox, C. C. (Eng.) 134, 139.

1. *Chambers v. Howell*, 11 Beav. (Eng.) 6; *Roys v. Vilas*, 18 Wis. 169. See *Merritt v. Dickey*, 38 Mich. 41.

As to personal representatives buying an interest in the partnership. *Moses v. Moses*, 50 Ga. 9.

2. 2 Schoul. Pers. Prop. 381 *et seq.* *Chapman v. Speller*, 14 Q. B. (Eng.) 621; *Blood v. French*, 9 Gray (Mass.), 197; *Bartholomew v. Warner*, 32 Conn. 98; *Bingham v. Maxcy*, 15 Ill. 295.

The personal representative sells only such title as was in the decedent, and the purchaser takes the title at his own risk, and will not be discharged from payment if it prove defective. *Cogan v. Frisby*, 36 Miss. 178. See *Stanbrough v. Evans*, 2 La. Ann. 474; *Succession of White*, 9 La. Ann. 232.

But while the purchase-money remains in the hands of the representative still undistributed, it was said that the purchaser could require it to be refunded on failure of title. *Mockbee v. Gardner*, 2 Har. & G. (Md.) 176, 177.

Nor in the absence of fraud or express

warranty can the purchaser hold the representative liable personally. "The exemption of executors, administrators, and other trustees from personal responsibility on an implied warranty seems to be indispensable. For who would accept an office of this kind, if he were to become necessarily the guarantor of the good title of him whom he represents in all the property submitted to his charge which he may be obliged by order of court to sell? In all cases in which the title sold was ascertained to be defective after a final distribution of the estate, the administrator, if a recovery were had against him, would have to look for indemnity to creditors, distributees, and legatees. In most instances this prospect of security would never be realized, and no power is given him to retain for such a contingency." *Archer, J.*, in *Mockbee v. Gardner*, 2 Har. & G. (Md.) 176, 177.

3. *Mockbee v. Gardner*, 2 Har. & G. (Md.) 176, 177; *Sumner v. Williams*, 8 Mass. 162; *Buckels v. Cunningham*, 14 Miss. 358.

4. *Ramsey v. Blalock*, 34 Ga. 376; *Lynch v. Baxter*, 4 Tex. 431. See *Kelso v. Vance*, 58 Tenn. 334.

But in Alabama it is held that the power to sell implies the power to warrant, and an administrator is chargeable with a breach in his representative character. *Craddock v. Stewart*, 6 Ala. 77, 80.

Fraud.—A fraud practised by an administrator in the sale of his testator's effects is a good defence to an action on a note given for the article on the sale of which the fraud was practised, on the principle that the estate cannot be allowed to obtain unconscientious advantage. *Williamson v. Walker*, 24 Ga. 257; *Crayton v. Munger*, 9 Tex. 285.

The purchaser may have the contract rescinded, or the price abated. *Able v. Chandler*, 12 Tex. 88.

The representative also renders himself personally liable to an action for damages. *Able v. Chandler*, 12 Tex. 88; *Mockbee v. Gardner*, 2 Har. & G. (Md.) 176; *Sumner v. Williams*, 8 Mass. 162; *Buckels v. Cunningham*, 14 Miss. 358. See *West v. Wright*, 98 Ind. 335.

the transfer; and if it prove otherwise, a court of equity will relieve the purchaser from his contract.¹

The power of disposition extends to assigning and underletting leaseholds vested in the personal representative in right of the decedent; and such disposition, if made *bona fide*, is good even against a specific legatee, and, if the personal representative die without having administered the whole estate, cannot be avoided by his executor or the administrator *de bonis non*.² But the power to assign or underlet cannot be exercised inconsistently with the directions of the will; and when so exercised, the assignment or underlease will be set aside as against an assignee or lessee with notice.³ Where the executor or administrator is *named* in a condition or covenant, in the original lease, not to assign or underlet, or to assign or underlet only in a particular way, or on leave granted, he is bound thereby.⁴ The personal representative's

1. *Woods v. North*, 6 Humph. (Tenn.) 309; *Crisman v. Beasley*, 1 Sm. & M. Ch. (Miss.) 561.

If the order under which a judicial sale is made be void, the purchaser need not complete the title and pay the purchase-money. *Succession of Michel*, 20 La. Ann. 233; *Beene v. Collenberger*, 38 Ala. 647.

2. *Wms. Exrs.* (7th Eng. ed.) 939. See *Doolan v. McCauley*, 66 Cal. 476.

But if the leasehold has been specifically bequeathed, the concurrence of the legatee should if possible be obtained; for after the executor's assent to the bequest, the legal title vests in the legatee, at whose suit an action of ejectment will lie against the purchaser. *Taylor, Land & Ten.* § 134. See *Paramour v. Yardley*, Plowd. (Eng.) 539; *Westwick v. Wyer*, 4 Co. 28 b; *Doe v. Guy*, 3 East (Eng.), 120; *Fenton v. Clegg*, 9 Exch. (Eng.) 680.

In making assignments of leaseholds, the executor or administrator should let the assignee take all risks as to the value of the purchase. It has been held a breach of duty for the personal representative to grant an underlease of leaseholds of his decedent, with an option of purchase to be exercised by the sub-lessee at some future time at a fixed price. *Oceanic Steam Nav. Co. v. Satherberry*, 29 W. K. (Eng.) 113.

But the object for which the disposition is made must be a proper one. Under a lease not containing repairing covenants, an administrator has no power to mortgage leaseholds in order to raise money for repairing the property. *Ricketts v. Davis*, 20 Ch. D. (Eng.) 745.

The proceeds from an absolute disposition of the term or rents from the underlease are assets. *Bank v. Dudley*, 2 Pet. (U. S. C. C.) 492; *Taylor, Land & Ten.* § 133. Compare *Margrave v. Archbold*, 1 Dow. (Eng.) 107. See § XII. 2, b, "Election and Appropriation."

In California, where real estate as well as personal devolves upon the administrator, he may lease such real estate during the period of administration, any lease for a definite term being subject to termination by final distribution of the estate, and the discharge of the administrator. *Doolan v. McCauley*, 66 Cal. 476.

3. *Wms. Exrs.* (7th Eng. ed.) 940; *Keating v. Keating*, 1 Lloyd & Goad (Eng.), 133.

A bequest of leaseholds to executors *upon trust to sell*, and to invest the proceeds for the benefit of persons, some of whom are infants, will not enable them to grant and under-lease; and a court of equity will not enforce the performance on agreement to take such under-lease. *Evans v. Jackson*, 8 Sim. (Eng.) 217. See *Stronghill v. Anstey*, 1 De G. M. & G. (Eng.) 635.

As to validity of a lease made in violation of, an agreement between widow and distributees, see *Drohan v. Drohan*, 1 Ball & Beat. (Eng.) 185.

4. *Roe v. Harrison*, 2 T. R. (Eng.) 425. See *Doe v. Bevan*, 3 M. & Sel. (Eng.) 357; *Lloyd v. Crispe*, 25 Taun. (Eng.) 259.

It has been questioned whether a bequest of a term by will to a specific legatee is not a breach of a condition not to alien. *Parry v. Harbert, Dyer* (Eng.), 45 b; *Windsor v. Burry, Dyer*, 4, 15, in margin; s. c., cited in *Pannel v. Fen Moore* (Eng.), 351. See *Knight v. Morey, Cro. Eliz.* 60; *Berry v. Taunton, Cro. Eliz.* 331. But see *Fox v. Swann, Style* (Eng.), 483; *Crusoe v. Bugby*, 3 Wils. (Eng.) 237; *Doe v. Bevan*, 3 M. & Sel. (Eng.) 361.

Whether executor or administrator who is not *named* in the *proviso* or covenant is bound thereby, is doubtful. *Roe v. Harrison*, 2 T. R. 425, 429, by Ashurst, J. See *Phillips v. Everard*, 5 Sim. (Eng.) 102.

The better opinion would appear to be, that in such case he is not. *Anon. Dyer* (Eng.), p. 66 a, pl. 8; *Touchst.* 133; *Lord*

power of disposition over the assets is not suspended by merely filing a bill in equity, on the part of a creditor of the deceased for the administration of the estate, but continues until there has been a decree in the suit.¹

8. *Indorsement of Promissory Notes and Bills of Exchange.*—Executors and administrators have full authority to indorse promissory notes and bills of exchange made payable to the deceased, or his order,² and the indorsement of the representative appears to be essential to a proper delivery by him;³ and the transfer confers a good title upon a *bona fide* purchaser, even though purchasing at a discount, unless chargeable with knowledge of a fraudulent perversion on the part of the representative.⁴

Thurlow in *Seers v. Hind*, 1 Ves. Jr. (Eng.) 294.

But a condition that the lessee, his *executors*, or *assigns* shall not alien without the consent of the lessor, binds the administrator as an assignee within the condition. *More's Case*, Cro. Eliz. (Eng.) 26; s. c., And. (Eng.) 123. *Walmsley, J.*, in *Thornhill v. Adams*, Cro. Eliz. 757. See also *Anon. Moore* (Eng.), 44, pl. 13.

In *Northcote v. Duke*, 2 Eden (Eng.), 319; s. c., *Ambleton*, 511, it was held that to work a forfeiture for breach of the condition not to assign, the executor must have notice of the condition. But see *Touchstone* by *Atherley*, p. 284, note.

In case of a term for years being forfeited by reason of the executor or administrator assigning or underletting without license, relief cannot be obtained in equity. *Lovat v. Lord Ranelagh*, 3 Ves. & B. (Eng.) 24; *White v. Warner*, 2 Meriv. (Eng.) 459; *Reynolds v. Pitt*, 19 Ves. (Eng.) 14.

As to relief afforded a *bona fide* purchaser from the personal representative, see *Cox v. Brown*, 1 Chanc. Rep. (Eng.) 170.

As to relief of a *bona fide* purchaser from claims against the estate purchased by him of executors having power to sell, see *Latrobe v. Tierman*, 2 Md. Ch. 474.

1. *Wms. Exrs.* (7th Eng. ed.) 943; *Neeves v. Burrage*, 14 Q. B. (Eng.) 504.

As to nature of control exercised by courts of probate and equity over representative's title, see *Marston v. Paulding*, 10 Paige (N. Y.), 40; *Crawford v. Elliott*, 1 Bailey (S. C.), 206; *Ashburn v. Ashburn*, 16 Ga. 213; *Holcomb v. Holcomb*, 11 N. J. Eq. 281.

As to directing contest concerning a gift *causa mortis*. *Wadsworth v. Chick*, 55 Tex. 241.

2. *Rawlinson v. Stone*, 3 Wils. (Eng.) 1; 2 Sea. (Eng.) 1260; *Walworth, Ch.*, in *Hertell v. Bogert*, 9 Paige (N. Y.), 52; *Shaw, C. J.*, in *Rand v. Hubbard*, 4 Met. (Mass.)

252; *Wms. Exrs.* (7th Eng. ed.) 943; *Cleveland v. Harrison*, 15 Wis. 670. See *Nelson v. Stollenwerck*, 60 Ala. 140.

For purposes of transfer, there is no difference between the indorsement of a note by the decedent, and one by his personal representative. *Watkins v. Maule*, 2 Jac. & W. (Eng.) 236, 243.

3. *Bromage v. Lloyd*, 1 Ex. (Eng.) 32.

As to the application of the statute of limitations to such transactions, see *Cleveland v. Harrison*, 15 Wis. 670.

As in the case of other assets, the transfer of a note due the estate by the representative in payment of, or as security for, his own debt, gives the transferee with notice no right of recovery, unless there is a balance due the representative on the settlement of his accounts, for in such case he may appropriate the instrument to the payment of his debt. *Latham v. Moore*, 6 Jones, Eq. 167; *Scranton v. Farmers' Bank*, 24 N. Y. 424; *Scott v. Searles*, 15 Miss. 498; *Smartt v. Waterhouse*, 6 Humph. (Tenn.) 158; *Williamson v. Morton*, 2 Md. Ch. 94; *Ward v. Turner*, 7 Ired. Eq. (N. C.) 73; *Schoul. Exrs. & Admsrs.* § 352.

4. *Gray v. Armistead*, 6 Ired. Eq. (N. C.) 74; *Munteith v. Rahn*, 14 Wis. 210.

The fact that the transfer was improper does not affect the title of the indorsee, assignee, or transferee, who takes the instrument in good faith for value. *Speelman v. Culbertson*, 15 Ind. 441; *Walker v. Craig*, 18 Ill. 116; *Wilson v. Doster*, 7 Ired. Eq. (N. C.) 231; *Hough v. Bailey*, 32 Conn. 288. Under the codes of some States the rule is otherwise. *Burbank v. Payne*, 17 La. Ann. 15.

An administrator or executor may in a proper case sell *choses in action* belonging to the estate at a price below their nominal value. *Bradshaw v. Simpson*, 6 Ired. Eq. (N. C.) 243; *Gray v. Armistead*, 6 Ired. Eq. (N. C.) 74; *Wheeler v. Wheeler*, 9 Cowen (N. Y.), 34. Compare *Sheibley v. Hill*, 57 Ga. 232; *Troup v. Rice*, 55 Miss. 278.

But the guaranty implied by such indorsement binds the representative personally, and not the estate;¹ and he cannot escape a personal liability thereon, unless he expressly confines his stipulation to payment out of the estate.² Parol evidence is inadmissible to establish such reservation, though the note be signed in his official character.³

9. *Power to bind the Estate by Contract.* — An executor or administrator has power to complete a contract made by his decedent, without waiting for suit to be brought thereon;⁴ but he cannot, by virtue of the general powers of his office, make any contract which will bind the estate, and authorize a judgment *de bonis decedentis*. The only effect of such engagements is to bind himself individually.⁵ Thus, a promissory note given by an administrator,

1. Robinson v. Lane, 22 Miss. 161; Johnston v. Union Bank, 37 Miss. 526, 533.

Thus the signature "A. B. executor," or "A. B. administrator," does not bind the decedent's estate directly, even though specifying that estate by name, but A. B. will be personally bound. Christian v. Morris, 50 Ala. 585; East Tenn. Co. v. Gaskell, 2 Lea (Tenn.), 742. See Sieckman v. Allen, 3 E. D. Smith (N. Y.), 561.

So where a bill is indorsed to certain persons as executors, and they indorse it over, they become personally liable. Buller, J., in King v. Thorn, 1 T. R. (Eng.) 489. See Snead v. Coleman, 7 Gratt. (Va.) 300.

It has, however, been held that the representative cannot incur such liability unless he has assets, or forbearance was the consideration. Bank of Troy v. Topping, 9 Wend. (N. Y.) 273; s. c., 13 Wend. (N. Y.) 557. Compare Wms. Exrs. (7th Eng. ed.) 1780. See § XV.

As to whether the representative's giving his own obligation payable at a future day is to be taken as a conclusive admission of assets, see Thompson v. Mangle, 3 Iowa, 342; Childs v. Morrins, 2 Br. & B. 460.

2. Williams v. Ely, 13 Wis. 1; Studebaker Mfg. Co. v. Montgomery, 74 Mo. 101.

3. McGrath v. Barnes, 13 S. C. 328; Stirling v. Winter, 80 Mo. 141.

4. Denton v. Sanford, 9 (N. Y.) N. E. Rep. 490.

The power to complete such contracts remains unchanged by the Illinois statute as to such performance under order of the county court, except that an administrator, completing the contract without the order of the court, assumes the risk of losses incurred. Smith v. Wilmington Coal Co., 83 Ill. 498.

5. Schoul. Exrs. & Admsrs. § 256; Pinkney v. Singleton, 2 Hill (S. C.), 343; Underwood v. Millegan, 10 Ark. 254; McEldery v. McKenzie, 2 Port. (Ala.) 33; Jones v. Jenkins, 2 McCord (S. C.), 494; Sims v. Stilwell, 4 Miss. 176; Miller v.

Williamson, 5 Md. 219; Steele v. Steele, 64 Ala. 438.

"An action on his own promise lies not against an executor or administrator in his official character." Gibson, C. J., in Fritz v. Thomas, 1 Wh. (Pa.) 66, 72. See Thompson v. Peter, 12 Wheat. (U. S.) 565; Peck v. Botsford, 7 Conn. 178.

For goods purchased for the benefit of the estate, he incurs a personal liability. Harding v. Evans, 3 Port. (Ala.) 221; Lovell v. Field, 5 Vt. 218.

An attorney has no claim against the estate represented by an executor for services rendered in connection with the settlement. The executor is personally liable. Barker v. Kunkel, 10 Ill. App. 407; Devane v. Royal, 7 Jones (N. Car.), L. 426; McMahon v. Allen, 4 E. D. Smith (N. Y.), 519; McGloin v. Vanderlip, 27 Tex. 366; Bowman v. Tallman, 2 Robert (N. Y.), 385.

The personal representative may bind himself individually, but cannot bind the estate by a special contract with an attorney for compensation for services rendered the estate, nor create a lien on the estate thereby. Paige's Est. 57 Cal. 238; Platt v. Platt (N. Y.), 12 N. E. Rep. 22; s. c., 48 Tex. 491; Austin v. Munro, 47 N. Y. 360.

The administrator of an insolvent estate cannot, by his mere agreement, bind the estate in such manner as to take the assets out of the course of distribution provided by law. James' Appeal, 89 Pa. St. 54.

After the death of a mortgagor, the mortgagee made additional advances to his administratrix, who was his widow. Held, that her ward, the mortgagor's infant son, was not bound by her agreement that the mortgagee should stand as security for these advances. Percival v. Gale, 40 N. J. Eq. 440.

An administrator cannot bind the estate by a promise that it shall continue liable to indemnify a surety on a promissory note, given by the intestate's partner and heirs

although signed by him in his capacity as administrator, binds himself only.¹

10. *Power to act by Attorney.* — The executor or administrator in many transactions may employ agents in the management of the estate; but he cannot, by a power of attorney not authorized by the will, transfer the entire management of estate to another so as to bind creditors and parties in interest.² A power of sale

in payment of a former note made by the intestate and his partner, and signed by the surety, upon the intestate's promise of indemnity. *Kingman v. Soule*, 132 Mass. 285.

But a contract between an executor and a creditor of the estate for payment of interest and an extension of time, is valid. *North v. Walker*, 2 Mo. App. 174.

Debts contracted by an executor in carrying on planting operations do not bind the estate. *Florsheim v. Holt*, 32 La. An. 133. See § XV.

The expenses incurred by an executor in cultivating a crop, or in other due course of his executorship, are not a charge upon the corpus of the estate. His power to charge it with the expenses of cultivating a farm extends only to the income; for such expenses he may incur a personal liability, but has no power to bind the general assets, or to charge them with that character of indebtedness. *Hardee v. Cheatham*, 52 Miss. 41; *S. P. Ferry v. Laible*, 27 N. J. Eq. 146; *Cain v. Young*, 1 Utah T. 361.

Even where the contract expressly exempts the representative from personal liability, no lien arises on the creditor's behalf; but the covenant of the executor or administrator, limited to the extent of the assets in his hands, binds him personally to that extent. *Nicholas v. Jones*, 3 A. K. Marsh. (Ky.) 385; *Allen v. Graffins*, 8 Watts (Pa.), 397.

The executor cannot create a lien on the assets for a debt due during the decedent's lifetime. *Ford v. Russell*, 1 Freem. Ch. 42; *Ga. Dec. pt. ii. 7*; *James' App.* 89 Pa. St. 54.

While the contracts of the personal representative, made without express power and authority, create only a personal liability, the creditor may, after suing him to insolvency, have a remedy to reach and subject any indebtedness to him on the part of the estate. *Steele v. Steele*, 64 Ala. 438.

1. *White v. Thompson* (Me.), 9 Atl. Rep. 118; *McFarlin v. Stinson*, 56 Ga. 396. See *Lynch v. Kirby*, 65 Ga. 279.

The executor may, however, show by other than parol evidence that the execution of the note was intended merely as an acknowledgment of a debt due from the estate. *Stirling v. Winter*, 80 Mo. 141.

Where an executor, without authority of

law, accepts a bill of exchange in payment, absolute or conditional, of the promissory note of a solvent debtor to him in his official character, the drawer of the bill is chargeable with notice of the disability of the executor to bind the estate by such transaction, is regarded as participating in a breach of trust by the executor, and, when sued upon the note by the executor, he cannot object that the executor by failing to give any notice of the dishonor of the bill, is estopped to bring such action. *Parham v. Stith*, 56 Miss. 465.

Power to purchase. — Power to purchase is an incident of the power to invest. If the purchase was improper, and the seller was cognizant of the fact, parties in interest may maintain a bill in equity to compel the seller to refund the purchase-money, and put them in *statu quo*. *Trull v. Trull*, 13 Allen (Mass.), 407.

An executor is justified in purchasing for the estate at a foreclosure sale under a mortgage belonging to the estate, when it is for the interest of the estate that he should do so. *Dusing v. Nelson*, 7 Col. 184.

Power to insure. — Although by the statute 19 Geo. II. c. 37, sect. 4, re-insurance on ships is declared generally unlawful, the executors or administrators of the assurer may make re-assurance, to the amount of the sum before assured by him, provided it shall be expressed in the policy to be a re-assurance. *Wms. Exrs.* (7th Eng. ed.) 944; *Park on Insurance*, 421 (7th ed.).

It is within the powers of the personal representative of the assured to procure the indorsement of the policy at the office of the company. *Park on Insurance* (7th Eng. ed.), 662.

Under what circumstances it may become the duty of the representative to insure the property of the estate, see § XIV.

2. *Schoul. Exrs. & Admsrs.* §§ 109, 268; *Neal v. Patten*, 47 Ga. 73.

As to appointment of resident attorneys by non-resident administrators, see *Mass. Pub. Sts. c. 132, § 8*; *Robie's Est. Myrick* (Cal.), 226; *Ex parte Barker*, 2 Leigh (Va.), 719; *Jones v. Jones*, 12 Pick. 623.

A sale by an agent to whom the executor had transferred the entire management of the estate will not divest the claims of creditors upon the property sold. *Neal v. Patten*, 47 Ga. 73.

given by will to executors cannot be exercised by attorney, for, by the power, a personal trust and confidence is reposed in the donee to exercise his own judgment and discretion; and the maxim *delegatus non potest delegare* applies.¹

II. *Power of Election by Executor.*—Where the testator at the time of his death was entitled out of several chattels to take his choice of one or more to his own use, and an interest vested in him immediately by the grant, the election may be made by his executor.²

XIV. *Duties.*—I. *Burial of the Dead.*—It is the duty of the executor or administrator to bury the deceased in a manner suitable to the estate he leaves behind him.³

1. Wms. Exrs. (7th Eng. ed.) 944; Combe's Case, 9 Co. 75 b; Sugd. Powers (6th ed.), 222; Williams v. Mattock, 3 Vt. 189; Berger v. Duff, 4 John. Ch. (N. Y.) 368; Floyd v. Johnson, 2 Litt. (Ky.) 109.

While the ordinary functions incident to the office of executor can be exercised by one of several executors, although the others renounce, a power of sale given by will to co-executors cannot be delegated by one to the other; and an agreement for a sale entered into by one co-executor for himself and the other, under a power of attorney from the latter, is not valid, and cannot be specifically enforced. Berger v. Duff, 4 John. Ch. (N. Y.) 368.

2. Wms. Exrs. (7th Eng. ed.) 944; Toller, 174; Com. Dig. Election, B.

Thus, if a fine be of one hundred acres, and the connuse renders fifty to the connor for years, his executor may choose which fifty he will have. 1 Roll. Abr. 725; Election, C. pl. 4.

Also, if A. makes a lease for years to B. of forty acres, parcel of sixty, the election may be made by B.'s executor. Jones v. Chesney, 1 Freem. (Eng.) 530.

But if, by the terms of the grant, no interest vested in the grantee before his election, it ought to be made in the life of the parties. Thus, if a man gives to A. such of his horses as A. and B. shall choose, the election ought to be in the lifetime of A. Co. Litt. 145 a; Morris v. Levesay, 1 Roll. Abr. 726; Election, C. pl. 6; Com. Dig. Election, B.

Power to appropriate assets to extent of debts paid out of his individual property. See § XII. 2, c.

Power to determine or elect as to which of two estates certain assets shall belong. See § XII. 3, e, n.

3. 2 Bl. Com. 508; Hapgood v. Houghton, 10 Pick. (Mass.) 154.

"The rule appears to be, that the executor is entitled to be allowed reasonable expenses according to the testator's condition in life; and if he exceeds those, he is to take the chance of the estate turning out

insolvent. No precise sum can be fixed to govern executors in all cases. It must obviously vary in every instance, not only with the station in life of each particular testator, but also with the price of the requisite articles at the place." Wms. Exrs. (7th Eng. ed.) 970. See Stag v. Punter, 3 Atk. (Eng.) 119; Hancock v. Codmore, 1 B. & Ad. (Eng.) 260; Parke, B., in Yardley v. Arnold, 1 Car. & M. (Eng.) 434, 438; Edwards v. Edwards, 2 Cr. & M. (Eng.) 612; s. c., 4 Tyrwh. (Eng.) 438; Reeves v. Ward, 2 Scott (Eng.), 395; Bissett v. Antrobus, 48 (Eng.) 512; Patterson v. Patterson, 59 N. Y. 574, 582; Rappelyea v. Russell, 1 Daly (N. Y.), 214; Wood v. Vandenberg, 6 Paige (N. Y.), 277, 285.

It has further been held, that as against legatees or distributees, such expenses will be allowed as will bury the deceased according to the station he held in life; but as against creditors, the rule is less liberal. Flintham's Appeal, 11 Serg. & R. (Pa.) 16; McGlinsay's Appeal 14 Serg. & R. (Pa.) 64. See Faunce's Est. 75 Pa. St. 220, 222, 226; Angle's Appeal, 76 Pa. St. 431; Metz's Appeal, 11 Ser. & R. (Pa.) 204; Patterson's Est. 1 Watts & S. (Pa.) 292; Brackett v. Tillotson, 4 N. H. 208-210; Jennison v. Hapgood, 10 Pick. (Mass.) 77.

It was formerly held, that as against creditors in the case of an insolvent estate, only expenses absolutely necessary were warranted. Lord Holt in Shelley's Case, 1 Salk. (Eng.) 296.

But this position was not sustained in equity, on the ground that the executor could not, at the time of the funeral, know of the condition of the estate, and hence, if he had no reason to suspect its insolvency, could not be held guilty of a *devastavit* in burying him in accordance with his ostensible condition. Stagg v. Punter, 3 Atk. (Eng.) 119. See also Porter's Appeal, 51 Leg. Intell. (Pa.) 338; Fairman's Appeal, 30 Conn. 205.

Extravagance, however, will not be permitted, even as against legatees or next of

2. *Proving the Will and taking out Letters.* (As to manner and form of probate, see PROBATE AND LETTERS OF ADMINISTRATION.) — It is the duty of the executor to prove the will at the earliest available opportunity; and he may be cited by the probate court either *ex officio*,¹ or at the instance of any party interested to do so,²

kin. *Stackpoole v. Stackpoole*, 4 Dav. (Eng.) 227.

Proper funeral expenses will be allowed before any debt or duty whatsoever. 3 Just. (Eng.) 202; *Parker v. Lewis*, 2 Dev. L. (N. C.) 21; *Palmer v. Stevens*, R. M. Charl. (Ga.) 56.

As to what are proper expenses, see *Porter's Est.* 77 Pa. St. 43; *Ferrin v. Myrick*, 41 N. Y. 315; *Fairman's Appeal*, 30 Conn. 205, 209; *Springsteen v. Samson*, 32 N. Y. 714; *Tuttle v. Robinson*, 33 N. H. 104, 117; *Lund v. Lund*, 41 N. H. 355. As to mourning apparel for widow, *Johnson v. Baker*, 2 C. & P. (Eng.) 207; *Bridge v. Brown*, 2 Y. & Coll. C. C. 181, 186; *Griswold v. Chandler*, 5 N. H. 492, 495; *Flintham's Est.* 11 S. & R. (Pa.) 16; *Suc. of Holbert*, 36 La. Ann. 431; *Macknett v. Baker*, 9 C. E. Greene (N. J.), 296; *Pitt v. Pitt*, 2 Cas. temp. Lee (Eng.), 508; *Wood's Est.* 1 Ashm. (Pa.) 314; DEBTS OF DECEDENT, 5 Am. & Eng. Enc. of Law, 249 n.

As to effect of direction in will, or expressed wish of deceased, *Donald v. McWhorter*, 44 Miss. 124; *Cool v. Higgins*, 23 N. J. Eq. 308; *Bainbridge's Appeal*, 97 Pa. St. 482.

As to personal liability of representative for funeral expenses, see § XV. 2, c.

As to whether funeral expenses of wife are a charge on her separate estate, see *Constantinides v. Walsh*, 3 Mass. (L. ed.) 137; 5 N. Eng. Rep. 807; DEBTS OF DECEDENTS, 5 Am. & Eng. Enc. of Law, 249 n.

1. *Waukford v. Waukford*, 1 Salk. (Eng.) 299, 309; *Swinb. pt. 6*, § 12, pl. 1; *Godolph. pt. 1. c. 20*; s. c., *Wms. Exrs.* (7th Eng. ed.) 274. "It should be done within such reasonable, decent, and convenient time as the circumstances may indicate, or not so soon as to imply irreverent haste, and not so remote as to suggest special motive for the delay." 3 Redf. on Wills, § 7 (3d ed.).

Under stat. 55 Geo. III. c. 184, sect. 37, penalties are imposed upon any one attempting to administer upon the estate without obtaining probate of the will or letters of administration within six calendar months after the death of the deceased, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration which shall not be ended within four calendar months after the death. *Wms. Exrs.* (7th Eng. ed.) 311.

Similar statutes exist in many of the United States; and penalties are frequently

affixed to the intentional suppression, sequestration, or destruction of a dead person's will by any person acquiring possession thereof, and provide also for summary proceedings in the court of probate against persons suspected of having or knowing as to the whereabouts of such instrument. *Purd. Dig. (Pa.)* 507, pl. 2; *Mass. Gen. Stats. c. 92*, §§ 16, 17; *Smith, Prob. Pract. (Mass.)* 59; *State v. Pace*, 9 Rich. Law (S. C.), 355; *Stone v. Brown*, 16 Tex. 425; *Hill v. Davis*, 4 Mass. 137; *Loring v. Oakey*, 98 Mass. 267; *Smith v. Moore*, 6 Greenl. (Me.) 274.

The statutory penalty for neglecting to exhibit a will is purely cumulative, and does not affect the jurisdiction of the probate court to issue a citation upon the executor and other persons for the purpose of compelling the production and investigating the whereabouts of the instrument. *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33, 42. See *State v. Pace*, 9 Rich. L. (S. C.) 355; *Brick's Est.* 15 Abb. Pr. (N. Y.) 12; *Bethun v. Dinmore*, Cas. temp. Lee, 158; *Swinb. pt. 6, c. 12, pl. 6*; 3 Redf. Wills (3d ed.), 6.

While the executor is the most proper person to submit the will for probate, it is not unfrequently the practice in the United States for the will to be presented by the custodian. *Schoul. Exrs. & Admrs.* § 53.

Under the Texas statute an executor, by neglecting to prove the will within thirty days, does not lose the right to letters testamentary if he presents a valid excuse for his neglect. *Stone v. Brown*, 16 Tex. 425.

It has been held that devisees and legatees may bind themselves by parol or written agreement to destroy the will. *Phillips v. Phillips*, 8 Watts (Pa.), 195. See *Adams v. Adams*, 22 Vt. 50.

See, under what circumstances letters may be dispensed with, "Probate and Letters of Administration," Am. & Eng. Enc. of Law.

2. *Wms. Exrs.* (7th Eng. ed.) 311; 3 Redf. Wills (3d ed.), 6; *Swinb. pt. 6*, § 12, pl. 1.

"Whoever has a right to offer a will in evidence, or to make title under it, may insist on having it proved. A creditor, therefore, of a devisee has this right for the purpose of obtaining satisfaction of his debt; otherwise, there might be a failure of justice." *Wilde, J.*, in *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33, 42. See *Stone v. Hereford*, 8 Blackf. (Ind.) 452; *Foster v. Foster*, 7 Paige (N. Y.), 48;

and accept or renounce the executorship.¹ Until letters have been actually issued to him, an administrator has no legal right to intermeddle with the effects of the deceased, and, if he does so, may be held liable as executor *de son tort*.²

3. *The Inventory.* — *When necessary.* — *Form and Contents.* — *Effect as Evidence.* — Under the early ecclesiastical probate practice, the filing of an inventory was essential to the safety of an executor or administrator;³ and under stat. 22 & 23 Car. II. c. 10, sect. 1, the exhibition of an inventory of the "goods, chattels, and credits of the deceased, come to his possession," at or before a specified day, was a condition of the administration bond. Under this act it was incumbent upon the executor or administrator to exhibit an inventory on the day specified without citation.⁴ Under the court of probate act, executors and administrators are only bound to exhibit an inventory when cited by the court at the instance of an interested party, and the practice has fallen into complete disuse.⁵ In most of the United States, the return of an inventory to the probate court or registry is a settled feature of the probate practice, and made a condition of the administration bond.⁶ In some States, only one inventory is required; and for

Matter of Greeley, 15 Abb. Pr. (N. Y.) N. S. 393.

It has been thought that reasonable expectation of a legacy is sufficient to sustain an application. Godolph, pt. 1, c. 20, § 2.

1. § VIII. 1.

2. § VII. 2.

3. Wms. Exrs. (7th Eng. ed.) 974; Stat. 21 Hen. VIII. c. 5, sect. 4.

The failure to file an inventory in spiritual courts prevented the representative from relying on want of assets; in temporal, it exposed him to imputation of waste. Swinb. pt. 3, § 17, pl. 8; Orr v. Kaines, 2 Ves. Sen. (Eng.) 193. See also Swinb. pt. 6, §§ 6, 8, 9; Kenny v. Jackson, 1 Hagg. (Eng.) 106; In the Goods of Williams, 3 Hagg. (Eng.) 217.

In some county jurisdictions, an executor had to exhibit his inventory before probate would be granted him. Wms. Exrs. (7th Eng. ed.) 975.

4. Wms. Exrs. (7th Eng. ed.) 975.

5. Wms. Exrs. (7th Eng. ed.) 976.

Under what circumstances such citation will issue, and who are sufficiently interested to make application, see Wms. Exrs. (7th Eng. ed.) 976.

The only instance in which a party having any kind of interest has been refused, is where a creditor has filed a bill in chancery for the discovery of assets, in which case he shall not proceed in both courts. Myddleton v. Rushout, 1 Phillim. (Eng.) 247; Brotherton v. Hellier, 2 Cas. temp. Lee, 134.

An allegation of interest is sufficient, although disputed, to entitle one to apply

for an inventory. Schmidt v. Heusner, 4 Dem. (N. Y.) 275. See Breamer v. Waller, 2 Demarest (N. Y.), 351. Compare Re Waite, 3 Demarest (N. Y.), 261.

Where an issue has been granted to test the validity of a will, held that the contestant has a sufficient interest in the estate to demand the filing of an inventory by the executor. Heenan's Will, 15 Phila. (Pa.) 588.

The method prescribed by N. Y. Code, § 2715, to compel the return of an inventory, affords the only method. Re Nutt, 3 Demarest (N. Y.), 170.

6. Schoul. Exrs. & Admsrs. § 230; Mass. Gen. Stats. c. 96, § 2; Smith (Mass.), Prob. Pract. 103; Gary, Prob. Pract. § 318; Purd. Dig. (Pa.) p. 510, pl. 22; Dwyer v. Kaltayer (Tex.), 5 S. W. Rep. 75.

The failure to file an inventory within the specified time is a technical breach of the bond which may or may not prove serious, according to circumstances. If, upon citation, the executor or administrator performs his duty, or shows good reason why an inventory should be deferred or dispensed with, as a general rule, a forfeiture will not be insisted upon. Schoul. Exrs. & Admsrs. § 230; Lewis v. Lusk, 35 Miss. 696; Adams v. Adams, 22 Vt. 50; McKim v. Harwood, 129 Mass. 75; Leake v. Beanes, 2 Har. & J. (Md.) 373; Moses v. Moses, 50 Ga. 9, 30; Connelly's Appeal, 1 Grant (Pa.), 366; Stearn v. Mills, 4 B. & Ad. (Eng.) 657; Scott v. Governor, 1 Mo. 686; State v. Gubb, 22 Mo. App. 91; Potter v. Titcomb, 1 Fairf. (Me.) 53; Bourne v. Stevenson, 58 Me. 499; Hart v. Ten

additional assets coming to possession or knowledge, income, and accretions, the personal representative is bound only to account;¹ in others the proper practice is to file a supplemental inventory to cover after-discovered assets.² Where the executor is also residuary legatee, and has given the bond required in such case,³ or where no property has come to his hands, it has been held that an inventory will be dispensed with.⁴

Eyck, 2 Johns. Ch. (N. Y.) 62. See § XI. 7.

In some States, statutes expressly provide that the delinquent representative shall be summoned to return his inventory, or show cause why attachment should not issue; and, upon reasonable cause appearing, further time will be granted to make the return. Redf. (N. Y.) Surr. Pract. 215.

The court may issue the summons at its own instance, or on the application of an interested party. Thomson v. Thomson, 1 Bradf. (N. Y.) 24; Forsyth v. Burr, 37 Barb. (N. Y.) 540.

1. Pitt v. Woodham, 1 Hagg. (Eng.) 250; Hooker v. Bancroft, 4 Pick. (Mass.). See Emory v. Thompson, 2 Harr. & J. (Md.) 244.

2. Commonwealth v. Bryan, 8 Ser. & R. (Pa.) 128; Moore v. Holmes, 32 Conn. 553; Laws of Iowa, Rev. 1860, 411, § 2365.

In New York, such assets must be appraised, and another inventory returned, within two months after the discovery. 2 N. Y. R. S. 86, § 24. But application to compel the administrator to file a further inventory will be refused where he denies the existence of further assets. Re McIntyre, 4 Redf. (N. Y.) 489.

In Missouri the probate court has jurisdiction to compel the administrator, at any time before final settlement, to inventory any property of the estate overlooked or omitted. Walter v. Ford, 74 Mo. 195.

The earnings of a schooner, or the rent of a farm or mill, or the proceeds of logs and lumber sold from land belonging to the estate, received by the administrator after two years from his appointment, are not new assets, when the schooner, farm, mill, and land are contained in the inventory. And neither is money hired by the heirs on a mortgage of the intestate's real estate, and turned over to the administrator for the purpose of paying debts against the estate, when he has entered it on his account, with the assent of the judge of probate. Littlefield v. Eaton, 74 Me. 516.

In South Carolina it is the duty of the administrator to file annual returns, but conditions not expressed in the statute cannot be interpolated. Koon v. Munro, 11 S. C. 139.

A supplemental inventory may also be filed to correct errors in the first. Bradford's Admrs. 1 Browne (Pa.), 87.

3. § XI. 2.

4. Walker v. Hall, 1 Pick. (Mass.) 20; Territory v. Bramble, 2 Dak. 189.

Where an executor files a verified account showing no assets (no inventory having been filed or required), the burden of showing assets is on creditors who assert their existence. Re Palmer, 3 Demarest (N. Y.), 129.

A provision in the will, that no inventory need be filed, will be disregarded by the court. Re Potter, 3 Demarest (N. Y.), 108. But see Brainerd v. Birdsall, 2 Demarest (N. Y.), 331.

The fact that the personal property of one deceased and its proceeds have been disposed of, does not excuse a failure to file an inventory. Silverbrandt v. Widmayer, 2 Demarest (N. Y.), 263, overruling Matter of Robbins, 4 Redf. (N. Y.) 144. Compare Higgins v. Higgins, 4 Hagg. (Eng.) 242.

Unless waste is alleged, the remainderman has no right to demand an inventory of property held by the executrix as life-tenant under the will. Brooks v. Brooks, 12 S. C. 422.

Who may be compelled to exhibit an Inventory. — Special and Limited Administrators. — Attorneys. — Any one into whose hands a reasonable presumption can be raised that any part of the effects of the estate have travelled, can be compelled to file an inventory, upon proper application by interested parties. Thus, the representatives of a deceased administrator, although not at the time those of the first testator, an administrator *durante minore etate*, although his administration has expired, an attorney who takes administration in the name of another, and *a fortiori* an administrator *de bonis non, durante absentia, pendente lite*, etc., may be called upon for an inventory upon such presumption being raised. Ritchie v. Rees, 1 Add. (Eng.) 158; Taylor v. Newton, 1 Cas. temp. Lee (Eng.), 15; Bailey v. Bristowe, 2 Robert (Eng.), 145; s. c., 7 Notes of Cas. (Eng.) 386; Wilson v. Keeler, 2 Chip. (Wis.) 16. See Smith's (Mass.) Prob. Pract. 107; Dana's Case, 1 Tuck. (N. Y.) Surr. 113; Colvert v. Peebles, 71 N. C. 274.

The fact that the executor or administrator called upon does not represent the estate of the original testator, is immaterial,

The inventory should contain a full description and valuation of all the goods, chattels, and credits of the deceased to which the representative's official title extends, whether such property is at the time in his own possession, or, to his knowledge, in the possession of others.¹ Property found among the effects of the deceased, though claimed by a third person whose title is not yet established,² notes and accounts belonging to the estate,³ assets

provided a reasonable presumption can be raised that the assets have travelled into his hands. It has also been said that a party interested may maintain an application without taking out a grant *de bonis non*. *Ritchie v. Rees*, 1 Add. (Eng.) 158; *Gale v. Luttrell*, 2 Add. (Eng.) 234; *Holland v. Prior*, 1 My. & K. (Eng.) 245, 246, 247.

An administrator *pendente lite* may be compelled to exhibit an inventory although a bill for discovery has been filed against him by another party. But his executor cannot be compelled to do so in a suit respecting his will by the representatives of a party claiming an interest, not pronounced fees in the suit pending which he was appointed administrator. *Wms. Exrs.* (7th Eng. ed.) 980; *Brotherton v. Hillier*, 2 Cas. temp. Lee (Eng.), 131; *Lascalles v. Jobber*, 1 Cas. temp. Lee (Eng.), 443.

The ecclesiastical courts generally held any unreasonable delay in producing an inventory when called for, contumacious, and condemned the parties guilty of it in costs. *Phillips v. Bignell*, 1 Phillim. (Eng.) 241; *Griffiths v. Bennett*, 2 Phillim. (Eng.) 364. See *Leeke v. Beanes*, 2 Harr. & J. (Md.) 373; *Hart v. Ten Eyck*, 2 John. Ch. (N. Y.) 62.

1. *Schoul. Exrs. & Admrs.* § 232; *Wms. Exrs.* (7th Eng. ed.) 980, 1679; *Vanmeter v. Jones*, 3 N. J. Eq. 520; *Pursel v. Pursel*, 14 N. J. Eq. 514; *McNeel's Estate*, 68 Pa. St. 412; *Speakman's Appeal*, 71 Pa. St. 75; *Williams v. Morehouse*, 9 Conn. 470; *Potter v. Titcomb*, 1 Fairf. (Me.) 53; *Griswold v. Chandler*, 5 N. H. 492; *Turner v. Ellis*, 24 Miss. 173; *Bourne v. Stevenson*, 58 Me. 499; *Smith (Mass.)*, Prob. Pract. 101-103; *Gary, Prob. Pract.* § 318.

The executor or administrator must inventory all property to which he is entitled in that character, as distinguished from the heir, widow, and donee *mortis causa* of the decedent. *Toller*, 248; *Vanmeter v. Jones*, 3 N. J. Eq. 520; *Pursel v. Pursel*, 14 N. J. Eq. 514.

Appraisement.—In England it is not necessary that the inventory and appraisement should be made pursuant to the letter of the statute: it is sufficient if the goods of the deceased are appraised by any honest persons in the neighborhood, and the inventory verified by special oath. The general oath of office will not suffice. 1 Oughton, tit. 233, §§ 1, 2, n.; 2 Toller, 250.

Under the Massachusetts statute, the

judge of probate issues an order (usually on the day the executor or administrator qualified, and upon his verbal request) to three suitable disinterested persons. These appraisers, having been sworn to a faithful discharge of their trust, appraise the estate of the deceased upon the inventory blank which accompanies the order, filling up schedules, and delivering the document when completed to the executor or administrator, by whom it should be returned to the probate office for record with his own oath that the list is just and perfect. Similar legislation exists in most of the North-western States. *Schoul. Exrs. & Admrs.* § 230; *Mass. Gen. Stat. c. 96, § 2*; *Smith, Prob. Pract.* 103; *Gary, Prob. Pract.* § 318.

In New York two appraisers suffice; and the appraisement is made in duplicate, and previous notice given to legatees and next of kin, so that they may attend if they desire. *Redf. (N. Y.) Sur. Pract.* 214. See *Purd. Dig. (Pa.)* 518, pl. 62, 63; *King v. Morrison*, 1 Ga. 188; *Parks v. Renker*, 5 Leigh (Va.), 149.

But legatees or next of kin may not interfere with an appraisal: they must wait until the accounting. *Vogel v. Arbogast*, 4 Dem. (N. Y.) 399.

Failure to give the required notice vitiates the inventory. *Salomon v. Heichel*, 4 Dem. (N. Y.) 176.

Fees of expert at second or third appraisement in Louisiana cannot be larger than allowed by law to appraisers appointed to take in the inventory. *Haus-tan's Succession*, 32 La. An. 54.

In New York the appraiser's estimate of the value of articles is subject to review by the probate court, and does not conclude creditors. *Applegate v. Cameron*, 2 Bradf. (N. Y.) Surr. Pract. 212; *Willoughby v. McCluer*, 2 Wend. (N. Y.) 609. See *Ames v. Downing*, 2 Bradf. (N. Y.) 321. Compare *Loeven's Est. Myrick's Probate (Cal.)* 203.

2. *Bourne v. Stevenson*, 58 Me. 504; *Waterhouse v. Bourke*, 14 La. An. 358; *Gold's Case*, Kirby (Conn.), 100. But in such case prudence would demand that the nature of the claim should also be stated in the inventory. *Schoul. Exrs. & Admrs.* § 233. It cannot be amended to determine a disputed title to property. *Greenhough v. Greenhough*, 5 Redf. (N. Y.) 191.

3. *Succession of Cool*, 14 La. An. 677.

situate in another State,¹ debts due the estate from the personal representative,² and property fraudulently conveyed, should all be included.³ In the absence of express legislation, real estate need not be inventoried.⁴ The inventory should specify large items of value, and set out by themselves such special classes as chattels real, household furniture, cattle, stock in trade, cash, notes, bonds, and securities for money.⁵ Separate debts should be distinguished from those which are doubtful or desperate.⁶ Real estate should be specified by parcels.⁷

See *Black v. Whitall*, 9 N. J. Eq. 572; *Potter v. Titcomb*, 1 Fairf. (Me.) 53; *Bourne v. Stevenson*, 58 Me. 499.

1. *Matter of Butler*, 38 N. Y. 397; 1 Tuck. (N. Y.) Sur. 87. See *Hooker v. Olmstead*, 6 Pick. (Mass.) 481; *Sherman v. Page*, 28 N. Y. Superior Ct. 59. As to ancillary administrators, see *Purd. Dig. (Pa.) Schoul. Exrs. & Admsrs. §§ 181, 234*.

In England it is not competent for the probate court to require an inventory of foreign assets. *Raymond v. Von Watteville*, 2 Cas. temp. Lee, 551; *Wilson v. Ogle*, 2 Cas. temp. Lee, 555.

2. *Weems v. Bryan*, 21 Ala. 1302; *Purd. Dig. (Pa.)* 517 pl. 56; 2 N. Y. R. S. 84, § 13; *Piper's Est.* 15 Pa. St. 533; *Soverhill v. Suydam*, 59 N. Y. 142. See *Commonwealth v. Gould*, 118 Mass. 300, 307; *Williams v. Morehouse*, 9 Conn. 470; *Hall v. Hall*, 2 McCord, Ch. (S. C.) 269; *Hall v. Pratt*, 5 Ham. (Ohio) 72. See § XII. 3, b; § XI. 6, n.

3. *Bourne v. Stevenson*, 58 Me. 504; *Andrews v. Doolittle*, 11 Conn. 283. But see *Snodgrass v. Andrews*, 30 Miss. 472. Compare § XII. 3.

4. *Saville v. Morgan*, 1 Cas. temp. Lee (Eng.), 431. Compare § XII. 3, e.

In some States, statutes enact that real estate shall be appraised, two separate schedules being made, and the schedule for personal property alone serving as the basis of the executor's or administrator's accounts. *Smith's (Mass.) Prob. Pract.* 102; *Gary, Prob. Pract.* § 330; *Henshaw v. Blood*, 1 Mass. 35.

An inventory of real estate, as required by *Mont. Rev. Stats. §§ 118, 126*, is not a prerequisite of the administrator's right to take possession thereof. *Black v. Story*, 14 Pac. Rep. 703.

In Connecticut it has been held that the personal representative is bound to inventory real estate which to his knowledge has been fraudulently conveyed by the decedent. *Minor v. Mead*, 3 Conn. 289. See *Booth v. Patrick*, 8 Conn. 106; *Andrews v. Doolittle*, 11 Conn. 283. Compare *Andrews v. Tucker*, 7 Pick. (Mass.) 250; *Potter v. Titcomb*, 1 Fairf. 53; *Cringan v. Nicholson*, 1 Hen. & Munf. Va. 428; § XII. 3, e.

Exempt Property.—Exempt property

belonging to the widow and children, though not deemed assets, should be stated in the inventory without being appraised. *N. Y. Stat. Redfield's Surr. Pract.* 211. See, as to appraisers' powers to set apart for widow, *Redf. Surr. Pract.* 211; *Sheldon v. Bliss*, 8 N. Y. 31.

In some States a separate and distinct inventory of property allowed the widow is required. *Gary, Prob. Pract.* § 321.

5. *Vanmeter v. Jones*, 3 N. J. Eq. 520.

Bonds and investment securities should be stated at the market value, whether above or below par. *Gary, Prob. Pract.* 328.

Inventory should also indicate, as to all interest-bearing securities, the rate, name of debtor, date from which unpaid interest has to run, etc. *Weed v. Lermond*, 33 Me. 492.

6. *Wms. Exrs. (7th Eng. ed.)* 981.

A debt returned in the inventory without comment will be presumed collected or collectible. *Graham v. Davidson*; 2 Dev. & B. (N. C.) Eq. 155; *Hickman v. Kamp*, 3 Bush (Ky.), 205; *Schultz v. Pulver*, 11 Wend. (N. Y.) 361; *Smith v. Davies*, Bull. N. P. 140.

Where an executor or administrator inventories a debt as desperate, he will not be charged with it except upon proof that he has, or might have, collected it. *Finch v. Ragland*, 2 Dev. Ch. (N. C.) 137; *Matter of Millenovich*, 5 Nev. 161.

But it is sufficient for the creditor to prove that the letter was solvent to throw upon the personal representative the burden of showing that the debts could not be collected. *Huntingdon v. Spears*, 3 Ired. (N. C.) 450.

Mass. Gen. Stats. c. 98, § 6, provides that executors and administrators shall not be compelled to account for debts inventoried as due the deceased, if it appears to the probate court that they remain uncollected without their fault. See *Steele v. Morrison*, 4 Dana (Ky.), 618.

In *Shelley's case* *Lord Holt* said that all separate debts mentioned in the inventory shall be accounted assets in the executor's hands; for that is as much as to say that they may be had for demanding, unless the demand or refusal be proved. *Shelley's Case*, 1 Salk. (Eng.) 296.

7. *Adams v. Adams*, 20 Vt. 50.

Under the modern authorities, an inventory duly returned to the probate court or registry is only *prima facie* evidence of the amount of property belonging to the estate within the jurisdiction where it was taken, and throws the *onus* of disproving its correctness upon the representative.¹ A failure to inventory certain property is not conclusive against those interested in the estate,² nor does it estop the representative from recovering it.³

4. *Collecting the Assets.* — It is the duty of the executor or administrator, as soon as he has taken upon himself the execution of his office, to collect the assets of the estate with all reasonable diligence,⁴

1. Wms. Exrs. (7th Eng. ed.) 1966, Schoul. Exrs. & Adms. § 233; Dean's Succession, 33 La. Ann. 867; Reed v. Gelbert, 32 Me. 519; Morrill v. Foster, 33 N. H. 379; Hoover v. Miller, 6 Jones, L. (N. C.) 79; Grant v. Reese, 94 N. C. 720; Cameron v. Cameron, 15 Wis. 1. See Smith v. Davies, Bull. N. P. 140; s. c., Selwyn's N. P. 779 (6th ed.), n.; Shelley's Case, 1 Salk. (Eng.) 296; Gyles v. Dyson, 1 Stark. N. P. c. 32.

In a controversy with the appraisers the representative may show that the valuation is too high or too low. Ames v. Downing, 1 Bradf. 321; See Deven's Est. Myrick, Prob. (Cal.) 203.

Subsequent gains or losses are not to be disregarded, whatever the inventory may show. Willoughby v. McCluer, 2 Wend. (N. Y.) 608; Mass. Gen. Stats. c. 98, § 7; Merchants v. Comback (N. J.), 7 Atl. Rep. 633.

Where the administrator of one of the creditors is sued for failing to collect from the administrator of the debtor, the inventory of the latter is admissible to show means of information which the former might have availed himself of. Thompson v. Thompson (Ga.), 3 S. E. Rep. 261.

As to motion to strike off items. Thorne v. Underhill, 1 Dem. (N. Y.) 306.

An inventory not certified by an executor is as to him not an inventory, and is not sufficient to charge him. Parks v. Renker, 5 Leigh (Va.), 149. But see Carrol v. Connett, 2 J. J. Marsh. (Ky.) 195; *Re* Ahrens, 3 Dem. (N. Y.) 358.

He may show that he certifies under an error of fact. Martin v. Boler, 13 La. Ann. 369.

2. Walker v. Walker, 25 Ga. 76; Mc-Willie v. Van Vaeter, 35 Miss. 428.

3. Conover v. Conover, 1 N. J. Eq. 403.

4. Eisenbise v. Eisenbise, 4 Watts (Pa.), 134, 136.

The primary object of promptly collecting the assets is to enable the representative to meet the payment of debts against the estate as they shall be presented. He would certainly be delinquent in the discharge of his duty if he were to wait until

the claims against the estate shall have been all presented, and the aggregate amount thereof first ascertained, and then, and not before, set about collecting the assets. Not being permitted then to delay collecting the assets until he can first ascertain the amount of the debts, the whole of the assets, for aught he can know, may be wanted for paying them; and hence it becomes his duty to collect them with all reasonable diligence; and to enable him to do so, the law must supply him with the means necessary for that end. Eisenbise v. Eisenbise, 4 Watts (Pa.), 134, 136, per Kennedy.

Collecting Debts. — Currency. — What may be taken in Payment. — Private Arrangements with Debtor. — The executor or administrator may accept payment of debts due the estate in legal-tender currency, and cannot be compelled to account in coin for such assets. Jackson v. Chase, 98 Mass. 286.

Private arrangements with debtor as to accepting part of his personal property, its avails or the proceeds of real estate when made in the exercise of ordinary skill and diligence, will be sustained, and will not render the representative personally liable for such part of the indebtedness as he fails to collect. Neff's Appeal, 57 Pa. St. 91. But to accept for a good claim an assignment of comparatively worthless property betrays culpable negligence. Bass v. Chambliss, 9 La. Ann. 376; Parham v. Stith, 56 Miss. 465; Scott v. Atchison, 36 Tex. 76.

Acceptance by a personal representative, himself indebted to the estate, of a discharge of his own debt towards the payment due him in his fiduciary capacity, makes himself liable to the estate for the whole debt so settled. Alvord v. Marsh, 12 Allen (Mass.), 603.

If he receive a note or other security in his individual right for a debt due the estate, he is liable over to the estate, but the transaction as between himself and the debtor is good. Ross v. Cowden, 7 W. & S. (Pa.) 376; Biscoe v. Moore, 12 Ark. 79. Land should not be taken in payment

and to this end extensive powers have been conferred upon him.¹

5. *Payment of Debts.*—*a. Duty of observing Legal Priorities.* See DEBTS OF DECEDENTS, § 2.—All debts must be paid by the executor or administrator before any legacies,² and, in making payment, he must be careful to observe the order of priority prescribed by the governing statute; for if he pay those of a lower degree first, he must, on deficiency of assets, answer those of a higher out of his own estate.³ A failure by the executor or administrator to plead a debt of a higher nature in bar of an action brought against him for a debt of inferior degree, and *riens ultra*, if he has not assets for both, will be an admission of assets to satisfy both debts.⁴ But

if its proceeds can be had instead. *Weir v. Tate*, 4 Ired. Eq. (N. C.) 264. See § XII. 3, c, n.

As to when personal representative will be held liable to the estate for negligence in failing to collect, see § XV. 3, b, (1).

1. *Eisenbise v. Eisenbise*, 4 Watts (Pa.), 134, 136; *Wms. Exrs.* (7th Eng. ed.). See § XII. 2, 3, §§ XIII., XVI.

2. *Wms. Exrs.* (7th Eng. ed.) 1340; *McNair's Appeal*, 4 R. (Pa.) 148; *McIntosh v. Humbleton*, 35 Ga. 95; *Dean v. Pertis*, 11 Ala. 104; *Union Bank v. McDonough*, 7 La. An. 232. See *post*, 6.

As to payment to foreign executor. *Citizens' Bank v. Sharp*, 53 Md. 521.

As to construction of acts rendering executors liable in damages for failure to pay over to creditor as directed by court, see *Van Hook v. Litchford*, 35 Tex. 598; 2 Bl. Com. *511.

3. *Wms. Exrs.* (7th Eng. ed.) 989. See *Clayton v. Wardell*, 2 Bradf. (N. Y.) Sur. 1; *Nichols v. Chapman*, 2 Wend. (N. Y.) 452; *Cunningham v. Cunningham*, 94 Ind. 557; *Re McMahon*, 7 How. Pr. (N. Y.) 113.

If the personal representative gives a preference to a debt of lower dignity over those duly presented of a higher, he commits a *devastavit*, and the fact that the payment was made through an honest mistake is no excuse. The rule in this respect is the same, both in law and equity. *Morge v. Albritton*, 7 Ired. Eq. (N. C.) 62; *Huger v. Dawson*, 3 Rich. (S. C.) 328; *Nimmo v. Commonwealth*, 7 Hen. & Munf. (Va.) 57; *Gay v. Lemle*, 32 Miss. 309; *Miller v. Janney*, 15 Mo. 309; *Bass v. Heat*, 33 Miss. 131. See § XV. 3, b, (1), n.

4. *Rock v. Leighton*, 1 Salk. (Eng.) 310; 1 Saund. (Eng.) 333 a, n. 8; *Britton v. Bathurst*, 3 Lev. (Eng.) 114.

The law gives no opportunity of setting up the superior debt except before plea pleaded. *Abbis v. Winter*, 3 Swanst. (Eng.) 578, n.

When Estate to be represented Insolvent.—In some States where it appears

that the estate can only pay a part of the demands in full, it is the duty of the executor or administrator to represent it insolvent. If the recovery of a particular claim which has been presented would cause the insolvency, although he may believe that he has a good defence, he should represent the estate insolvent. *Mass. Gen. Stats. c. 97, §§ 16, 17, 18, 19*; *Newcomb v. Goss*, 1 Met. (Mass.) 333, 334, 335; *State v. Crawford*, 2 (Fla.) So. Rep. 371.

If judgment be rendered against him upon a debt of the deceased before representing the estate insolvent, he must pay it in full without regard to the sufficiency or insufficiency of the assets. *Newcomb v. Goss*, 1 Met. (Mass.) 333.

But even in such States statutes provide that where the executor or administrator shows in his accounts in the probate court that he has exhausted all the assets which have come to his hands, in paying debts and claims preferred by the governing statute over the common creditors of the deceased, such settlement shall be a bar to any action brought against him by any creditor not entitled to such preference, although the estate has not been represented insolvent. *Gen. Stats. c. 97, § 20.*

Effect of Direction in Will.—It is beyond the power of a testator to effect the legal order of payment by a direction in his will. *Turner v. Cox*, 8 Moore, P. C. (Eng.) 288; *Moore v. Ryers*, 65 N. C. 240.

Foreign Assets.—"The established rule in the administration of the assets of deceased persons, *in regard to the creditors*, is to be drawn from the law of the country where the assets are, and where the executor or administrator acts, and from which he derives his authority, and not from the law of the domicile of the deceased. The residue of the assets is distributed according to the law of the domicile." *Kent, Com. *419, n. (e).* See also *Story's Conflict of Laws*, § 524; *Marshall, C. J.*, in *Harrison v. Sterry*, 5 Cranch (U. S.), 499; *Tilghman, C. J.*, in *Milne v. Moreton*, 6 Binney (Pa.),

if, at the time the personal representative paid the debt of lower rank, he had no notice of the existence of the debt of higher rank, he stands excused.¹

b. Right to prefer. — Confession of Judgments. — Effect of Notice. — Among creditors of equal degree, under the English probate practice, the personal representative may pay one in preference to another;² but if one of several creditors of equal degree obtains a judgment at law,³ or decree for payment in equity, he must be satisfied before the rest.⁴ The preference of the executor or

361; Chase, C. J., in *De Sobry v. De Laistre*, 2 Harr. & J. (Md.) 224; *Holcomb v. Phelps*, 16 Conn. 127; *Varnum v. Camp*, 1 Green (N. J.), 332; *Smith v. Union Bank*, 5 Peters, (U. S.) 523, 524. But compare *Wilson v. Lady Demsany*, 18 Beav. (Eng.) 293; *Cook v. Gregson*, 2 Drew (Eng.), 286; *Carron Iron Co. v. MacLaren*, 4 H. L. Cas. 455. See DEBTS OF DECEDENTS, 5th Am. & Eng. Enc. of Law, 237, n. (1).

Attorney's Lien. — An attorney's lien upon a fund recovered for the decedent takes precedence of specialty creditors, and the personal representative cannot insist upon applying it in course of administration. *Turwin v. Gilson*, 2 Ark. (Eng.) 720; *Lloyd v. Mason*, 4 Hare (Eng.), 132. See *Attorney and Client*, § XIII.

1. Wms. Exrs. (7th Eng. ed.) 1029; *Harman v. Harman*, 2 Show. (Eng.) 492; s. c., 3 Mod. (Eng.) 115; *Hawkins v. Day*, 1 Dick. (Eng.) 1029; *Webster v. Hammond*, 3 Harr. & M. 131; *Place v. Oldham*, 10 B. Mon. (Ky.) 400; *Mayo v. Bentley*, 4 Call, 528.

A like reservation must also be understood where it is said that debts of superior rank must be pleaded in bar of an action to recover a debt of lower rank, or else the personal representative will be personally liable on deficiency of assets. Hence, to an action by a specialty creditor, an executor or administrator may plead a judgment recovered against him on a simple contract debt, without notice of the specialty debt and *riens ultra*. But in such plea it must be expressly averred that the executor or administrator had no notice of the specialty debt. *Davies v. Murkhouse*, Fitzgb. 76 Bull. N. P. 178; *Magureth v. Davis*, cited in *Scudamore v. Hearne*, Andrews, 340.

Such decree is entitled to payment before judgments subsequently obtained; and although the representative cannot plead it at common law, equity will protect him in paying due obedience to it. Wms. Exrs. (7th Eng. ed.) 1036; *Cas. temp. Talb. (Eng.)* 223.

Where a bill is brought by single creditor on his own behalf only, there must be a report and final decree to prevent the payment of a judgment by an executor.

A decree for an account is not enough. *Perry v. Philips*, 10 Ves. 41.

But where the creditor files his bill, not for his own debt alone, but *for himself and all other creditors*, the decree for an account and distribution is in the nature of a judgment for all the creditors, and, although legal priorities are not affected by it, no payment by the representative to any creditor after notice of the decree will be allowed in his accounts. Wms. Exrs. (7th Eng. ed.) 1036; *Paxton v. Douglas*, 8 Ves. (Eng.) 520; *Perry v. Philips*, 10 Ves. (Eng.) 40; *Parker v. Ringham*, 33 Beav. (Eng.) 535; *Nunn v. Barlow*, 1 Sim. & Stu. (Eng.) 588; *Jones v. Jukes*, 2 Ves. Jr. (Eng.) 518; *Jeby v. Jeby*, 24 Beav. (Eng.) 525. See also *Brady v. Shiel*, 1 Camp. (Eng.) 148; *McCoy v. Green*, 3 Johns. Ch. (N. Y.) 58; *Walker v. Cheever*, 35 N. H. 347.

2. Wms. Exrs. (7th Eng. ed.) 1033; *Lyttleton v. Cross*, 3 B. & C. (Eng.) 322.

An executor who is also a legatee waives his right of preference by obtaining an injunction prohibiting certain of his creditors from levying on his interest in the estate until there has been a decree establishing their priorities. *Fouché v. Garrison* (Ga.), 3 S. E. Rep. 330.

3. Went. Off. Ex. (14th ed.) 282; *Abbis v. Antles*, 3 Swanst. (Eng.) 578 b; *Ashley v. Pocock*, 3 Atk. (Eng.) 208. As to priority of judgments, see DEBTS OF DECEDENTS, 5th Am. & Eng. Enc. of Law, 238.

4. *Morrill v. Bank of England*, *Cas. temp. Talb.* 217; 2 Bev. P. C. 465; Wms. Exrs. (7th Eng. ed.) 1036; *Mason v. Williams*, 2 Salk. (Eng.) 507; *Perry v. Philips*, 10 Ves. 34; *Gould v. Fryer*, 3 Bro. C. C. (Eng.) 22; *Dollond v. Johnson*, 2 Sm. & G. (Eng.) 301.

As to English legislation requiring judgments to be docketed, see Wms. Exrs. (7th Eng. ed.) 999.

As to other debts, there must be actual notice; but the better opinion is, that such notice need not be by suit. *Brooking v. Jennings*, 1 Mod. (Eng.) 175; *Oxenham v. Clapp*, 2 B. & Ad. (Eng.) 312, per Parke and Patterson, JJ.; *Webster v. Hammond*, 3 Har. & M. (Md.) 131.

As to the extent to which the doctrine of

administrator is also precluded by notice of an action at law commenced against him by a creditor;¹ yet, even after action brought, he may indirectly accomplish the same result by confessing a judgment to another creditor of equal degree,² or allowing a decree *pro confesso* to be entered against him in another's favor. A

constructive notice by judgment or decree is in force in the United States, see *McCoy v. Green*, 3 Johns. Ch. (N. Y.) 58; *Walker v. Cheever*, 35 N. H. 347; *Sawyer v. Mercer*, 1 T. R. (Eng.) 690.

To avoid liability, it is essential that the executor plead as above; for if, innocent of the existence of a bond, he confess a judgment on a simple contract, and afterwards judgment be given against him on the bond, the failure to plead the first judgment will be taken as an admission of assets, and he will be bound to satisfy both. *Britton v. Bathurst*, 3 Lev. (Eng.) 114.

Of debts of record, as judgments, decrees in equity, debts due by recognizance and statute, the judicial record is treated as affording constructive notice, which every executor and administrator is bound to regard. *Wms. Exrs.* (7th Eng. ed.) 1030, 1032; *Littleton v. Hibbins*, Cro. Eliz. 793; *Hickey v. Haled*, 67 L. R. (Eng.) 788. See *Lawrence, J., Searle v. Lane*, 2 Vern. (Eng.) 89; *Sorrell v. Carpenter*, 2 P. Wms. (Eng.) 483.

1. *Wentw. Off. Ex.* (14th ed.) 282; 1 Saund. (Eng.) 333 a, n. (8); *Tolputt v. Wells*, 1 M. Sel. (Eng.) 403, 407; *Ashley v. Pocock*, 3 Atk. (Eng.) 208.

But after suit brought, the representative may voluntarily pay another creditor of equal degree till he has notice of the suit, and then plead *plene administravit* before notice. *Nightingale v. Lee*, 1 Freem. (Eng.) 54; *Parker v. Dee*, 3 Swanst. 531, *in nobis*. *Contra*, *Touchst.* 479. As to constructive notice, see *Wentw. Off. Ex.* (14th ed.) 282, 283. *Pro*, *Nottingham in Parker v. Dee*, 2 Swanst. 531, n.; *Allison v. Davidson*, Dev. & Bat. Eq. (N. C.) 46.

Effect of Filing Bill.—Under the English authorities, the filing of a bill by a creditor, whether on his own behalf or on behalf of himself and all other creditors, does not affect the representatives to prefer the other creditors of equal degree pending the decree. *Wms. Exrs.* (7th Eng. ed.) 1038; *Maltby v. Russell*, 2 Sim. & Stu. (Eng.) 227. See also *Darston v. Oxford, Prec. Chanc.* (Eng.) 188; s. c., *Coles* (Eng.), 229; *Parker v. Dee*, 2 Chanc. Cas. (Eng.) 200; s. c., 3 Swanst. (Eng.) 529, n.; *Bright v. Woodward*, 1 Vern. (Eng.) 369; 3 P. Wms. (Eng.) 401, note to *Robinson v. Tonge*; *Mitchelson v. Piper*, 8 Sim. (Eng.) 64; *Neeves v. Burrage*, 14 Q. B. 504. *Contra*, *Abbis v. Winter*, 3 Swanst. (Eng.) 578 n. (a).

A judgment confessed after bill filed,

but before decree actually entered, is valid. *Larkins v. Paxton*, 2 Beav. (Eng.) 219; *Gilbert v. Hales*, 8 Beav. (Eng.) 236. As to an order nisi, L. R. 8 Ch. D. 154.

In the United States it is held that such preference is checked by the filing of a creditor's bill. *Bamawell v. Smith*, 5 Jones, Eq. (N. C.) 168; *Overman v. Grier*, 70 N. C. 693.

Effect of Part Payment.—Chancery, acting on the maxim, "Equality is equity," will make no further payments, either of legal or equitable assets, to creditors who have received part payment of their debts through the representative's preference, until the other creditors have been paid the same proportion. *Wilson v. Paul*, 8 Sim. (Eng.) 63; *Mitchelson v. Piper*, 8 Sim. (Eng.) 64.

2. *Wms. Exrs.* (7th Eng. ed.) 1034; *Lyttleton v. Cross*, 3 B. & C. (Eng.) 217; *Parker v. Dee*, 3 Swanst. (Eng.) 531, n.; *Prince v. Nicholson*, 5 Taun. (Eng.) 665; 1 Saund. 333 a, note to *Hancock v. Prowd*. See also *Gregg v. Bonde*, 9 Dana (Ky.), 343; *Wilson v. Wilson*, 1 Cranch (U. S. C. C.), 255; *Powell v. Myers*, 1 Dev. & Bat. Eq. 562.

If the administrator or his co-administrator is interested in the claim, the judgment is viewed with suspicion. *Finch v. Ragland*, 2 Dev. Ch. (N. C.) 137; *Smith v. Downey*, 3 Ired. Eq. (N. C.) 268.

Even after action commenced, judgment confessed to a creditor of equal degree is valid; and even after the executor or administrator has pleaded the general issue, he may confess judgment to another creditor, and plead it *puis darrein continuance*. Nor will it make any difference that the representative knew of the existence of the debt upon which the judgment was confessed before the commencement of the action. *Prince v. Nicholson*, 5 Taun. 333, 665; *Lyttleton v. Cross*, 3 B. & C. (Eng.) 317; *Alder v. Park*, 5 Dowl. (Eng.) 16.

Equity will not interfere with such election. *Lepard v. Vernon*, 3 Ves. & B. (Eng.) 53. See *Waring v. Danvers*, 1 P. Wms. (Eng.) 215; 2 Saund. (Eng.) 51 n. (3); *Parker v. Dee*, 3 Swanst. (Eng.) 328, n. (a); s. c., 2 Ch. Cas. 277; *Barker v. Dumeres*, *Barnard*, Ch. Cas. (Eng.) 277.

But a judgment confessed to a creditor, as well for his own debt as in trust for the debts of many others, is bad. Such confession would seem to be made in bad faith. *Tolputt v. Wells*, 1 M. & Sel. (Eng.) 395.

prior plea confessing assets may have the same effect.¹ The whole system of voluntary preference is inconsistent with the policy of discouraging competition among creditors, characteristic of American legislation, and with statutes requiring the presentation and allowance of claims; nevertheless, in some States it has been recognized.²

c. Right to retain.—Under the English probate practice, an executor or administrator may retain for his own debt due to him from the deceased in preference to all other creditors of equal degree.³ The right extends to debts due to the representative

1. *Walters v. Ogden*, 2 Dougl. (Eng.)

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2. DEBTS OF DECEDENTS, §§ 1, 2. *Fouché v. Garrison* (Ga.), 3 S. E. Rep. 330.

3. *Wms. Exrs.* (7th Eng. ed.) 1039. As to administrator, see *Bond v. Green*, 1 Brownl. (Eng.) 75. But compare *Lenoir v. Winn*, 4 Desaus. (S. C.) 65.

The remedy is said to arise from mere operation of law to avoid the incongruity of compelling the representative to bring suit against himself, or be postponed to all other creditors of the same degree. 2 Bl. Com. *511, 3 Bl. Com. 18; *Toller*, 295; *Godolph.* pt. 2, c. 11, s. 3. See *Perkins v. Perkins*, 3 Cent. L. J. (Sup. Ct. R. I.) 315; *Glenn v. Glenn*, 41 Ala. 571.

Perhaps the right may be more logically traced to the idea of a lien, similar to that which the representative has for his charges and allowances, founded upon the principle, "*In equali jure potior est conditio possidentis.*" *Fonblanq. Treat. Eq. bk. 4, pt. 2, c. 2, s. 2, note (m).*

The privilege is confined strictly to debts. The personal representative has no right to retain for a legacy or distributive share given him by will, to the exclusion of other legatees or distributees. *Gadsden v. Lord*, 1 Desaus. (S. C.) 247. See *Paff v. Kinney*, 1 Bradf. (N. Y.) 1.

Nor can he retain as against creditors of a higher degree; for the law merely places him in the same position as if he had sued himself in his representative character, and recovered his debt, which there could be no room to suppose during the existence of debts of higher rank. 3 Bl. Com. *18; 1 Saund. 333, note (6) to *Hancock v. Prowd*.

Where a creditor who has proved his debt, dies, and bequeaths the debt to the executrix, she has no right of retainer in respect of it. *Jones v. Evans*, L. R. 2 Ch. D. (Eng.) 420.

As to whether the executor, by instituting an administrative suit on behalf of himself and all other creditors, waives his right of retainer, see *Campbell v. Campbell*, 29 W. R. (Eng.) 233; *Richmond v. White*, 27 W. R. (Eng.) 878.

The right of retainer is not affected by the act abolishing the distinction between specialty and simple contract debts. *Crowder v. Stewart*, L. R. 16 Ch. D. (Eng.) 368.

Who may, and who may not, retain.—An administrator *durante minore aetate* is entitled to retain, not only for his own debt, but for a debt due the infant administrator. *Roskelley v. Godolphin*, Raym. (Eng.) 483; *Franks v. Cooper*, 4 Ves. (Eng.) 764. So an executor of an executor may retain either for his own debt, or for a debt due the deceased executor. *Hopton v. Dryden*, Prec. Ch. (Eng.) 180. Also an administrator *de bonis non* and the executor of an administrator. *Weeks v. Gore*, 3 P. Wms. (Eng.) 184. See *Burge v. Brallon*, 2 Hare (Eng.), 373. But not the executor of one of several executors, one or more of whom is still living. *Hopton v. Dryden*, Prec. Ch. (Eng.) 181.

The husband of a *feme covert* executrix may retain for his own debt, or a debt due his wife before marriage. *Toller*, 359.

If the husband be executor, he may retain for a debt contracted by the testator, with the wife *dum sola*. *Prince v. Rowson*, 1 Mod. (Eng.) 208; 2 Mod. (Eng.) 51.

If one of two joint and several obligors makes the obligee his executor, he may either retain, or, if he has not received satisfaction out of the assets, sue the survivor. *Crosse v. Cocke*, 3 Keb. (Eng.) 116; *Cock v. Cross*, 2 Lev. (Eng.) 73; s. c., 1 Freem. 49, 50; *Wms. Exrs.* (7th Eng. ed.) 1049, 1318.

So if the obligor appoint the obligee his executor, and there are no assets out of which he may retain, the obligee may sue the heir if he is bound. *Waukford v. Waukford*, 1 Salk. (Eng.) 304.

As to whether a surety on a joint obligation who has become the personal representative of the principal debtor, and on forfeiture of the bond discharged, the debt can retain, see *Toller*, 298; *Bathurst v. De la Zouch*, 2 Dick. (Eng.) 460; s. c., *nom.* *Bathurst v. De la Zouch*, 34 Beav. (Eng.) 9; *Boyd v. Brooks*, 34 Beav. (Eng.) 7; s. c., 34 L. J. Ch. (Eng.) 605. Compare

jointly with others, or solely to himself, and whether the debt be due to him in the character of trustee,¹ or *cestui que trust*.² The fact that the debt is barred by the general statute of limitations,³ or that a decree for an account has been made in a suit by creditors for the administration of assets, and that the assets, out of which the retainer is sought, have come to his hands after the decree, does not preclude the exercise of the right;⁴ but a court of equity will only allow an executor or administrator to retain out of equitable assets a proportionate part of his claim with other

Wms. Exrs. (7th Eng. ed.) 1013; DEBTS OF DECEDENTS, § 2, p. 242, n. (4).

An executor cannot retain against his co-executor, but he may retain for his own debt out of a balance found to be due from himself and his co-executor to the estate. *Chapman v. Turner*, 11 Vin. Abr. 72, tit. "Executors," D. 2; s. c., 9 Mod. (Eng.) 268; *Kent v. Pickering*, 2 Keen (Eng.), 1.

An executor *de son tort* cannot retain. § VII. i.

But a party who by stat. 43 Eliz. c. 8 becomes executor *de son tort* in consequence of a gift to him of the intestate's effects by an administrator who has obtained the grant fraudulently, is, by the express provision of that act, allowed to retain. Wms. Exrs. (7th Eng. ed.) 1447; *Vernon v. Curtis*, 214 Bl. (Eng.) 26 n. (b); *Toller*, 366.

If administration be granted to a creditor as such, and afterwards be repealed at the suit of the next of kin, such creditor shall retain against the rightful administrator. *Blackborough v. Davis*, 1 Salk. (Eng.) 38. See, as to granting of administration to creditors, *Toller*, 106; *Fonbl. Treat. on Eq. bk. 4, pt. 2, c. 2, § 2, n. (m)*; *Spicer v. James*, 2 My. & K. (Eng.) 387; *Thompson v. Cooper*, 1 Coll. (Eng.) 81.

Satisfaction and Ademption. — Effect of Appointment upon Debt. — Extinguishment.

— Under what circumstances the appointment of a creditor to be executor, and the consequent privilege of retainer, operate as an extinguishment of the debt, see "Legacies," "Satisfaction and Ademption." See also Wms. Exrs. (7th Eng. ed.) 1316–1319; *Woodward v. Lord Darcy*, Phrod. (Eng.) 185, 186; *Went. Off. Ex.* (14th ed.) 78; *Cock v. Cross*, 2 Lev. (Eng.) 73; *Waukford v. Waukford*, 1 Salk. (Eng.) 305; *Co. Litt.* 264 b, n.; *Dorchester v. Webb*, Cro. Car. (Eng.) 372; s. c., *W. Jones* (Eng.) 345; *Rawlinson v. Shaw*, 3 T. R. (Eng.) 557; *Lowe v. Peskett*, 16 C. B. (Eng.) 500; *Hall v. Pratt*, 5 Ham. (Ohio) 72; *Kimball v. Moody*, 27 Ala. 130; *Claffin v. Hawes*, 4 Dev. (N. C.) 103; *Fort v. Battle*, 13 Sm. & M. (Miss.) 133; *Sebring v. Keith*, 2 Hill (S. C.), 340; *Carr v. Lowe*, 7 Heisk. (Tenn.) 215; *Fort v. Battle*, 13 Sm. & M. (Miss.) 133.

1. *Plumer v. Marchant*, 3 Burr (Eng.), 1380 (cited 3 Ad. & El. 858); *Bain v. Sadler*, L. R. 12 Eq. Ces. (Eng.) 570; *Saunders v. Saunders*, 2 Litt. (Ky.) 314; *Stephens v. Harris*, 6 Ired. Eq. (N. C.) 57; *Enders v. Brune*, 4 Rand. (Va.) 483; *Harrison v. Henderson*, 7 Heisk. (Tenn.) 315; *Chaffin v. Chaffin*, 2 Dev. & Bal. (N. C.) Ch. 255; *Malte v. Malte*, 1 Desaus. (S. C.) 247; *Evans v. Evans*, 1 Desaus. (S. C.) 515; *Gadgsden v. Lord*, 1 Desaus. (S. C.) 208; *Lenoir v. Winn*, 4 Desaus. (S. C.) 65; *Hosack v. Rogers*, 6 Paige (N. Y.), 415; *Williams v. Purdy*, 6 Paige (N. Y.), 166; *Clark v. Clark*, 8 Paige (N. Y.), 152.

2. *Cockroft v. Black*, 2 P. Wms. (Eng.), 298; *Franks v. Cooper*, 4 Ves. (Eng.) 763; *Loomes v. Shotherd*, 1 Sim. & Stu. (Eng.) 461. See also *Roskelley v. Godolphin*, Raym. (Eng.) 483; s. c., *nom.* *Boskellet v. Godolphin*, Skin. (Eng.) 214; s. c., *nom.* *Roskelley v. Godolphin*, 2 Show. (Eng.) 403; *Marriot v. Thompson*, Willes (Eng.), 186; *Loane v. Casey*, 2 W. Bl. (Eng.) 965.

Where the principal is to be paid to trustees in trust to provide the executor or administrator with an annuity, it has been held that the latter cannot retain for the principal sum. *Thompson v. Thompson*, 9 Prin. (Eng.) 464, 473.

3. *Hopkinson v. Leach*, Madd. Pract. (2d ed.) (Eng.) 583; *Stahlschmidt v. Lett*, 1 Sm. & G. (Eng.) 415. See also *Hill v. Walker*, 4 Kay & J. (Eng.) 166; *Distributees of Knight v. Godbolt*, 7 Ala. 304; *Payne v. Pusey*, 8 Bush (Ky.), 564; *Rogers v. Rogers*, 8 Wend. (N. Y.) 503.

On the same principle, a creditor of an intestate is entitled to a grant of administration, although his right of action is barred by the statute. *Coombs v. Coombs*, L. R. P. & D. (Eng.) 288.

4. *Munn v. Barlow*, 1 Sim. & Stu. (Eng.) 588.

The right to retain is not lost by payment into court in a creditor's suit of money received on account of the assets of the deceased, and will prevail against the plaintiff's right to have the costs of the suit satisfied. *Chissum v. Dewes*, 5 Russ. (Eng.) 29; *Tipping v. Power*, 1 Hare (Eng.), 405, 411; *Hall v. McDonald*, 14 Sim. (Eng.) 1.

creditors.¹ Damages for a tort, or which in their nature are arbitrary, cannot be retained.² A retainer may either be pleaded, or given in evidence under a plea of *plene administravit*, at the option of the personal representative.³ In many of the United States, the right of retainer has been abolished by statute;⁴ in others, statutes requiring presentation and allowance of claims exclude it by necessary implication;⁵ but in some it still exists.⁶

d. Mode of Payment. — Interest. — Currency. — Advancements out of Representative's Own Funds. — Recovering Over-Payments from Creditors. — Personal Liability of the Representative. — In the absence of express stipulation in the original contract, or mutual agreement between the creditor and representative, the debts of the estate should be paid in money which is legal tender,⁷ with

1. Wms. Exrs. (7th Eng. ed.) 1041; Bailey v. Ploughman, Moseley (Eng.), 95; Chambers v. Harvest, Moseley (Eng.), 123; Hall v. Kendall, Moseley (Eng.), 328; Carr v. Lowe, 7 Heisk. (Tenn.) 84.

A court of equity never assists a retainer. "The rule of this court in cases of retainer is, unless the party can show a legal right to retain, we never give it to him: if he can show a legal right, we never take it away from him." Verney, M. R., in Chapman v. Turner, Vin. Abr. Exrs. D. 2, pl. 2.

2. Loane v. Casey, 2 W. Bl. (Eng.) 968, per Blackstone, J. See De Tastet v. Shaw, 1 B. & Ald. (Eng.) 664.

3. Bond v. Green, 1 Brownl. (Eng.) 75; Plumer v. Marchant, 3 Burr. (Eng.) 1380, 1385; Loane v. Casey, 2 W. Bl. (Eng.) 965. See § XVI. 1, b, (13).

4. N. Y. Rev. Stats. 88, § 33; Genl. Stats. Mass. c. 97, §§ 26, 27; Wiley v. Thompson, 9 Met. (Mass.) 329. See Williams v. Purdy, 6 Paige (N. Y.), 166; Treat v. Fortune, 2 Bradf. Surr. (N. Y.) 116; Nelson v. Russell, 15 Mo. 356. See Lewis v. Carson, 3 Mo. L. 810; s. c., 12 West. Rep. 320.

Executors cannot withdraw money from the estate to pay themselves unearned commissions. Wheelwright v. Rhoades, 11 Abb. (N. Y.) N. Cas. 384; 28 Hun (N. Y.), 57.

Where an executor assigns a claim which he holds against the estate, his assignee may maintain an action thereon the same as any other creditor, and is not confined to the statutory remedy the executor himself must have pursued. Snyder v. Snyder, 96 N. Y. 88.

5. DEBTS OF DECEDENTS, §§ 1, 2, p. 228, n. (4). See Wright v. Wright, 72 Ind. 149; McLaughlin v. Newton, 53 N. H. 531; Hubbard v. Hubbard, 16 Ind. 25; Henderson v. Ayers, 23 Tex. 96; Matter of Flood, 4 Redf. (N. Y.) 263; Sanderson v. Sanderson, 17 Fla. 820; 11 R. I. 270.

6. Harrison v. Henderson, 7 Heisk.

(Tenn.) 315; Knight v. Golbolt, 7 Ala. 304; Stephens v. Harris, 6 Ired. Eq. (N. C.) 57; Saunders v. Saunders, 2 Litt. (Ky.) 314; Evans v. Evans, 1 Desaus. (S. C.) 515; Page v. Lloyd, 5 Pet. (U. S. C. C.) 303; Milam v. Ragland, 19 Ala. 85; Young v. Wycliffe, 7 Dana (Ky.), 447; Dolman v. Cook, 14 N. J. Eq. 56; Smith v. Watkins, 8 Humph. (Tenn.) 331; Fort v. Battle, 13 Sm. & M. (Miss.) 133.

7. Schoul. Exrs. & Admsrs. § 441; Magraw v. McGlynn, 26 Cal. 420. But where there are two kinds of money, either one of which is legal tender, the probate court may require an executor to pay a debt of the testator's estate in that kind which he has received as the property of the estate. Magraw v. McGlynn, 26 Cal. 420.

If a creditor receive in payment of his debt a depreciated currency at its nominal value, without fraud or mistake, he will be bound by such payment. Carruthers v. Corbin, 38 Ga. 75. See McGarr v. Nixon, 36 Tex. 289.

Where a debt was payable in confederate money, it was held that the value of such money should be estimated at the date when the debt was contracted, and not when it was payable; and the value should be ascertained in United States currency, and not in coin. Gray v. Harris, 43 Miss. 421.

If the executor or administrator pay off the debts at a discount, he is entitled only to a credit on the sums paid. Heager's Executors, 15 Johns. (N. Y.) 65; Miller v. Towles, 4 J. J. Marsh. (Ky.) 255; Cox v. John, 32 Ohio St. 532; Carruthers v. Corbin, 38 Ga. 75.

As to paying a bank in its own paper, see Wingate v. Pool, 25 Ill. 118.

A promissory note given by the representative for a debt of the decedent is neither a payment nor extinguishment of the debt, but only suspends the right of action on the original debt until the maturity of the note. Taylor v. Perry, 48

the exception of bonds, notes, and other instruments which expressly bear interest, unless a different rule is prescribed by the local statute, claims of creditors are to be treated with respect to interest as they stood at the decedent's death.¹ Under the American practice, an executor or administrator who pays the debts of his testator or intestate out of his own funds, or advances money for that purpose, acquires no right of subrogation to the original creditor, and must look for reimbursement to his accounts.² In most States an over-payment may be recovered by the personal representative from a creditor; the inference being, that he only intended to make such payment as the estate could afford, and not to subject himself to personal liability on deficiency of assets.³ In the absence of negligence or misconduct, the ex-

Ala. 240. See *Peter v. Beverley*, 10 Pet. (U. S.) 532; 1 How. (U. S.) 134.

An executor who owes money to the estate, and deposits his own money in a bank to his credit as *executor*, thereby makes a payment; and the deposit belongs to the estate, and cannot be touched by his creditors. *Scranton v. Farmers' Bank*, 33 Barb. (N. Y.) 527.

A creditor will not be allowed to pay himself by withholding the property of the estate in his possession from the administrator. *Roumfort v. McAlamey*, 82 Pa. St. 193. See § II. 2, c.

1. *Schoul. Exrs. & Admsrs.* § 440; *Davis v. Wright*, 2 Hill (S. C.), 560; *Succession of Dumford*, 1 La. Ann. 92; *Holmes v. Lusk*, 78 Ky. 548.

2. *Blank's Appeal*, 3 Grant (Pa.), 192; *Gist v. Cockey*, 7 Har. & J. (Md.) 135; *McClure v. McClure*, 19 Ired. 185; *Hill v. Buford*, 9 Mo. 869. See *Jones v. Jukes*, 2 Ves. Jr. (Eng.) 518. This position is founded upon the theory that a debt paid by an administrator is extinguished and not assigned. After the accounts have been settled, and he has shown in the legal manner that there is a balance due him from the estate, he may recover it out of the personalty, if there be any left, or out of the lands. His right is founded upon the allowance, and not upon the original debt. *Blank's Appeal*, 3 Grant (Pa.), 192; *McClure v. McClure*, 19 Ired. 185, 189.

An administrator who has paid off a debt of the estate is to be credited in his accounts with its actual, not its estimated, value. *Amos v. Heatherby*, 7 Dana (Ky.), 45. See § XVII. 5.

In some States it is *held* that an executor or administrator who in good faith, and for the benefit of the estate, has paid the claims of creditors beyond the personal assets in his hands, or advanced money therefor, may in equity be substituted to the rights of such creditors, and recover from the heir the amount so overpaid. In

such case an account will be taken in the course of the proceedings. *Williams v. Williams*, 22 Am. Dec. 729; s. c., 2 Dev. Eq. (N. C.) 69; *Kinney v. Harvey*, 21 Am. Dec. 597; s. c., 2 Leigh (Va.), 70. See also *Clay v. Williams*, 2 Munf. (Va.) 105; *Johnson v. Corbett*, 11 Paige (N. Y.), 265. See DEBTS OF DECEDENTS, §§ 3, 4, p. 260, n. (1), 271-275.

A promise by the heir to satisfy a creditor's claim, if the administrator will deliver to him the assets in his hands, is founded upon sufficient consideration, and becomes binding on the creditor's assent to the arrangement. *Courtors v. Perquier*, 1 Brev. (S. C.) 314.

3. *Heard v. Drake*, 4 Gray (Mass.), 514; *Walker v. Hill*, 17 Mass. 380; *Beatty v. Dufief*, 11 La. An. 74; *Richards v. Nightingale*, 9 Allen (Mass.), 149; *Walker v. Hill*, 17 Mass. 380; *Austin v. Henshaw*, 7 Pick. (Mass.) 46; *Bliss v. Lee*, 17 Pick. (Mass.) 83; *Walker v. Bradley*, 3 Pick. (Mass.) 261; *Rogers v. Weaver*, 5 Ham. (Ohio) 536; *Beatty v. Dufief*, 11 La. An. 741; *Wolf v. Beard*, 13 N. W. Rep. 274; 3 Ill. L. ed. 672. *Contra*, *Lawson v. Hansborough*, 10 B. Mon. (Ky.) 147; *Carson v. McFarland*, 2 R. (Pa.) 118; *Blank's Appeal*, 3 Grant (Pa.), 192.

If there is an express agreement with creditors before payment, the money may undoubtedly be recovered back in case of insolvency. *Hatcher v. Royster*, 14 Lea (Tenn.), 222.

At common law a creditor cannot be compelled to refund the amount of a debt paid to him by an executor or administrator. The reason is, that the only ground upon which the executor could demand the repayment, would have been a good defence against the original claim, and would have excused him from paying the debt. If he proceeds with common care and diligence, he can never be compelled to pay more than has actually come to his hands; and if there is an actual deficiency of assets,

ecutor or administrator is not personally liable for the debts of the deceased; and if assets fail to satisfy all claims in due order of preference, and he has used the assets properly as far as they go, creditors cannot pursue him farther.¹

6. *Payment of Legacies and Distributive Shares.*—*a. Mode of Payment—Priority of Debts—Retainer, Set-off, Personal Liability—Distribution of Residue, Executor's Right thereto—Time of Payment—Nature of Interests of Distributees and Residuary Legatees before Distribution—Liability of Representative for Debts of which he had no Notice at Time of paying Legacies—Contingent Claims—Retaining or impounding Assets—Refunding Bonds—Compelling Legatees and Distributees to refund when no Bond is taken—Advancing Legatees and Distributees.*—After discharging all the debts of the estate, it is the duty of the executor to pay the legacies,²

the loss will fall on those creditors who are negligent in demanding their debts, or on those whose debts are postponed by law. The administrator, therefore, proceeding regularly and carefully, can never have occasion to call on a creditor to refund. Jackson, J., in Walker v. Hill, 17 Mass. 384.

In Massachusetts and Ohio it would seem to be essential to the recovery that the money was paid under the impression that the estate was solvent. Jackson, J., in Walker v. Hill, 17 Mass. 387, 388. See Rogers v. Weaver, 5 Ham. (Ohio) 536.

As to the right of an executor or administrator who has paid the debts of the estate out of his own funds to appropriate the assets in repayment, see § XIII. (11), n.; Haslett v. Glenn, 7 Har. & J. (Md.) 17.

1. Schoul. Exrs. & Admsrs. § 442; Orange County v. Kidder, 20 Vt. 519; Eno v. Cornish, Kirby (Conn.), 297; Ritter's Appeal, 23 Pa. St. 95; Rucker v. Wadlington, 5 J. J. Marsh. (Ky.) 238; Black's Appeal, 25 Pa. St. 238; Succession of Morgan, 23 La. An. 290; Byrd v. Holloway, 6 Sm. & M. (Miss.) 199.

2. Wms. Exrs. (7th Eng. ed.) 1340; 2 Redf. Wills, 448; McMillan v. Tombs (Ga.), 4 S. E. Rep. 16.

All debts must be paid before any legacies, regardless of testator's wishes. Lomas v. Wright, 2 My. & K. (Eng.) 769; Schoul. Exrs. & Admsrs. § 476. See 4, n. ante.

A voluntary bond is preferred to legacies. Wms. Exrs. (7th Eng. ed.) 1015, 1341; Gordon v. Small, 53 Md. 550.

There is no distinction in this respect in favor of specific legacies. Spode v. Smith, 3 Russ. (Eng.) 511.

Property specifically bequeathed is not discharged from its liability for the testator's debts by the fact that there has come to the executor's hands property of the testator not specifically bequeathed more

than sufficient to pay his debts, and that the specific legacy has been delivered by the executor to the legatee. Davies v. Nicholson, 2 De G. & J. (Eng.) 693.

Legacies given for valuable consideration do not rank as debts, even to the extent of the consideration, although preferred to other general legacies when abatement is necessary. Schoul. Exrs. & Admsrs. § 490 n.; Wms. Exrs. (7th Eng. ed.) 1364; 2 Redf. Wills. 452. See Wood v. Vandemburgh, 6 Paige (N. Y.), 277; Clayton v. Akin, 38 Ga. 300; Pollard v. Pollard, 1 Allen (Mass.), 490.

To a creditor's application for an order on the administrator to pay his demand, an answer by the administrator that he had paid over the funds to the distributees is no defence. North v. Priest, 81 Mo. 561.

After discharging the debts, it is the duty of an executor promptly to notify legatees of their legacies, and if, from any ambiguity, it is uncertain who are legatees, to institute a bill for ascertaining. Tilton v. American Bible Society, 60 N. H. 377.

Where the devisees and legatees do not insist on a forfeiture of a legacy by a legatee who has contested the will, the will having contained such a provision, the executors cannot insist upon the forfeiture. Williams v. Williams, 15 Lea (Tenn.), 438.

The Mode of Payment should be as directed by the will. Where it was apparent that a testator intended that the incomes to be received by his several children should be equal, and the will made no provision for an assignment or setting apart of securities, the executors and testamentary trustees nevertheless did set apart securities to represent the different shares, thus making the incomes unequal, held, that the assent of the beneficiaries to such arrangement should be presumed only upon the clearest evidence, and that receipts signed by the beneficiaries did not constitute such evi-

and deliver over the residue to the residuary legatee,¹ if any, and, if not, to distribute it under the statute of distribution.² An

dence, adequate knowledge of the facts not being had. *Arthur v. Nelson*, 1 Demarest (N. Y.), 337.

When a testator provides that legacies may be paid by setting off real estate to the legatees, said set-off to be made by three disinterested persons, the persons to make the set-off may be appointed by agreement of the parties or by the court. *Gafney v. Kenison* (N. H.), 10 Atl. Rep. 706.

In 1875 a testator bequeathed to his wife an annuity of \$1,500 United States currency, to be calculated at the rate of \$110 currency for every \$100 United States gold, "if, at the time when the above payments commence, specie payments should have been resumed, and also if gold should have gone higher." Before its payment commenced, specie payments were resumed. The executor paid her \$1,610 per annum. *Held*, that it should have been only the equivalent of \$1,363.64 in gold, and he should be charged the excess with interest, and be allowed to deduct it from future payments of the annuity. *Schutz v. Stutzer*, 5 Redf. (N. Y.) 344.

As to payments in depreciated currency, see *Boyd v. Townes*, 79 Va. 118.

As to when setting aside promissory notes will be a good payment, see *Davidson v. Morse*, 14 S. Car. 251.

Where two usufructuaries have accepted a delivery to both of the whole usufruct bequeathed to them, the executor, although authorized by the will to administer the succession property until the youngest legatee attains his majority, is not required to place the usufructuaries separately in possession. But if a usufructuary dies before the youngest legatee comes of age, the executor may be called upon to resume administration. *Samuels v. Brownlee*, 36 La. An. 228.

An executor who had delivered a specific legacy cannot withdraw his assent or liability. *Eberstein v. Camp*, 37 Mich. 176.

Retainer and Set-off.—An executor or administrator may retain a legacy or distributive share in whole or part in satisfaction of a debt due from the legatee or distributee. *Smith v. Kearney*, 2 Barb. Ch. (N. Y.) 534. See *Terris v. Burrows*, 34 Hem. (N. Y.) 104; *Folz v. Hart*, 84 Ind. 56; *Courtenay v. Wilson*, 3 Hare (Eng.), 539; *Hodgson v. Fox*, L. R. 9 Ch. D. 673.

As to satisfaction of debts by legacies, and of the effect of appointing a debtor or a creditor executor, see *Wms. Exrs.* (7th Eng. ed.) 1303, "Legacies," "Satisfaction and Ademption."

Personal Liability.—In the absence of

fraud, negligence, or illegal conduct, an executor cannot be held personally liable for the payment of legacies. Mere neglect to pay a balance of a legacy is not enough. *Hurlbut v. Durant*, 21 Hun (N. Y.), 481.

But an executor who settles up his final accounts after demand by a legatee, pending the passage of a special act to enable such legatee to take, will be compelled to pay after settlement. *England v. Prince George's Parish Vestry*, 53 Md. 466.

A., who was named as executor, but not as legatee, in a will, promised the testator that if he would not change the will so as to give certain legacies, A. would pay them out of the estate. *Held*, that the promise imposed no legal obligation on A. *Bull v. Bull*, 31 Hun (N. Y.), 69.

An executor who pays a legacy which has remained unpaid for twenty years, and is not postponed by the terms of the will, is not entitled to credit in his accounts. *Hemphill v. Moody*, 62 Ala. 510. See § XVI.

1. *Wms. Exrs.* (7th Eng. ed.) 1454; 2 Redf. Wills, 487.

Where a person has been appointed under the will of the testator trustee of the residue of his estate, the executor is to pay the residuary fund to him; and if, instead of so doing, he pays it to some other person who has no just claim to it, the probate court has no jurisdiction to allow such payment in his accounts. *Williams v. Cushing*, 34 Me. 370. See § XVII.

The fund will be deemed still in his hands as executor until he renders an account showing payments to the person appointed trustee, and legally qualified to receive it. *Williams v. Cushing*, 34 Me. 370, 375; *Smith v. Lambert*, 30 Me. 137; *Conkey v. Dickinson*, 12 Met. (Mass.) 51; *Arden v. Perry*, 11 Pick. (Mass.) 503; *Shaw, C. J.*, in *Newcomb v. Williams*, 9 Met. (Mass.) 535. Compare § XII. 2, b.

Nature of Residuary Legatee's Interest.—A residuary legatee under a will has a clear and tangible interest in the residue, which on his death before payment devolves upon his personal representative. *Cooper v. Cooper*, L. R. 7 H. L. (Eng.) 53; *Brown v. Farndell*, Carth. (Eng.) 52; *Toller*, 341.

As to right of residuary legatee to compel conversion of assets and payment of debts and legacies within a year of the testator's death, see *Wightwick v. Lord*, 6 H. L. Cas. (Eng.) 217, 235.

2. *Story*, Eq. Juris. § 1208; *Wms. Exrs.* (7th Eng. ed.) 650, n. (d²); *Hays v. Jackson*, 6 Mass. 149, 153; *Nickerson v. Bewly*, 8 Met. (Mass.) 431; *Wilson v. Wilson*, 3

administrator is not bound to make distribution until so ordered by the probate court.¹ The statute provides that no distribution of an intestate's effects shall be made until one year be expired after his death;² and, by parity of reasoning, it was held that a legacy cannot be demanded of an executor within a year of the testator's death.³

Bin. (Pa.) 557; s. c., 9 Ser. & R. (Pa.) 424. See *Grasser v. Eckart*, 1 Bin. (Pa.) 580, 584; *Darragh v. McNair*, 2 Ash. (Pa.) 238; *Neaves' Est.* 9 Ser. & R. (Pa.) 186, 190; *Hill v. Hill*, 2 Hayw. (N. C.) 298; *Dewlap v. Ingram*, 4 Jones, Eq. (N. C.) 178; *Paup v. Mingo*, 4 Leigh (Va.), 163; *Denn v. Allen*, 1 Penning (N. J.), 44.

Executor's Right to Undisposed Residue.—If the testator named in his will an executor, but no residuary legatee, it was formerly *held*, under the English probate practice, that the executor was entitled to hold the residue of the personal estate, after paying all debts, charges, and legacies, for his own benefit. *Attorney-General v. Hooker*, 2 P. Wms. (Eng.) 338; *Urquhart v. King*, 7 Ves. (Eng.) 288; *Wms. Exrs.* (7th Eng. ed.) 1474, 1475.

This position appears to have been founded upon a presumed intention, on the part of the testator, to benefit the executor; and hence, wherever an intention could be shown, from the will, that the testator intended to confer the office without the beneficial interest in the residue, equity considered the executor a trustee for the next of kin; or, if no known kindred, for the crown. *Taylor v. Haygarth*, 14 Sim. (Eng.) 8; *Johnstone v. Hamilton*, 11 Jur. N. S. 777; *Wms. Exrs.* (7th Eng. ed.) 1475.

Under stat. 11 Geo. IV. & Wm. IV. c. 40, the executor is to be deemed, in all cases, a trustee for the next of kin. This act puts the burden of proof on the executor to show that the testator intended he should take the residue beneficially. *Juler v. Juler*, 29 Beav. (Eng.) 34.

But the statute is *held* to apply only to cases where the testator has left next of kin; and the executor will take as against the crown, unless an intent to exclude him is affirmatively shown. *Russell v. Clowes*, 2 Coll. (Eng.) 648; *Chester v. Chester*, L. R. 12 Eq. Cas. 444. See, as to construction, *Wms. Exrs.* (7th Eng. ed.) 1476-1482.

In the United States, the notion that an executor should take beneficially by virtue of his office was repudiated in many States, by statutes, one hundred years ago. *Schoul. Exrs. & Admsrs.* § 494. See § XII. 2, b, n.

But the fact that the next of kin is also executor does not disentitle him to the residue which otherwise vested in him. *Mass. Stat.* 1783, c. 24, § 10.

A pecuniary legatee's interest is not enlarged constructively by his appointment

as executor. *Browne v. Cogswell*, 5 Allen (Mass.), 556.

As to bequest to executor, but not in that character. *Reeves's Trusts*, L. R. 4 Ch. D.

As to what words will exclude next of kin. *Clarke v. Hilton*, L. R. 2 Eq. 810.

1. 22 & 23 Car. c. 10, § 3, cited at large in *Wms. Exrs.* (7th Eng. ed.) 1484. It is no breach of the bond not to make distribution until decree. § XI. 7.

In the ordinary course of settling the estate, the personal property is not distributed till after the accounts have been settled in the probate court. This applies also to an executor. *Tappan v. Tappan*, 30 N. H. 50, 68; *Probate Court v. Kimball*, 42 Vt. 320. See *Wms. Exrs.* (7th Eng. ed.) 1389; see *Thomas v. Montgomery*, 1 Russ. & My. (Eng.) 737.

When all the debts of an intestate have been paid, and the administrator is discharged, the assignment of the property to the heirs and next of kin is a mere formality which it is the duty of the court to make, and which nobody can contest. *Dickison v. Reynolds*, 48 Mich. 158.

2. 22 & 23 Car. 2, c. 10, § 8; *Wms. Exrs.* (7th Eng. ed.) 1526.

The Interest of a Distributee under the statute of distributions is analogous to that of a residuary legatee under a will; and if he die within the year, his interest shall be considered as vested in him, and go to his personal representative. *Brown v. Farnell*, Carth. (Eng.) 51, 52; *Cooper v. Cooper*, L. R. 7 Eng. & Jr. App. H. L. 53. See *McConico v. Cannon*, 25 Ala. 462; *Foster v. Fifield*, 20 Pick. (Mass.) 67; *Moore v. Gordon*, 24 Iowa, 158; *Kingsbury v. Scovill*, 26 Conn. 349; *Puckett v. James*, 2 Humph. (Tenn.) 565; *Maxwell v. Craft*, 32 Miss. 307.

As to husband's death pending settlement of wife's estate, see *Schoul. Hus. & Wife*, § 415; *Roosevelt v. Ellthorp*, 10 Paige (N. Y.), 415; *Fielder v. Hanger*, 3 Hap. Ex. 770.

As to the interest of distributees in the estate where there are no debts, see *Outlaw v. Farmer*, 71 N. C. 31, 34.

The proviso makes no suspension or condition precedent in the interest of the parties, but was inserted merely with a view to creditors. *Brown v. Farnell*, Carth. (Eng.) 51, 52.

3. *Tindall, C. J.*, in *Davis v. Blackwell*,

If the executor or administrator, in ignorance of the existence of a debt or claim against the deceased, *bona fide* hand over the

9 Bing. (Eng.) 5; s. c., 2 Morse & Sc. 8; Wood v. Penoyre, 13 Ves. (Eng.) 333; Wms. Exrs. (7th Eng. ed.) 1387; State v. Crossley, 69 Ind. 203; Miller v. Congdon, 14 Gray (Mass.), 114; King's Estate, 11 Phila. (Pa.) 26. See Pearson v. Pearson, 1 Sch. & Lef. (Eng.) 11; Toller, 312; Swearingham v. Stull, 4 Harr. & M. H. (Md.) 38; Sullivan v. Winthrop, 1 Sumner (C. C.), 12; Hallett v. Allen, 13 Ala. 555; Hoagland v. Schenck, 1 Harr. (N. J.) 370; Hammond v. Hammond, 2 Bland, Ch. (Md.) 306; Lawrence v. Embree, 3 Bradf. Sur. (N. Y.) 364; Cook v. Meeker, 36 N. Y. 15; Martin v. Martin, 6 Watts (Pa.), 67; Huston's Appeal, 9 Watts (Pa.), 473; Eyre v. Golding, 5 Bin. (Pa.) 475; Miles v. Wister, 5 Bin. (Pa.) 477; Bitzer v. Hahn, 14 Serg. & R. (Pa.) 238; Perry v. Hale, 44 N. H. 368.

Within that period, he cannot be compelled to pay a legacy, although the testator directs an earlier discharge. Benson v. Maude, 6 Madd. 15. See White v. Donnell, 3 Md. Ch. 526; Pollard v. Pollard, 1 Allen (Mass.), 490, 491; Howland v. Howland, 11 Gray (Mass.), 469, 476; Brooks v. Lynde, 7 Allen (Mass.), 64, 67; Marsh v. Hague, 1 Edw. Ch. (N. Y.) 174; Andrews v. Hunneman, 6 Pick. (Mass.) 129; Brook v. Lewis, 6 Madd. (Eng.) 358. 2 N. Y. R. S. 90, § 44, provides for the payment of a legacy at the time directed, though within the year, upon a refunding bond being given.

The year's allowance is for the convenience of the executor, to enable him to ascertain the condition of the assets; and if the circumstances of the estate are such as to enable him to discharge legacies at an earlier period, he is at liberty to do so. Pearson v. Pearson, 1 Sch. & Lef. (Eng.) 12, per Lord Redesdale; Story, J., in Sullivan v. Winthrop, 1 Sumner (U. S.), 12, 13, 16; Angerstein v. Martin, 1 Turn. & R. (Eng.) 241; Evans v. Inglehart, 6 Gill & J. (Md.) 191. In Garthshore v. Chalie, 10 Ves. (Eng.) 13, Lord Eldon said, that, if a case was produced in which it was quite clear that there were no debts, the court would give the fund to the party, notwithstanding there had not been a lapse of twelve months.

If the payment of a legacy is postponed by an intervening estate, pending litigation or any other cause, more than a year, it becomes payable immediately when the right accrues, and the executor cannot claim further delay. Schoul. Exrs. & Admsrs. § 478; Laundry v. Williams, 2 P. Wms. (Eng.) 478; 2 Redf. Wills, 466; Lord v. Lord, L. R. 2 Ch. (Eng.) 782; Miller v.

Philip, 5 Paige (N. Y.), 573. For further discussion, see LEGACIES.

Legacies Subject to Divesting Contingencies. — The fact that a legacy is subject to a divesting contingency will not prevent the legatee from receiving payment at the end of the year from the testator's death; nor will he be compelled to give security for its repayment in case the event happen, unless it is shown to the court that there is danger that the property will be wasted, secreted, or removed by the first taker. Fawkes v. Gray, 18 Ves. (Eng.) 131; Taggard v. Pipet, 118 Mass. 315. See Condict v. King, 13 N. J. Eq. 375; Boone v. White, 16 N. J. Eq. 411; Tyson v. Blake, 22 N. Y. 558; Williams v. Cotter, 3 Jones, Eq. (N. C.) 395; Pelham v. Taylor, 1 Jones, Eq. (N. C.) 121; Horah v. Horah, 1 Wms. (N. C.) 107; Fiske v. Cobb, 6 Gray (Mass.), 144; Horner v. Shelton, 2 Met. (Mass.) 194; McCarty v. Cosgrove, 101 Mass. 124; Eicheberger v. Barnitz, 17 Ser. & R. (Pa.) 293; Kinnard v. Kinney, 5 Watts (Pa.), 108; Clarke v. Terrey, 34 Conn. 176. Where a legacy was given to a father on condition that he should not interfere with the education of his daughter, security was required, costs being deducted from the legacy. Colston v. Morris, 6 Madd. (Eng.) 89. For further discussion, see LEGACIES.

Annuities. — Bequests for Life. — An annuity commences immediately upon the testator's death, and, unless directed otherwise, the first payment is to be made at the expiration of the year next after that event. If this is an express direction that it should be paid quarterly, or monthly, the first payment should be made at the end of the first three months, or first month respectively after the testator's death. Lord Eldon in Gilson v. Bott, 7 Ves. (Eng.) 96, 97, and Fearn v. Young, 9 Ves. (Eng.) 553; Stamper v. Pickering, 9 Sim. (Eng.) 176; Story, J., in Sullivan v. Winthrop, 1 Sumner, 12; Eyre v. Golding, 5 Binn. (Pa.) 472; Hilyard's Estate, 5 W. & S. (Pa.) 30; Sargent v. Sargent, 103 Mass. 297, 299, 300; Storer v. Prestage, 3 Madd. 167; Wiggin v. Swett, 6 Met. (Mass.) 194; Houghton v. Franklin, 1 Sim. & Stu. (Eng.) 390.

A bequest of the residue for life, with remainder over, entitles the beneficiary for life to the income from the death of the testator. Wms. Exrs. (7th Eng. ed.) 1390, 1391; Angerstein v. Martin, 1 Turn. & R. (Eng.) 232; Brown v. Gellaths, L. R. 2 Ch. (Eng.) 751; Williamson v. Williamson, 6 Paige (N. Y.), 298; Cooke v. Meeker, 42 Barb. (N. Y.) 533; Evans v. Inglehart, 6 Gill & J. (Md.) 171; Lovering

assets to legatees or distributees, want of notice alone will not excuse him from its satisfaction if the assets were originally sufficient for that purpose; but want of notice taken in connection with lapse of time may preclude the creditor or claimant from complaining of the insufficiency of the assets on the ground of *laches*.¹ Where contingent liabilities exist, an executor is not bound to part with the assets to particular or residuary legatees without sufficient indemnity; and while, if such indemnity be offered, he must pay the legacy² without it, or without impounding a sufficient part of the residuary estate for that purpose, a court of equity will not compel him to do so.³ But where an executor,

v. Minot, 9 Lush. (Mass.) 151; *Sargent v. Sargent*, 103 Mass. 297; *Hilyard's Estate*, 5 Watts & S. (Pa.) 30. But see *Welsh v. Brown*, 43 N. J. L. 37. See LEGACIES.

1. Wms. Exrs. (7th Eng. ed.) 1352; *Chelsea Waterworks v. Cowper*, 1 Esp. N. P. C. (Eng.) 275; *Norman v. Baldry*, 6 Sim. (Eng.) 621; *Smith v. Day*, 2 M. & W. (Eng.) 684; *Knatchbull v. Fearnhead*, 3 My. & Cr. (Eng.) 122; *Hill v. Gomme*, 1 Beav. (Eng.) 540. See also *March v. Russell*, 3 My. & Cr. (Eng.) 30; *Taylor v. Taylor*, L. R. 10 Eq. Cas. (Eng.) 477; *Blackwell v. Davis*, 9 Bing. (Eng.) 5; s. c., 2 Moore & Sc. (Eng.) 8.

In *Richards v. Brown*, 3 Bing. N. S. (Eng.) 493, it was admitted by Tindal, C. J., that if a creditor misleads the executor, either by *laches* or express authority, so as to induce him to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of the insufficiency of the assets. See *Stroud v. Stroud*, 7 M. & Gr. (Eng.) 417, 421.

In most of the United States, executors and administrators are protected from such liability by statutes requiring creditors to present their claims within a certain time after publication of notice. See DEBTS OF DECEDENTS, § 1.

Stat. 22 & 23 Vict. c. 35, sect. 29, enables an executor or administrator to protect himself by giving such notice to creditors to present claims as would be given by the court of chancery in a suit for the administration of assets. Wms. Exrs. (7th Eng. ed.) 1356; *Cogg v. Bowland*, L. R. 3 Eq. 368.

2. Sir J. Nicholl in *Higgins v. Higgins*, 4 Hagg. (Eng.) 244.

Distributees are entitled to distribution upon tendering a refunding bond. *Gumma v. Noble*, 24 Miss. 150.

3. Wms. Exrs. (7th Eng. ed.) 1344; *Cochrane v. Robinson*, 11 Sim. (Eng.) 378; *Fletcher v. Stevenson*, 3 Hare (Eng.), 360, 370; *Dobson v. Carpenter*, 12 Beav. (Eng.) 370; *Hickline v. Boyer*, 3 Mac. & G. (Eng.) 635; *Dean & Allen*, 20 Beav. (Mass.) 1;

Vernon v. Egmont, 1 Bligh, N. S. (Eng.) 554.

If he pay legacies or make distribution without indemnity or impounding the assets, he will be liable to answer the damages *de bonis propriis*, should the condition or covenant be broken, and the liability become absolute. *Simmonds v. Bolland*, 3 Meriv. (Eng.) 547; 2 Redf. Wills, *449; *Hawkins v. Day*, Amb. (Eng.) 160; 1 Dick. (Eng.) 155; *Pearson v. Archdeaken*, 1 Alcock & Nap. (Eng.) 23; *Official Manager of Newcastle Bkg. Co. v. Hymers*, 22 Beav. (Eng.) 367.

Impounding or retaining Assets.—Where the legatees are unable to give a sufficient indemnity, under the English chancery practice, the executor is entitled to have a sufficient part of the assets retained and set apart for his security. *Dobson v. Carpenter*, 12 Beav. (Eng.) 370; *Fletcher v. Stevenson*, 3 Hare (Eng.), 360; *Brewer v. Pocock*, 23 Beav. (Eng.) 310; *Thomas v. Montgomery*, 3 Meriv. (Eng.) 551, 552, cited 2 Bligh, N. S. 568, 571. But compare *Dean v. Allen*, 20 Beav. 1. In *Dobson v. Samuel*, 1 Dr. & Sm. (Eng.) 575, it was held that the executor was sufficiently protected by an order of the court in an administration suit.

A claim by a lessor for the administration of the estate of his lessee, and to have sufficient part of the assets impounded to answer future possible breaches of covenant in the lease, cannot be supported. *King v. Malcott*, 9 Hare (Eng.), 692.

It has also been held, that if an executor answer unconditionally to a specific bequest of a testator's leasehold estates, he is not entitled to an indemnity out of the testator's general estate in respect of his covenants contained in the leases. *Shadbolt v. Woodfall*, 2 Coll. (Eng.) 30. See *Hicks v. Boyer*, 3 Mac. & G. (Eng.) 635, 646.

Where a tax was imposed before the estate was settled, it was held to be immaterial that proceedings for its collection were not begun until afterwards. The executor should have retained the necessary amount before distribution, and, having

giving a court of equity all the information he possesses, acts under its order, he will be protected from liability in all cases.¹ The most approved probate practice in the United States enables an executor or administrator to avoid all liability by taking a refunding bond from a legatee or distributee desiring payment of his legacy or distributive share before final settlement.² Unless

failed to do so, was personally liable. *Re McMahon*, 67 How. (N. Y.) Pr. 113. As to liability of commissioners for failure to retain in South Carolina, see *Rouse v. Raynal*, *Riley* (S. C.), Ch. 210.

An administrator who retains money in accordance with the provisions of the Maryland Code, art. 93, § 104, to meet claims not properly exhibited, does not thereby acknowledge that anything is due, and is not precluded from disputing the validity of the claim. *Pole v. Simmons*, 49 Md. 14.

North Carolina Revised Code, ch. 99, § 8, directing the tax on legacies to strangers in blood, imposed by the preceding section, to be retained by the executor or administrator "upon his settlement of the estate," and directing the tax to be paid into the clerk's office, has reference to his settlement to the individual to whom the legacy is bequeathed, and not to the final settlement of the estate; and the tax must be paid into the office, on the settlement with the legatee. *Attorney-General v. Allen*, 6 Jones (N. C.), Eq. 144.

If the interest of an intestate in a partnership has been inventoried and sold by the administrator for notes, the receipt by him of the notes, after the expiration of two years from the time of giving bond and notice of his appointment as administrator, does not authorize a delay in the distribution of the estate for the purpose of allowing him to retain assets sufficient to satisfy the claim of a creditor in another State, who has given notice of his demand, and who commenced a bill in equity in such other State against the intestate in his lifetime to establish it. *Sturtevant v. Sturtevant*, 4 Allen (Mass.), 122.

The contingent claims for which, by the Maine Rev. Stat. ch. 109, § 13, funds are to be preserved by order of the judge of probate, are those concerning which it is uncertain whether they will ever be converted into debts. *Greene v. Dyer*, 32 Me. 460.

1. *Romilly, M. R.*, in *Dean v. Allen*, 20 Beav. (Eng.) 1; *Wigram, V. C.*, in *Fletcher v. Stevenson*, 3 Hare (Eng.), 360, 370.

It is admitted, that, in suits for the administration of assets, a creditor who does not come in before the decree cannot hold the executor personally. Such creditor's only course is to prove his debt on paying the costs of the proceedings, and to be paid out of the residuary fund in court or in the

hands of the executor: if the residue has been paid out under the decree, his only remedy is to sue the legatees. *Wms. Exrs.* (7th Eng. ed.) 1356; *Gillespie v. Alexander*, 3 Russ. (Eng.) 136; *March v. Russell*, 3 My. & Cr. (Eng.) 41; *Hartwell v. Coleman*, 16 Beav. (Eng.) 140; *David v. Frowd*, 1 My. & K. 209, 210; *Sawyer v. Birchmore*, 1 Keen (Eng.), 401; *Underwood v. Hutton*, 5 Beav. (Eng.) 36; *Scale v. Buller*, 2 Giff. (Eng.) 312.

But Sir W. Grant was of opinion that creditors whose claims were contingent at the time of the suit stood in a different position, and that no decree which a court of equity could make would protect the executors from their demands, if the claim became absolute. *Simmons v. Bolland*, 3 Meriv. (Eng.) 554.

This position may now be considered overruled, and that stated in the text established. *Waller v. Barrett*, 24 Beav. (Eng.) 413; *Bennett v. Lytton*, 2 Johns. & H. (Eng.) 155; *Addams v. Ferick*, 26 Beav. (Eng.) 384; *Williams v. Headland*, 4 Giff. (Eng.) 505; *England v. Lord Tredegar*, L. R. 1 Eq. 344; *Dodson v. Samuel, Dr. & Sm.* (Eng.) 575. See *Starr v. McEwan*, 69 Me. 334.

An administrator who has made voluntary payments is protected by a subsequent decree in favor of such payee. *Charlton's Appeal*, 88 Pa. St. 476.

2. 1 Ind. Rev. Stat. 1876, pp. 554, 558, §§ 120, 140. See *Mass. Gen. Stat. c. 97, § 21*; 2 N. Y. R. S. 114, §§ 9-11; *Edgar v. Shields*, 1 Grant (Pa.), 361, 363; *Moffit v. Varden*, 5 Cranch (C. C.), 658; 2 Redf. Wills, *457, *556; *Alexander v. Fisher*, 18 Ala. 374; *Musser v. Oliver*, 21 Pa. St. 362.

An executor who pays legacies before paying the debts, without taking refunding bonds, is guilty of *devastavit*, and is liable to the unpaid creditors. *Edmunds v. Scott*, 78 Va. 720.

Where an executor, on paying a legacy, fails to take a bond to refund, as required by 1 Ind. Rev. Stat. 1876, pp. 538, 544, §§ 120, 140, this does not release the legatee or distributee from liability to refund, when necessary for the payment of debts, legacies, or claims. *Smith v. Smith*, 76 Ind. 236.

Such refunding bonds are usually taken by the representative with reference to claims of creditors, and cannot be extended by implication so as to allow him to re-

such bond be tendered, the representative is not compellable to make the payment without an order of court,¹ but, if he does so, voluntarily, cannot afterwards compel the legatees or distributees to refund, unless debts afterwards appear of which he had no previous notice, and the deficiency complained of was not caused by his own mismanagement.²

cover for an excess paid by way of distribution. *State v. McAleer*, 5 Ired. L. (N. C.) 632; *Robinson v. Chairman*, 8 Humph. (Tenn.) 374.

1. *Edgar v. Shields*, 1 Grant (Pa.), 361, 363; *Davis v. Newman*, 2 Rob. (Va.) 664, 670; *Huntsman v. Hooper*, 32 Minn. 163.

Where a will provides for the payment of one legacy before another, though not making it preferential, and payment is demanded of the executor, the latter, if it appears probable that there will be a deficiency of assets, should refuse to pay in full, and leave the legatee to his application to the court to compel such payment, whereupon the court may direct payment of a reasonable percentage, or require a bond from the legatee. *Harvard College Trustees v. Quinn*, 3 Redf. (N. Y.) 514.

2. *Nelthorpe v. Biscoe*, 1 Chan. Ca. (Eng.) 135; *Davis v. Davis*, 8 Vin. Abr. 423; tit. "Devise" J. d. pl. 35; 1 Rep. (3d ed.) Leg. 398; 2 Redf. Wills. (3d ed.) 457. See *Wms. Exrs.* (7th Eng. ed.) 1451; *Edgar v. Shields*, 1 Grant (Pa.), 361, 363; *Carson v. McFarland*, 2 Rawle (Pa.), 218; *Musser v. Oliver*, 21 Pa. St. 362; *Montgomery's Appeal*, 92 Pa. St. 202; 37 Am. Dec. 670; *Saegar v. Wilson*, 4 W. & S. (Pa.) 501; *McClure v. Askerd*, 5 Rich. Eq. (S. C.) 162; *Adams v. Turner*, 12 S. C. 594; *Gallego v. Attorney General*, 3 Leigh (Va.), 450, 488, 489; *Moffit v. Varden*, 5 Cranch (C. C.), 658; *Harkins v. Hughes*, 60 Ab. 316; *Davis v. Newman*, 2 Rob. (Va.) 664; *Jackson, J.*, in *Walker v. Hill*, 17 Mass. 348, 385; *Alexander v. Fox*, 2 Jones, Eq. (N. C.) 106; *Alexander v. Fisher*, 18 Ala. 374; *Donnell v. Cooke*, 63 N. C. 227; *Bumpas v. Chambers*, 77 N. C. 357; *Doriotcourt v. Jacobs*, 1 La. An. 214; *Moore v. Lanseur*, 33 Ala. 237.

"Whenever an executor pays a legacy, the presumption is, that he has sufficient to pay all the legacies; and the court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee whom he voluntarily paid to refund." *Orr v. Kaines*, 2 Ves. Sen. (Eng.) 194. See *Coppin v. Coppin*, 2 P. Wms. (Eng.) 294; *Demere v. Scranton*, 8 Ga. 43; *Tucker, J.*, in *Gallego v. Att. Gen.*, 3 Leigh (Va.), 450, 485, 489; *Rop. Leg.* (3d ed.) 399.

Under the English cases where the legacy was paid under compulsion of suit, the executor may compel the legatee by bill to

refund. *Newman v. Bartan*, 2 Vern. (Eng.) 205; *Noel v. Robinson*, 2 Ventr. (Eng.) 368; s. c., 1 Vern. (Eng.) 94. See *Gallego v. Attorney-General*, 3 Leigh (Va.), 450, 485, 486, 489; *Doe v. Guy*, 3 East (Eng.), 123. This distinction was said to be doubtful. *McClure v. Askew*, 5 Rich. Eq. (N. C.) 162, 167.

In *Alexander v. Fisher*, 18 Ala. 374, 380, it was held, that where the distribution was made in good faith, and for the accommodation of the distributees, *without a full knowledge* of the condition of the estate, and under an honest and reasonable impression that debts of which the administrator had notice could be resisted, he can compel the distributees to refund. Compare *Tucker, J.*, in *Gallego's Exrs. v. Attorney-General*, 3 Leigh's Rep. (Va.) 450, 489, 490.

In Virginia "a payment to one (legatee) in full shall not be construed into an admission of assets sufficient to pay all: it merely furnishes a strong presumption, which may be rebutted by proof of an original deficiency. And in all cases where the executor is compelled to pay a creditor, he shall, upon the principle of substitution, have the right to compel the legatee to refund, and this although he had notice of the debt at the time of payment, unless he has been guilty of culpable neglect of his duty to inform himself of the condition of the estate. But where he has not been subjected to the suit of a creditor, he shall not be permitted to recover back for his own benefit what he has voluntarily paid to the legatee." *Allen, J.*, in *Davis v. Newman*, 2 Rob. (Va.) 664, 671.

Reimbursement from Money subsequently coming to Hand.—An executor who has made advances to legatees in unequal proportions, and in excess of the money in his hands, may reimburse himself from the next money coming to hand, having first equalized the payments to the legatees; and if he dies before reimbursing himself, his personal representative is entitled to like relief. *Lay v. Lay*, 10 S. Car. 208. Compare *People v. Atkins*, 7 Ill. App. 105; *Kelly v. Davis*, 37 Miss. 76; *Taylor v. Taylor*, L. R. 20 Eq. (Eng.) 155; *Wilson v. Randall*, 37 Ala. 74; *Fay v. Reages*, 2 Sneed (Tenn.), 200.

Thus, an executrix who had made payments upon an annuity before due, to a

An advance may be ordered to a legatee pending the settlement when his necessities justify such action, and there can be no reasonable doubt of its being safe to direct the advance.¹

legatee, was *held* entitled to retain the money so paid out of future payments. *Livesey v. Livesey*, 3 Russ. (Eng.) 287. See *Cooper v. Pitcher*, 4 Hare (Eng.) 485. But he can look to the legatee's share only for reimbursement, and cannot affect the rights of others. *Johnson v. Henagan*, 11 S. C. 93.

Where the administrator has made advances to an infant distributee in excess of his share of the personal assets, he is not entitled to have the land sold for his reimbursement. *Munden v. Bailey*, 70 Ala. 63.

After verdict for an administrator in a suit for a distributive share which he had paid before the decree of distribution, the decree may be modified on due notice. *McDermott v. Hayes*, 60 N. H. 9.

As to when advances to an heir by an administrator will be applied on his distributive share, see *Lyle v. Williams*, 65 Wis. 231.

Whether Creditor can enable Legatee to refund. — An unsatisfied creditor may compel a legatee to refund whether the legacy was paid to him voluntarily or on compulsion, and although the assets at the decedent's death were sufficient to pay both debts and legacies, and the legacy was paid by the personal representative in insurance of the creditor's demand. *Wms. Exrs.* (7th Eng. ed.) 1451; *March v. Russell*, 3 My. & Cr. (Eng.) 31; *Davis v. Nicholson*, 2 De G. & J. (Eng.) 693; *Noble v. Brett*, 24 Beav. (Eng.) 499; *Stuart v. Kissam*, 2 Barb. (N. Y.) 493; *Tripp v. Talbird*, 1 Hill, Ch. (S. C.) 142; *M'Mullin v. Brown*, 2 Hill, Ch. (S. C.) 457; *DEBTS OF DECEDENTS*, § 3, p. 260, n. (5).

The right may be lost by laches, acquiescence, or such a course of dealing as would render its assertion inequitable. *Ridgway v. Newstead*, 2 Giff. (Eng.) 492; s. c., on appeal, 30 L. J. Ch. 889; *M'Mullin v. Brown*, 2 Hill, Ch. (N. Y.) 457.

Assets settled *bona fide* on the marriage of the residuary legatee cannot be followed. *Dilkes v. Broadmead*, 2 Giff. (Eng.) 113.

A purchaser of a legacy which has been paid in full cannot be called upon, it would seem, to refund or pay any part of a debt subsequently established against the testator's estate. *Noble v. Brett*, 24 Beav. (Eng.) 499.

The creditor must first exhaust his remedy at law against the administrator before applying to equity to compel the legatee to refund. *Pyke v. Searcy*, 4 Porter (Ala.), 52; *Doriocourt v. Jacobs*, 1 La. An. 214.

For further discussion, see *DEBTS OF DECEDENTS*, § 3, p. 260.

In creditors' suits in chancery for the administration of assets, it is *held* that the legatee can only be compelled to refund his proportionate part of the debt to a creditor coming in after the decree. *Gillespie v. Alexander*, 3 Russ. (Eng.) 130.

But this rule only applies where the estate has been administered by a court of chancery. *Davis v. Nicholson*, 2 De G. & J. (Eng.) 693.

When One Legatee can compel Another to refund. — If the assets were not originally sufficient to pay all the legacies, and one legatee receives his legacy in full, an unsatisfied legatee may compel him to refund, provided he has failed to recover the legacy from the executor, who is primarily liable. But if the assets were originally sufficient to pay all the legacies, and the subsequent deficiency was caused by the wasting of the executor, or accident, an unsatisfied legatee cannot compel a satisfied one to refund. *Wms. Exrs.* (7th Eng. ed.) 1452, 1453; *Walcott v. Hall*, 1 P. Wms. 495, and note (1); s. c., 2 Bev. C. C. 305. See also observations of M. R. in *Gillespie v. Alexander*, 3 Russ. (Eng.) 133; and in *Davis v. Frowd*, My. & K. (Eng.) 200; *Demere v. Scranton*, 8 Ga. 43; *Lyston v. Lipton*, 2 John. Ch. 614, 626, 627; *Stephenson v. Axson*, 1 Bailey, Eq. (S. C.) 274.

"If a legacy has been erroneously paid to a legatee who has no further property in the estate, in recalling that payment I apprehend that the rule of the court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the court, justice must be due out of this share." Lord Eldon in *Gittins v. Steele*, 1 Swanst. (Eng.) 200; *McKinzie v. Smith*, 2 Murph. (N. C.) 92.

In *Stephenson v. Axson*, 1 Bailey, Eq. (S. C.) 274, it was *held* that a legatee receiving any part of the estate from the executor, *knowing* that the other legacies have not been paid or provided for, may be compelled to refund with interest to the same extent to which the executor is liable to the other legatees. See *Trip v. Talbird*, 1 Hill, Ch. (S. C.) 142.

1. *Hoyt v. Jackson*, 1 Demarest (N. Y.), 553. See *Lockwood v. Lockwood*, 3 Redf. (N. Y.) 330. The surplus of "one-third," required by N. Y. Code, § 2719, to allow the surrogate to decree payment to a legatee or distributee within a year, etc., is to be estimated by excluding the amount of the petitioner's claim, and payments already

b. To whom Legacies and Distributive Shares should be paid. — Deceased Legatees. — Absentees. — Infants. — Married Women. — Testamentary Trustees. — It is a general rule that executors and administrators must see at their peril that they pay legacies and distributive shares to the persons legally authorized to receive them, and a literal compliance with the directions of the will is not in all cases sufficient.¹ If the legatee or distributee has deceased since the testator or intestate, payment should be made to his executor or administrator.² If he has been long absent, and his whereabouts unknown, in the absence of express legislation providing for such contingency, the executor or administrator should apply to the court for direction.³ Legacies or distributive shares due an infant should be paid to his probate or chancery guardian, and not to the infant himself, natural guardian, parent, or any other relation on his account, unless so directed by the court.⁴ At common law a legacy to a married woman should be

made. *Tuttle v. Heidermann*, 5 Redf. (N. Y.) 199.

The surrogate will not order the payment of a legacy until all interested have an opportunity to present their claims to a share in the distribution of the estate, so that it may appear that the petitioner is entitled to the legacy. *Neaves v. Neaves*, 2 Demarest (N. Y.), 230.

Pending a contest concerning the validity of a will, the surrogate is powerless to order payments to legatees. *Re McGowan*, 28 Hun (N. Y.), 246. Under N. Y. Code, §§ 2717, 2718, a surrogate has no jurisdiction to entertain proceedings instituted by one claiming a legacy, to compel an executor to pay the same, where the executor "files a written answer duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity." *Fiester v. Shepard*, 92 N. Y. 251.

An executor cannot be peremptorily ordered to pay an annuity, where no decree or award has been made in favor of the annuitant; but the executor having failed to comply with a previous order directing the investment of a fund for the annuitant, as directed by the will, he will be again ordered to set apart and invest the fund. *Vautier's Estate*, 14 Phila. (Pa.) 259.

1. *Shaw, C. J.*, in *Newcomb v. Williams*, 9 Met. (Mass.) 535.

Legacy to A. and his Family. — A legacy to A., to be divided between himself and his family, is discharged by payment to A. *Cooper v. Thornton*, 3 Bro. C. C. (Eng.) 96, 186. *Robinson v. Tickell*, 8 Ves. (Eng.) 142.

As to "family," as a word descriptive of legatees, see LEGACIES. Also *Wms. Exrs.* (7th Eng. ed.) 1125.

2. *Newcomb v. Williams*, 9 Met. (Mass.) 535. See *Waterman v. Hawkins*, 63 Me.

156; *Williams v. Cushing*, 34 Me. 370; *Hall v. Andrews*, 17 Ala. 40; *Parson's Est.* 13 Phila. (Pa.) 406.

Payment to the heir would be illegal, although the legacy were expressly to the man and his heirs. *Shaw, C. J.*, in *Newcomb v. Williams*, 9 Met. (Mass.) 535.

3. *Schoul. Exrs. & Admsrs.* § 484.

Where a legatee has been long absent, sixteen years or more, without being heard from, chancery has in several instances made distribution — sometimes directing that parties entitled, in such contingency, to the legacy, should give security to refund in case the absent legatee should return. *Dixon v. Dixon*, 3 Bro. C. C. (Eng.) 510; *Wms. Exrs.* (7th Eng. ed.) 1420; *Bailey v. Hammond*, 7 Ves. (Eng.) 590. See *Re Lewes' Trusts*, L. R. 11 Eq. (Eng.) 236.

Stat. 36 Geo. III. c. 52, § 32, permits executors to pay legacies to absentees "beyond seas" into the Bank of England. *Wms. Exrs.* (7th Eng. ed.) 1407, 1421; *Re Birket*, L. R. 6 Ch. D. 576.

4. *Schoul. Exrs. & Admsrs.* § 483; *Wms. Exrs.* (7th Eng. ed.) 1405, 1526; *Dayley v. Tollferry*, 1 P. *Wms.* (Eng.) 285; *Shaw, C. J.*, in *Newcomb v. Williams*, 9 Met. (Mass.) 535; *Quinn v. Moss*, 12 Sm. & M. (Miss.) 365; *McKnight v. Walsh*, 23 N. J. Eq. 136; *Sparhawk v. Buell*, 9 Vt. 41; *Whitlock v. Whitlock*, 1 Demarest (N. Y.), 160; *Génet v. Talmadge*, 1 John. Ch. (N. Y.) 3; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Kent v. Dunham*, 106 Mass. 586; *Decrow v. Moody*, 73 Me. 100. Compare *Rotherham v. Fanshaw*, 3 Atk. (Eng.) 629; *Phillips v. Paget*, 2 Atk. (Eng.) 80, 81.

A contrary doctrine appears to have once prevailed. *Hollway v. Collins*, 1 Chanc. Cas. 245; s. c., 1 Eq. Cas. Abr. 300, pl. 1.

Under what circumstances the court will order an infant's legacy to be paid to the

paid to her husband, and he alone could discharge the executor.¹ But in most States the husband's common-law rights in his wife's property have been so far modified by statute or judicial decision, that the wife alone can give a good discharge.² Where the legatee

father. *Walsh v. Walsh*, 1 *Drew* (Eng.), 64; *Lang v. Pettus*, 11 *Ala.* 37.

In New York the court cannot order the executors to pay to the father, as the natural guardian of his children, a sum for their suitable maintenance and education. A general guardian must be appointed to receive such payment. *Houghton v. Watson*, 1 *Demarest* (N. Y.), 299.

Where the infant has no regularly appointed guardian, see *McLoskey v. Reid*, 4 *Bradf. Surr.* (N. Y.) 334.

A person appointed guardian to an infant in one State, is not thereby entitled to receive from the administrator in another State the legacy or portion of the infant. *McLoskey v. Reid*, 4 *Bradf. (N. Y.) Sur.* 334; *Morrell v. Dickey*, 1 *John. Ch.* (N. Y.) 153.

But if the testator order the legacy to be paid to the father, he will be considered a trustee for the child, and his receipt will be a good discharge to the executor. *Cooper v. Thornton*, 3 *Bro. C. C.* (Eng.) 96; *Robinson v. Tickell*, 8 *Ves.* (Eng.) 142.

On the other hand, an executor intrusted by the testator with keeping a legacy for a minor until majority, is not discharged by payment before that time to the guardian, and is responsible if the guardian fails to pay it over to the ward. *Hinckley v. Hariman*, 45 *Mich.* 343.

After a child has attained his majority, payment to the father is not good unless made with the child's consent, or subsequently confirmed. *Cooper v. Thornton*, 3 *Bro. C. C.* (Eng.) 97, by Lord Alvanley.

When Executor may allow Maintenance.

—The executor cannot apply any part of the *capital* of the legacy for the maintenance or advancement of the infant, or for any other purpose than mere necessities, without the sanction of the court. But it should seem that he may apply so much of the *interest* of the sum bequeathed for the support of the infant legatee, although not authorized so to do by the testator, as the court would have directed if resorted to in the first instance. *Wms. Exrs.* (7th Eng. ed.) 1409. See § XVII. 5, n. 1 *Rop. Leg.* (3d ed.) 768; *Davies v. Austen*, 3 *Bro. C. C.* (Eng.) 178; s. c., 1 *Ves. Jr.* (Eng.) 247; *Robison v. Killey*, 30 *Beav.* (Eng.) 520; Sir W. Grant, in *Walker v. Wetherell*, 6 *Ves.* (Eng.) 474; *Ex parte Green*, 1 *Jac. & W.* (Eng.) 253; *Barlow v. Grant*, 1 *Vern.* (Eng.) 254; *Harvey v. Harvey*, 2 *P. Wms.* (Eng.) 23; *Ex parte Chambers*, 1 *Russ. & My.* (Eng.) 577; *Bridge v. Brown*, 2 *Y. & Coll. C. C.* (Eng.) 181.

The infant may be estopped from claiming repayment of a legacy applied to his support by the executor during minority, by a clear act of confirmation after attaining majority. 1 *Rop. Leg.* (3d ed.) 771; Lord Alvanley in *Cooper v. Thornton*, 3 *Bro. C. C.* (Eng.) 97. See *Brown v. Lee*, 4 *Ves.* (Eng.) 362.

Under what circumstances the court will order maintenance out of the interest of a legacy, see LEGACIES.

1. *Wms. Exrs.* (7th Eng. ed.) 749, 1413. See *Morgan v. Thames Bank*, 14 *Conn.* 99; *Jamison v. May*, 13 *Ark.* 600.

This applies also to the husband's right to wife's distributive share. *Wms. Exrs.* (7th Eng. ed.) 1526. And although the husband and wife are divorced *a mensa et thoro*. *Chamberlain v. Hewson*, 1 *Salk.* (Eng.) 115, per Lord Holt; 1 *Ld. Raym.* (Eng.) 74; *Wms. Exrs.* (7th Eng. ed.) 1414.

But if the husband has not made any provision for his wife, the executor may decline to pay the legacy until the husband has made such a settlement upon her as a court of chancery would have compelled him to make had he filed a bill for the money. *Browne v. Elton*, 3 *P. Wms.* (Eng.) 202. *Lady Elibank v. Montobin*, 5 *Ves.* (Eng.) 742, n.; *Glen v. Fisher*, 6 *John. Ch.* (N. Y.) 33. See also *Toller*, 321; *March v. Head*, 3 *Atk.* (Eng.) 720; 1 *Rop. Leg.* (3d ed.) 773; *Edes v. Edes*, 11 *Sim.* (Eng.) 569.

As to wife's power to waive her equity. *Willeys v. Cay*, 2 *Atk.* (Eng.) 67; *Milner v. Colmer*, 2 *P. Wms.* (Eng.) 641; *Parsons v. Dunne*, 2 *Ves. Sen.* (Eng.) 60; *Packer v. Packer*, 1 *Coll.* (Eng.) 92; *Groves v. Clarke*, 1 *Keen* (Eng.) 140; *Winch v. Brutton*, 14 *Sim.* (Eng.) 379.

As to payment to the husband of an adulteress. *Carr v. Eastbrooke*, 4 *Ves.* (Eng.) 146; 1 *Rop. Hus. & Wife* (2d ed.), 276, 375; *Bull v. Montgomery*, 2 *Ves. Jr.* (Eng.) 191; *In re Lewin's Trusts*, 20 *Beav.* (Eng.) 378.

Bequest to Separate Use. — If a bequest is made to the *separate use* of a married woman, as where it is given "for her own use, and at her own disposal," she alone can give a good discharge. Her husband has no interest in the fund, and she may sue for it by her next friend. *Wms. Exrs.* (7th Eng. ed.) 760, 1420; *Prichard v. Ames*, 1 *Turn. & R.* (Eng.) 222; *In re Tarsey's Trust*, L. R. 1 *Eq.* (Eng.) 561. See § XII. 3, a.

2. *Young's Estate*, 65 *Pa. St.* 101. See

or distributee is insane, his qualified committee or guardian is the proper person in American probate practice to receive the legacy or distributive share.¹ An executor may safely pay a testamentary trustee, designated in the will to receive the fund, without reference to the parties beneficially interested.²

c. Distribution in Kind.—Where a sale would be injurious to the interests of the estate, distribution may be made in kind, provided the distributees can be brought into accord, and their mutual rights under the statute equably adjusted.³

d. Legacies when due.—*Title of Legatee.*—*Assent of Executor.*—*Demand.*—*Interest.*—*Currency.*—*Abatement.*—*Payment or Delivery of Specific Legacies.*—*Actions and Proceedings to compel Payment.*—*Appropriation of Legacies payable in Futuro.*—See LEGACIES.

e. Distribution of Intestate Estates.—See *INTESTATE LAWS.*

XV. Liabilities.—1. *Liability of an Executor or Administrator upon the Acts of the Deceased.*—*a. Claims founded upon Contract.*—*Joint Contracts.*—*Covenants concerning Realty.*—*Liability of Executor of Deceased Lessee.*—Executors and administrators are answerable to the extent of assets for debts of every description due from the deceased, whether founded upon record, specialty, or simple contract, as notes unsealed, and promises not in writing, either express or implied.⁴ Executory contracts, unless personal

Walker v. Coover, 65 Pa. St. 430; Huff v. Wright, 39 Ga. 41; Quigley v. Graham, 18 Ohio St. 45; Foster v. Conger, 61 Barb. (N. Y.) 145; Voorhees v. Bonesteel, 16 Wal. (U. S.) 16; Harding v. Cobb, 47 Miss. 599; Knaggs v. Mestin, 9 Kan. 532; Jenkins v. Flinn, 3 Ind. 349; De Fries v. Conklin, 22 Mich. 255; Stone v. Gazzam, 46 Ala. 275; Colby v. Lamson, 39 Me. 119; Clough v. Russell, 55 N. H. 275. See HUSBAND AND WIFE.

1. Schoul. Exrs. & Admsrs. § 483. See Schoul. Dom. Rel. (3d ed.) 293; "Idiots and Lunatics," "Guardians," and "Ward," Am. & Eng. Enc. of Law.

2. 2 Redf. Wills (3d ed.), 477; Cooper v. Thornton, 3 Bro. C. C. (Eng.) 96; Robinson v. Tickell, 8 Ves. (Eng.) 142; 1 Rep. Leg. (3d ed.) 771; Re Denton, 102 N. Y. 200.

But he must see that the trustee is properly qualified. Newcomb v. Williams, 9 Met. (Mass.) 535.

Although executor be himself trustee, he must qualify before holding the fund in his new capacity. Miller v. Gordon, 14 Gray (Mass.), 114. See § XII. 2, c.

As to appointing testamentary trustees, see local statutes. Smith, Prob. Pract. 90-93; Wms. Exrs. (7th Eng. ed.) 1796.

As to distinction between the offices of executor and trustee, even when vested in the same person, see Croton v. Rugeles,

17 Me. 137; Wheatley v. Badger, 7 Pa. St. 459; § XII. 2, c.

3. Evans v. Inglehart, 6 Gill & J. (Md.) 171; Hester v. Hester, 3 Ired. Eq. (N. C.) 9; Reed's Estate, 82 Pa. St. 428.

Distributees should be equally dealt with. Lowry v. Newsom, 51 Ala. 570.

If shares of specific property are not exactly equal, the balances may be made up in money. Williams v. Holmes, 9 Md. 287.

If, on final settlement of the accounts, the assets are partly gold and partly currency, each distributee should have his fair share of each kind. Lowry v. Newsom, 51 Ala. 570. See Tilsen v. Haine, 27 La. An. 228.

Local statutes sometimes provide for a distribution in kind, in certain cases. Rose v. O'Brien, 50 Me. 188.

If a residuary legatee is willing to take his share in specie, he is entitled to do so; and the executors cannot refuse to make distribution on the ground that they have been unable to convert the securities into cash. Reed's Estate, 82 Pa. St. 428.

4. Wms. Exrs. (7th Eng. ed.) 1721.

The executor or administrator is bound to satisfy, so far as he has assets, all judgments recovered against the decedent, without regard to whether the cause of action upon which the judgment was founded would have survived or not. Wms. Exrs. (7th Eng. ed.) 1740.

to the testator or intestate, founded upon an existing personal relation, or requiring personal skill,¹ survive to the executor or administrator, and the estate may be held liable for a breach committed after as well as before the death of the deceased.² If a

The executor is liable upon a bond which becomes due, or note payable, after the death of the testator. *Toller*, 463.

If a person who has delivered a deed as an escrow, to be handed over to the party for whose use it is made, upon the performance of some condition, die before the condition is performed, and the condition be afterwards performed, the deed is good. *Lord Ellenborough in Copeland v. Stevens*, 1 B. & Ald. (Eng.) 606.

A note made payable by executors one year after maker's death, with legal interest, bears interest from its date, and not merely from the maker's death. *Roffey v. Greenwell*, 10 Ad. & El. (Eng.) 222; s. c., 2 Perr. & D. (Eng.) 365.

As to liability of executor on continuing guarantee of testator, see *Smith's Comm. L.* (4th ed.) 425. *Contra*, *Bradbury v. Morgan*, 1 H. & C. (Eng.) 249.

1. *Wms. Exrs.* (7th Eng. ed.) 1725; *Bland v. Umsted*, 23 Pa. St. 316; *Smith v. Wilmington Coal Co.*, 83 Ill. 498; *McGill v. McGill*, 2 Met. (Ky.) 258; 1 Par. Cont. (6th ed.) 131; *Siboni v. Kirkman*, 1 M. & W. (Eng.) 418; *McKeown v. Harvey*, 40 Mich. 226.

Thus, if an author agrees to write a work, and dies before completing it, his executors are discharged, for the performance has become impossible. *Marshall v. Broadhurst*, 1 Tyrwh. (Eng.) 349, per Lord Lyndhurst.

A contract by a newsman not to exercise his trade has been held not binding on his administratrix, although by its terms consideration was to be paid to his executors, administrators, and assigns during the joint lives of himself and wife. *Cooke v. Colcroft*, 2 W. Bl. (Eng.) 856; s. c., 3 Wils. 380.

As to what contracts will be considered personal, see *Wentworth v. Cock*, 10 Ad. & El. (Eng.) 445; *Robinson v. Davison*, L. R. 6 Ex. (Eng.) 269, 274; s. c., 2 Perr. & D. (Eng.) 251; *Cooper v. Jarman*, L. R. 3 Eq. Cas. (Eng.) 98; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; *Dickenson v. Callahan*, 19 Pa. St. 227.

Liability as to Apprentices.—A covenant by a master for the instruction of his apprentice is personal to the master, and his executor or administrator is not liable upon it. But the covenant by the master for the *main* of the apprentice still continues in force, and the representative may be held thereon to the extent of assets. *Baxter v. Benfield*, 2 Stra. (Eng.) 1266; 1

Bott. P. L. (6th ed.) pl. 696; *Rex v. Peck*, 1 Salk. (Eng.) 66.

Under the English practice, when an attorney to whom a clerk has been articulated dies before the articles expire, the court of chancery has jurisdiction to entertain a claim for a return of part of the premium; and such claim constitutes a debt payable out of the assets of the attorney. *Hirst v. Folson*, 2 Mac. & G. (Eng.) 134; *Winkeep v. Hughes*, L. R. 6 C. P. (Eng.) 85; *Wms. Exrs.* (7th Eng. ed.) 1766.

Contract of Agency.—The death of the principal revokes the agent's authority; consequently the agent cannot recover from the principal's representative for services rendered after his death, though performed in pursuance of a contract made with him during his lifetime. *Wms. Exrs.* (7th Eng. ed.) 1727; *Campaneri v. Woodburn*, 15 C. B. (Eng.) 400.

A contract by a partnership for the employment of an agent is discharged by the death of one of the partners. *Tasker v. Shepherd*, 6 H. & N. 575. See *M'Kee v. Myers*, Addis. (Pa.) 31; 1 *Chitty Cont.* (11th Am. ed.) 278, n (a), 376, 2 *ib.* 1412, "Agency."

2. *Smith v. Wilmington Coal Co.*, 83 Ill. 498; *McKeown v. Harvey*, 40 Mich. 226. See *Marshall v. Broadhurst*, 1 Cr. & Jerv. (Eng.) 405; *Garrett v. Noble*, 6 Sim. (Eng.) 504.

"There is no difference between a promise to pay a debt certain and a promise to do a collateral act which is uncertain, and rests only in damages as a promise by the testator to give such a fortune with his daughter, to deliver up such a bond, etc. For, wherever in those cases the testator himself is liable to an action, his executors shall be liable also." *Wms. Exrs.* (7th Eng. ed.) 1723. See *Fawcett v. Carter*, W. Jones (Eng.), 16.

An action has been sustained against the executor of an attorney for negligence by the deceased in transacting the plaintiff's business. *Wilson v. Tucker*, 3 Stark. N. P. C. 154; s. c., 1 Dow. & Ryl. N. P. C. 30. See *Dutton v. Tayley*, 18 Hill, W. S. (Eng.) 285; *Miller v. Wilson*, 24 Pa. St. 114. See § XII. d, (1); XV. 1, b.

If the contract survives, the personal representative is liable upon it, although not named in terms. *Went. Off. Ex.* (14th ed.) c. 11, pp. 239, 243; *Bradbury v. Morgan*, 1 H. & C. (Eng.) 249, 255; *Lord Macclesfield in Hyde v. Skinner*, 2 P. Wms. (Eng.) 197; *Harrison v. Sampson*, 2 Wash.

contract be joint, and one of the parties die, his executor or administrator is at law discharged from all liability, and the survivor or survivors alone can be sued;¹ but if the contract be several,

(C. C.) 155; *Lee v. Cooke*, 1 Wash. (C. C.) 306; *Harwood v. Hilliard*, 2 Mod. (Eng.) 208.

If A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform it. *Quick v. Jutborrow*, 3 Bulstr. 30, per Coke, C. J. See *Gordon v. Calvert*, 2 Sim. (Eng.) 253.

In cases of this kind, the executors will be liable, even where the heir is named, and the executors are not. *Williams v. Burrell*, 1 C. B. (Eng.) 402. See Co. Litt. 209 a; Went. Off. Ex. (14th ed.) c. 11, pp. 239, 240. Compare § XII. 3, c, ante.

It has been held that an action might be sustained against an executor upon a promise by the testator that his executor should pay the plaintiff £20 in consideration that the plaintiff would continue in the service of the testator till his death, and no averment of any promise by the executor to pay it need be made. *Powell v. Graham*, 7 Taunt. (Eng.) 580; s. c., 1 B. Moore (Eng.), 305. See *Plumer v. Marchant*, 3 Burr. (Eng.) 1383; *Ex parte Tindal*, 8 Bing. (Eng.) 402; s. c., 1 M. & Scott (Eng.), 607.

As to personal liability incurred by representative in completing executory contracts of the deceased, see 2.

Rescinding and avoiding Executory Contracts.—In the interest of the estate, the personal representative may rescind an executory contract made personally by the deceased, with the consent of the other party. *Gray v. Hawkins*, 8 Ohio St. 449; *Dougherty v. Stephenson*, 20 Pa. St. 210; *Laughlin v. Lorenz*, 48 Pa. St. 275; *Davis v. Lane*, 11 N. H. 512.

Or if disadvantageous to the estate may resist its enforcement, and in general may set up such pleas in defence as were open to his decedent. *Enbanks v. Dodd*, 4 Ark. 173; *Sandf., J.*, in *Ross v. Harden*, 44 N. Y. Super. Ct. 26.

1. *Godson v. Good*, 2 Marsh. (Eng.) 300, by Gibbs, C. J.; s. c., 6 Taun. 594; *Richardson v. Horton*, 6 Beav. (Eng.) 185; 1 Chitty, Pl. (16th Am. ed.) 58; *Hammond v. Jethro*, 2 Brownl. (Eng.) 99; *Calder v. Ruthenford*, 2 Brod. & Bing. (Eng.) 302; *Slater v. Wheeler*, 9 Sim. (Eng.) 156. See *Lawrence v. Interest*, 2 Penn. 724; *Grant v. Shurtut*, 1 Wend. (N. Y.) 148; *Poole v. M'Leod*, 1 Sm. & M. (Miss.) 391; *Rowan v. Woodward*, 2 A. K. Marsh. (Ky.) 140; *Foster v. Hooper*, 2 Mass. 572; *Simonds v. Center*, 6 Mass. 18; *Rice*, Appellant, 7 Allen. (Mass.), 112, 114; *Atwell v. Milton*, 4 Hen. & Munf. (Va.) 253; *Chandler v.*

Neil, 2 Hen. & Munf. (Va.) 124; *Ayer v. Wilson*, 3 Const. Ct. 319; *Gere v. Clarke*, 6 Hill (N. Y.), 350; 2 Chitty, Contr. (11th Am. ed.) 1356, 1411; *Watkins v. Tate*, 3 Call (Va.), 521; *Grynees v. Pendleton*, 4 Call (Va.), 130.

If two enter into a joint bond, and one dies at any time before judgment, action lies against the survivor alone. *Lampton v. Collingwood*, 4 Mod. (Eng.) 315.

If one of two defendants dies after judgment, and the plaintiff elects to take execution against the personalty, the execution must be against the survivor alone. *Harbert's Case*, 4 Co. 14 a; 2 Saund. 51 n. (4) to *Trethewy v. Ackland*.

A release given by the obligee to the representatives of the deceased obligor is no answer to an action against the survivor. *Ashbee v. Pidduck*, 1 M. & W. (Eng.) 564.

Relief in Equity.—"The true doctrine of obtaining relief in equity, by considering joint contracts as several, appears to be, that wherever a court of equity sees that in a contract joint in form, the real intention of the parties was that it should be joint and several, it will give effect to such intention. Accordingly, in certain cases, a joint bond in equity has been considered as several. But it is not a rule that every joint contract shall be considered as several in a court of equity, for a joint contract cannot be extended beyond its legal operation unless the party seeking so to extend it shows some previous equity entitling him to demand a several contract from each of the joint contractors, or unless there is some ground on which to infer mistake in the nature of the instrument. In the case of a partnership debt, all the partners have had a benefit from the money advanced or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. So, where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation, and it was not the bond which first created the liability to pay. But where the obligation exists only by virtue of a joint covenant or bond, the extent of its operation can be measured only by the words in which it is conceived, and a court of equity cannot give the instrument any other than its legal effect." *Wms. Exrs.* (7th Eng. ed.) 1746. See *Primrose v. Bromley*, 1 Atk. (Eng.) 90; *Bishop v. Church*, 2 Ves. Sr. (Eng.) 100, 371; *Ex parte Kendall*, 17 Ves. (Eng.) 525; *Liverpool Brough Bank*

or joint and several, the executor of the deceased contractor may be sued at law in a separate action.¹ These principles apply to covenants concerning realty; and the executor or administrator is liable on such covenants to the extent of assets whether the breach occurred in the lifetime of the deceased or in his own

v. Walker, 4 De G. & J. (Eng.) 24; *Sumner v. Powell*, 2 Meriv. (Eng.) 30; s. c., 1 Turn. & R. 423; *Richardson v. Horton*, 6 Beav. (Eng.) 185; *Rawstone v. Parr*, 3 Russ. (Eng.) 424, 539; *Thorpe v. Jackson*, 2 Y. & Coll. (Eng.) 533; *Other v. Iveson*, 3 Drew. (Eng.) 177; *Clarke v. Bickers*, 14 Sim. (Eng.) 639; *Slater v. Wheeler*, 9 Sim. (Eng.) 157; *Dixon on Partn.* 513, 514.

Executor of Deceased Partner.—Under these principles it has been settled that the executors of a deceased partner may be sued in equity on a partnership debt; and the more recent cases even hold that to entitle a partnership creditor to maintain such suit, it is not necessary for him to prove that the surviving partner is insolvent. *Vulliamy v. Noble*, 3 Meriv. (Eng.) 619; 4 My. & Cr. (Eng.) 109; *Holme v. Hammond*, L. R. 7 Ex. (Eng.) 218; *Bennett v. Woolfolk*, 15 Ga. 213; *Fillyan v. Laverty*, 3 Fla. 72; *Gamp v. Grant*, 21 Conn. 41; *Burnside v. Merrick*, 4 Met. (Mass.) 544; *Story, Partn.* § 362; 1 *Story, Eq. Jur.* § 676; *Collyer, Partn.* (5th Am. ed.) §§ 576–583, 580, n. (3). As to proving insolvency of surviving partner, see *Sir W. Grant in Devaynes v. Noble*, 1 Meriv. (Eng.) 530; *Sleech's Case*, 1 Meriv. (Eng.) 539; *Wilkinson v. Henderson*, 1 My. & K. (Eng.) 582; *Brown v. Weatherly*, 12 Sim. (Eng.) 61; *Way v. Bassett*, 5 Hare (Eng.), 68; 1 De G. J. & S. 616; *Romily, M. R.*, in *Brown v. Gordon*, 16 Beav. (Eng.) 310; *Ridgway v. Clare*, 19 Beav. (Eng.) 111; *Lodge v. Pritchard*, 1 De G. J. & Sm. (Eng.) 610 (Am. ed.), n. (1), and cases cited. *Cleghorn v. Ins. Bank*, 9 Ga. 319; *Baker v. Wimpee*, 19 Ga. 87; *Morrison v. Kurtz*, 15 Ill. 193; *Bell v. Newman*, 5 Ser. & R. (Pa.) 93; *Walker v. Eagle*, 25 Pa. St. 216; *Jarvis v. Brooks*, 23 N. H. 136; *Crocket v. Crain*, 33 N. H. 542; *Morgan v. Realtis*, 20 Martin (La.), 599; *Allen v. Wells*, 22 Pick. (Mass.) 453–455; *McCulloh v. Dashiell*, 1 H. & Gill (Md.), 96; *Dalgren v. Duncan*, 7 Sm. & M. (Miss.) 280; *Wilder v. Keeler*, 3 Paige (N. Y.), 167; *Payne v. Mathews*, 6 Paige (N. Y.), 19; *Murray v. Murray*, 5 John. Ch. (N. Y.) 50; *Woodrop v. Ward*, 3 Desaus. (S. C.) 203; *Hall v. Hall*, 2 McCord, Ch. (S. C.) 302; *Bowden v. Schatzell*, 1 Bailey, Eq. (S. C.) 260; *Simmons v. Tongue*, 3 Bland (Md.), 356; *Cammack v. Johnson*, 1 Green (N. J.), 163; *Hindley, Partn.* (3d Eng. ed.) 1095 *et seq.*; 1 *Story, Eq. Jur.* § 676.

The liability continues until the debts are

fully discharged. *Vulliamy v. Noble*, 3 Meriv. (Eng.) 619.

As to what dealings by the partnership creditors with surviving partners will operate as a discharge as against the estate of the deceased partner. *Thompson v. Percival*, 5 B. & Ad. (Eng.) 925; 4 My. & Cr. (Eng.) 110; *Brown v. Gordon*, 16 Beav. (Eng.) 302; *Lee v. Flood*, 2 Sm. & G. (Eng.) 250; *Blair v. Bromley*, 5 Hare (Eng.), 555, per *Wigram, V. C.*; *Lyth v. Ault*, 7 Ex. (Eng.) 669; *Ex parte Kendall*, 17 Ves. (Eng.) 526, per *Lord Eldon*; 4 My & Cr. (Eng.) 110; *Beach v. Norton*, 9 Conn. 182; *Calvert v. Marlord*, 18 Ala. 67.

Neither forbearance to sue at request of surviving partners, nor receipt of interest from them and a new partner, will have such effect. *Winter v. Innes*, 4 My. & Cr. (Eng.) 101; *Harris v. Farvell*, 13 Beav. (Eng.) 403. For further discussion, see *Dixon on Partnership*, 520 *et seq.* See PARTNERSHIP.

1. *Wms. Exrs.* (7th Eng. ed.) 1741; *May v. Woodward*, 1 Freem. (Eng.) 248.

As to what words constitute a joint and several bond, see *Tipping v. Coates*, 18 Beav. (Eng.) 401.

But he cannot be sued jointly with the survivor, because one is to be charged *de bonis testatoris*, the other *de bonis propriis*. *Hall v. Huffam*, 2 Lev. (Eng.) 228; *Kemp v. Andrews*, Carth. 171; 1 *Chitty's Pl.* (16th Am. ed.) 58.

Contribution.—It would seem that one who was jointly bound with the deceased as surety, and has been obliged to pay the whole debt since his death, is entitled to recover contribution from the estate in an action against the executor for money paid to his use as executor. *Ashby v. Ashby*, 7 B. & C. (Eng.) 449, 451, 452, by *Bayley and Littledale, JJ.* See *Batard v. Hawes*, 2 El. & Bl. (Eng.) 287.

If several contract for a chattel to be made or procured for the common benefit, and if by the agreement the executors of any party dying before the work is completed are to stand in the place of the deceased, in such case, though the legal remedy of the party employed would be solely against the survivors, yet the law would imply a contract on the part of the decedent that his executors should contribute his proportion of the price. *Wms. Exrs.* (7th Eng. ed.) 1748, 1773; *Prior v. Henbrow*, 8 M. & W. (Eng.) 873. See *Bachelder v. Fisk*, 17 Mass. 464.

time, for the priority of contract is not determined by death.¹ The fact that a covenant in a lease runs with the land, so as to make the assignee of the term liable for a breach after the assignment, does not discharge the representative of the original lessee from a concurrent liability on the covenant so far as he has assets, although the lessor may have accepted the assignee as his tenant. Hence, whether a term has been assigned by the lessee in his lifetime, or by his executor after his death, an action of covenant may still be maintained by the lessor against the executor of the lessee upon an express covenant for the payment of rent, notwithstanding any acceptance of the assignee as tenant; and so, also, may the assignee of the reversion.² For rent accrued in the lifetime of the

1. Wms. Exrs. (7th Eng. ed.) 1750; Coghill v. Freelove, 3 Mod. (Eng.) 326. See Hovey v. Newton, 11 Pick. (Eng.) 421.

In every case where the testator is bound by a covenant, the executor shall be bound by it, if it be not determined by the death of the testator. Bro. Covenant, pl. 12; Com. Dig. Covenant, C. 1. It is no bar to an action against the administrator, on a covenant made by the decedent, that the defendant took out administration on the plaintiff's promise, *not under seal*, that he would not sue. Harris v. Goodwyn, 2 M. & Gr. (Eng.) 405.

The executors represent the person of the testator as to the performance of covenants; and although the deceased covenanted for himself and his heirs, or himself, his heirs, and executors, the executor is the proper person to perform it, and is liable to an action on refusal. Thursden v. Warthen, 2 Bulstr. (Eng.) 158; Macartney v. Blundell, 2 Ridgw. P. C. (Eng.) 113; Phillips v. Everard, 5 Sim. (Eng.) 102; Stephens v. Hotham, 1 Kay & J. (Eng.) 571; 1 Sugd. V. & P. (9th ed.) 189. See Green v. Smith, 1 Atk. (Eng.) 573; Broome v. Monck, 10 Ves. (Eng.) 597; Loring v. Cunningham, 9 Cush. (Mass.) 87; Hauck v. Stauffes, 31 Pa. St. 235.

As to effect of direction to convert, see § XII. 3, e.

As to enforcing specific performance of contracts of decedents, see DEBTS OF DECEDENTS, § 6.

Covenants which do not survive.—**Personal Covenants.**—Covenants implied by Law.—Covenants to be performed by the testator in person, do not survive. Hyde v. Dean of Windsor, Cro. Eliz. 553; Bally v. Wells, 3 Wils. (Eng.) 29. Thus, if lessee for years covenants for himself to repair, or the lessor covenants for himself only to discharge the lessee from quit rents, the covenant is personal, only, and the executors or administrators are not bound. But if in these cases the words "during the term" be added in the covenant, the execu-

tors and administrators will also be charged. Touchst. 178, 482; Went. Off. Ex. (14th ed.) 250, 251; Ingery v. Hyde, Dyer, 114 a; Williams v. Burrell, 1 C. B. (Eng.) 402.

It should be observed that only express covenants survive against the executor or administrator, and no action lies against him for the breach of a covenant in law (as the covenant for quiet enjoyment implied in a demise), which occurred after the death of the decedent. Adams v. Gibney, 6 Bing. (Eng.) 656; Bragg v. Wiseman, 1 Brownl. (Eng.) 22; Proctor v. Johnson, 2 Brownl. (Eng.) 214.

As to what will constitute an implied or an express covenant within the meaning of the rule. Williams v. Burrell, 1 C. B. (Eng.) 402.

In Hovey v. Newton, 11 Pick. (Mass.) 421, it was *held* that damages may be recovered for breach of the covenant of quiet enjoyment, accruing both before and after the death of the covenantor, in one and the same cause of action against his administrator.

If a purchaser of real estate dies without having paid the purchase money, his heirs at law, or the devisee of the land purchased, will be entitled to have the estate paid for by the personal representative. Milner v. Mills, Mosley (Eng.), 123; Broome v. Monck, 10 Ves. (Eng.) 597.

See, as to right of heir or devisee to complete the purchase himself, and compel the personal representative to reimburse him, Broome v. Monck, 10 Ves. (Eng.) 597; Lord v. Lord, 1 Sim. (Eng.) 505; 1 Sugd. V. & P. (9th ed.) 180. See DEBTS OF DECEDENTS, § 3, pp. 256, 257.

Of course no such rights can exist unless the contract is one that can be specifically enforced against the estate, otherwise there is no conversion. Curre v. Bowyer, 5 Beav. (Eng.) 6, note (b).

2. Wms. Exrs. (7th Eng. ed.) 1751; Brett v. Cumberland, Cro. Jac. (Eng.) 521, 522; 1 Saund. 241 a, n. (5), to Thursby v. Glant; Hillier v. Casbard, 1 Sid. (Eng.)

lessee, the executor or administrator is liable only in his representative character; ¹ but for rent which has accrued since the death of the lessee, if *the executor enters* upon the demised premises, the lessor has his election, either to sue him as executor, or to charge him personally as assignee in respect of the perception of the profits. ²

266; s. c., 1 Lev. (Eng.) 127; Coghill v. Frelove, 3 Mod. (Eng.) 325. Unless the lessor accept the assignee, the executor is liable in either debt or covenant, as long as the lease continues, to the extent of assets, for rent accrued after the death of the testator. After acceptance, covenant alone lies upon the express covenant for its payment during the continuance of the lease. Wms. Exrs. (7th Eng. ed.) 1753; Pitcher v. Favey, 4 Mod. (Eng.) 76; 1 Saund. (Eng.) 241 (b), n. (5).

Hence it is prudent for an executor to require the assignee to enter into covenants for indemnity against the payment of rent and performance of covenants, although he himself is not bound to enter into a covenant for title, but only that he has done no act to encumber. Staines v. Morris, 1 Ves. & B. (Eng.) 8; Wilkins v. Fry, 1 Meriv. (Eng.) 265, 266. As to duty of assigning over, see Rowley v. Adams, 4 My. & Cr. (Eng.) 534; Taylor v. Shum, 1 Bos. & Pull. (Eng.) 21.

In the absence of a covenant for indemnity, an executor against whom damages have been recovered for a breach of the covenant, after the assignment, may maintain an action on the case or *assumpsit* against the assignee for neglecting to perform the covenant in the lease. Burnett v. Lynch, 5 B. & C. (Eng.) 589; Marzetti v. Williams, B & Ad. (Eng.) 424; Moule v. Garrett, L. B. 5 Ex. (Eng.) 132.

But the liability of the assignee continues only during his interest as such. Rowley v. Adams, 4 My. & Cr. (Eng.) 540; Humble v. Langston, 7 M. & W. (Eng.) 530; Wolveridge v. Stewart, 1 Cr. & M. (Eng.) 644.

Ground Rents.—In New York it has been held that the executors and administrators of a grantee in fee are liable in covenant for the rent when the grantee has covenanted for himself, his executor and administrators, to pay it. Van Rensselaer v. Platner, 2 John. Cas. (N. Y.) 17.

In Pennsylvania it is held that a ground-rent covenant does not survive against executors and administrators, and that, even when expressly named in the covenant of the grantee, their liability is completely discharged, if they pay the rent that accrued in the decedent's lifetime. Quain's Appeal, 22 Pa. St. 510.

1. 1 Roll. Abr. 603, B. pl. 9. Fruen v. Porter, 1 Sid. (Eng.) 379; Buckley v. Pirk, 1 Salk. (Eng.) 317. If the form of the

action is debt, it must be brought in *detinet* only, and judgment is *de bonis testatoris*.

2. Wms. Exrs. (7th Eng. ed.) 1754. Boulton v. Canon, 1 Freem. (Eng.) 337; 1 Saund. 1, note (1) to Jevens v. Harridge; Howard v. Heinerschit, 16 Hun (N. Y.), 177.

An executor who enters into possession of property held by his testator under a lease for a term of years, holds as assignee of the lease by operation of law, and can avoid personal liability for rents falling due between the entry and the time of yielding possession, only by showing an express contract to look to him as executor only, or such conduct on the part of the lessor as in effect precludes him from enforcing the executor's personal liability. The remedies against the estate and against the executor are not in themselves inconsistent.

The mere fact, therefore, that certain receipts for rent paid by the executor acknowledged the payment of the money by him as executor, does not go to show that the lessor exercised an election between the personal liability of the executor and that of the estate, where the receipts were drawn in that form at the request of the executor, so that he might use them as vouchers, and where the insolvency of the estate was not known at the time the receipts were given. Nor under the Ohio code and practice—allowing amendments at all stages of the proceedings—does the fact that the action for rent was originally brought against the executor as such, show such election. Becker v. Walworth (Ohio), 12 N. E. Rep. 1.

The executor may be charged in an action of debt, as executor, in the *detinet* or in the *debet* and *detinet* as assignee of the term. Hope v. Bague, 3 East (Eng.), 2; Hargrave's Case, 5 Co. (Eng.) 31; 1 Saund. note (1) to Jevens v. Harridge. See Salter v. Codbolt, 3 Lev. (Eng.) 74.

It is sufficient to charge him in the *debet* and *detinet* as assignee generally, without naming him executor. Lyddall v. Dunlap, 1 Wils. (Eng.) 4, 5; Wallaston v. Hakewill, 3 M. & Gr. (Eng.) 297.

So in covenant the executor may be charged as assignee, without naming him executor, by a general averment in the declaration that the estate of the lessee in the premises lawfully came to the defendant. Tilney v. Morris, 1 Ld. Raym. 553; s. c., 1 Salk. (Eng.) 309; Buckley v. Pirk, 1 Salk.

In the latter case the representative may avoid individual liability by specially pleading that the land is of less value than the rent, and that he has no assets, and praying judgment whether he ought to be charged otherwise than in the *detinet*.¹ He cannot plead *plene administravit*.² If the executor does not enter,³ he may still be charged in his representative character in the *detinet*, because he cannot so waive the term as not to be liable for the rent to the extent of assets.⁴

(Eng.) 317; 1 Saund. 1, note (1) to Jevens v. Harridge.

When the executor is charged as assignee, the judgment is *de bonis propriis*. Wentw. Off. Ex. (14th ed.) 285, 286. See Wigley v. Ashton, 3 B. & Ad. (Eng.) 101; Atkins v. Humphrey, 3 C. & B. (Eng.) 654; Toller, 280.

1. Billingham v. Spearman, 1 Salk. (Eng.) 297; Buckley v. Pirk, 1 Salk. (Eng.) 317; 1 Saund. (Eng.) 1, note (1) to Jevens v. Harridge; Tindal, C. J., in Wallaston v. Hakewill, 3 M. & Gr. (Eng.) 297; s. c., 3 Scott, N. R. (Eng.) 593.

"If, however, such a plea be pleaded to the whole rent in the declaration, it will not be a good bar unless it shows that there were no profits at all, because the executor is chargeable personally with so much of the rent as the premises are worth. If, therefore, the profits have been less than the rent, and therefore cover a part only, that part should be confessed, and the plea pleaded to the remainder."

Wms. Exrs. (7th Eng. ed.) 1757; Ruberry v. Stevens, 4 B. & Ad. (Eng.) 241; s. c., Nev. & M. (Eng.) 185. In Remnant v. Brembridge, 8 Taun. (Eng.) 191; s. c., 9 Moore (Eng.), 94, the defendant, who had taken possession as administrator of the original tenant, was allowed to show, under the general issue, that the premises had been productive of no profit to him, and that he had offered to surrender them eight months after the death of the intestate, and it was held a good defence to an action for use and occupation.

An averment that the defendant "*did not*" after verdict, has been held to mean that he "*could not*" derive any profit from the demised premises; and the plaintiff was held entitled to recover to the extent the defendant might, by the exercise of reasonable diligence, have derived profit. Hopwood v. Whaley, 6 C. B. (Eng.) 744; s. c., 60 E. C. L. 743.

2. When the action is brought against the representative as assignee, he cannot plead *plene administravit*, even though he be named executor in the declaration, (1), because the judgment, if given against him, will be *de bonis propriis*; (2), such plea admits a misapplication of the assets, since, if the rent is of less value than the land, as

the law *prima facie* supposes, so much of the profits as may be needed to make up the rent is appropriated to the lessor, and cannot be applied to any thing else. Wms. Exrs. (7th Eng. ed.) 1758. See Caly v. Joslyn, Aleyn (Eng.), 34; Helier v. Casbert, 1 Lev. (Eng.) 127, 128; Sackvill v. Evans, Freem. (Eng.) 171; Buckley v. Pirk, 1 Salk. (Eng.) 317; Taylor v. Cabaune, 8 Mo. App. 131.

3. Much question has arisen as to the necessity of actual entry to charge the executor as assignee. In Wallaston v. Hakewill, 3 M. & Gr. (Eng.) 297; s. c., 3 Scott, N. R. 593, Tindal, C. J., said that if, instead of relieving himself by pleading, he takes issue on the fact whether he is assignee or not, the evidence that he is executor proves the affirmative of the issue that he takes the term by assignment. See Green v. Lord Listowell, 2 Ir. L. Rep. 384; Kearsley v. Oxley, 2 H. & C. (Eng.) 896; Ackland v. Pring, 2 M. & Gr. (Eng.) 937; Paul v. Simpson, 9 Q. B. (Eng.) 365. Compare Williams v. Bosanquet, 1 Brod. & Bing. (Eng.) 238; Peck, B., in Nation v. Tozer, 1 Cr. M. R. (Eng.) 176; 4 Tyrwh. (Eng.) 565.

4. Howse v. Webster, Yelv. (Eng.) 103; Helier v. Casbert, 1 Lev. (Eng.) 127.

The judgment to such action is *de bonis testatoris*, and the executor may well plead *plene administravit*. So, where the executor is charged, in his representative character, *in covenant* for non-payment of rent, incurred in the defendant's own lifetime, *plene administravit* is a good plea, although he might have been charged as assignee of the term. Lyddall v. Dunlap, 1 Wils. (Eng.) 5; Wilson v. Wigg, 10 East (Eng.), 315.

Under what circumstances the executor should plead *plene administravit prater*, where the land yields some profit, though less than the rent, see Collins v. Crouch, 13 Q. B. 542.

It has been held that he cannot defend on the ground that the rental value is less than the rent stipulated in the lease. Taylor v. Cabaune, 8 Mo. App. 131.

The executor having received from sub-lessees rents more than sufficient to pay his own rent, is not entitled, in a suit by the lessor, to a counter-claim for money paid on notes of the testator for back rent;

b. Claims founded upon Tort.—At common law, no action founded upon a tort committed by the deceased for which damages only could be recovered in satisfaction, such as trespass, trover, false imprisonment, assault and battery, slander, deceit, obstructing and diverting water-courses, and the like, — where the declaration imputed a tort to person or property, and the plea must be not guilty, — lay against his executor or administrator.¹

the balance left after liquidation of the notes being ample to pay the accruing rent. *Becker v. Walworth* (Ohio), 12 N. E. Rep. 1.

Damages for breaches of a covenant to pay rent, before and after the death of the lessee, may be recovered in one action against his executor. *Greenleaf v. Allen*, 127 Mass. 248.

Waiving the Lease.—Although renunciation of the executorship must be *in toto*, or not at all; yet if the value of the land is less than the rent, and there is a total deficiency of assets, the representative may escape individual liability for subsequent breaches by promptly offering to surrender the lease. But if the assets are sufficient to bear the yearly loss for some years, though not for the whole term, he must pay the rent as long as the assets hold out, and then waive the possession, giving notice to the reversioner. *Wentw. Off. Ex.* (14th ed.) c. 11, p. 244, c. 12, p. 290; *Wilkinson v. Orwood*, 3 Anstr. (Eng.) 309, by Macdonald, C. B., cited by Woodward, V. C., 1 Kay & J. (Eng.) 575; *Reid v. Lord Tenterden*, 4 Tyrwh. (Eng.) 118, 120; *Remnant v. Brenridge*, 8 Taunt. (Eng.) 191; s. c., 9 B. Moore (Eng.), 94.

Effect of Assignment of Lease.—“If the term was assigned by the testator, it seems clear that the executor cannot be charged as assignee, because the lease did not pass to him; but still he will be liable as executor in debt in the *detinet* for the rent, unless the lessor has accepted the assignee as his tenant; and even in that case the executor will be liable as executor in covenant. If the executor enters, and afterwards himself assigns the lease, then he is chargeable as assignee for that time only during which he occupied. And if he is sued for rent incurred since the assignment by himself, he is liable in his representative character only. Therefore, if the lessor brings an action of covenant against the executor, and charges that, after the testator's death and the proving of the will by the defendant, the demised premises came by assignment to one A. B., and that such assignee has broken the covenants in the lease, the defendant may plead *plene administravit*.” *Wms. Exrs.* (7th Eng. ed.) 1759; *Wilson v. Wigg*, 10 East (Eng.), 313; *Helier v. Casbert*, 1 Lev. (Eng.) 127. See *Leigh v. Thornton*, 1 B.

& Ald. (Eng.) 625; *Montague v. Smith*, 13 Mass. 405.

Personal Liability of Executor of Lessee as Assignee on a Covenant for Repairs.—Since an action of waste lies against an executor for waste done in his own time, it was held that where an executor is sued as assignee on a covenant to repair, he is liable as any other assignee, and cannot protect himself from personal liability by a plea that the premises had yielded no profit, nor had been of any value whatever, since the testator's death, with the addition of an averment of *plene administravit*, and an offer to surrender before breaches occurred. *Tremeere v. Morison*, 1 Bing. N. S. (Eng.) 89; s. c., 4 M. & Scott (Eng.), 657. See also *Hornidge v. Wilson*, 11 Ad. & El. (Eng.) 645; s. c., 2 Perr. & D. (Eng.) 641; *Sleap v. Newman*, 12 C. B. N. S. (Eng.) 116. But see *Bayley, B.*, in *Reid v. Lord Tenterden*, 4 Tyrwh. (Eng.) 118, 120.

Personal Liability of Executor of Tenant from Year to Year.—If the executor of a tenant from year to year enters into the premises, and continues to occupy and pay rent, he becomes liable in his personal character upon the terms contained in the original demise. The fact that he continues to occupy, and the landlord abstains from giving notice to quit, raises an implied promise on behalf of both parties to abide by the terms of the original contract. *Buckworth v. Simpson*, 1 Cr. M. & R. (Eng.) 834. See *Arden v. Sullivan*, 14 Q. B. 832, 840.

Entry of One Joint Executor.—“If lands are leased for years by demise not under seal, and one of the two executors of the lessee enters into the demised premises, such entry does not ensue as the entry of the two executors so as to make them both liable in an action for use and occupation.” *Wms. Exrs.* (7th Eng. ed.) 1761; *Nation v. Tozer*, 1 Cr. M. & R. (Eng.) 172; s. c., 4 Tyrwh. (Eng.) 561. See “Joint Executors and Administrators.”

1. *Wms. Exrs.* (7th Eng. ed.) 1729; 1 Saund. (Eng.) 216 a, note (1) to *Wheatley v. Lane*; *Perry v. Wilson*, 7 Mass. 395; *Barnard v. Harrington*, 3 Mass. 288; *Jarvis v. Rogers*, 15 Mass. 398; *Harris v. Creashaw*, 4 Rand. (Va.) 14; *Hench v. Metzger*, 6 Serg. & R. (Pa.) 272; *Nicholson v. Elton*, 13 Serg. & R. (Pa.) 415; *Long v.*

But if, by reason of the tort, the estate has derived pecuniary advantage, the representative could be compelled to account to the injured party in another form of action for the benefit so obtained.¹ Thus, if goods wrongfully taken away by the deceased remain *in specie* in the hands of the executor or administrator, the rightful owner might maintain replevin or *detinue* against such

Hitchcock, 3 Ham. (Ohio) 274; More v. Bennett, 65 Barb. (N. Y.) 338; Boyles v. Overby, 11 Gratt. (Va.) 202.

At common law, no action lay against the executors of a sheriff for an escape. Wheatley v. Lane, 1 Saund. (Eng.) 216 a, note (1); Martin v. Bradley, 1 Caine (Eng.), 124. And on the same principle an action on the case does not lie against the executors of a deceased marshal for a false return to an execution, or for imperfect and insufficient entries therein. United States v. Daniel, 6 How. (U. S.) 11. See People v. Gibbs, 9 Wend. (N. Y.) 29.

An action founded upon the default of a postmaster by reason of his clerk's embezzling money from letters, will not survive. See Franklin v. Low, 1 John. (N. Y.) 396.

So, if a man served with a *subpœna*, and having had his expenses tendered him, neglects to appear as a witness, and dies, no action lies against his executors or administrators. Wentw. Off. Ex. (14th ed.) 255.

As to replevin, see Merritt v. Lambert, 8 Greenl. (Me.) 128; M'Evers v. Pitken, 1 Root (Conn.), 216; Mellen v. Baldwin, 4 Mass. 480.

Effect of Legislation.—By stat. 3 & 4 Wm. IV. c. 42, sect. 2, trespass, or trespass on the case, may be brought against executors and administrators, for an injury to property, real or personal, committed by the testator within six months of his death, provided such action be brought by them within six calendar months after they have taken upon themselves the administration of the estate.

In many States, statutes enlarge the number of actions which survive against executors and administrators. See Genl. Stats. Mass. c. 127, § 1; Laws of Iowa, 1860, c. 138, § 3467; Smith v. Sherman, 4 Cush. (Mass.) 408, 413; Nettleton v. Dinehart, 5 Cush. (Mass.) 543; Heinmuller v. Gray, 44 How. Pr. (N. Y.) 260; Norton v. Sewall, 106 Mass. 143, 145; McKinlay v. McGregor, 10 Iowa, 111; Shafer v. Grimes, 23 Iowa, 550; Snider v. Cray, 2 John. (N. Y.) 227; Aldrich v. Howard, 8 R. I. 125; Prescott v. Knowles, 62 Me. 277; Froust v. Burton, 15 Miss. 619.

1. Compare § XII. 3, d, (1), (2).

In Pennsylvania, under the Act Feb. 24, 1834, Purd. Dig. 286, executors and administrators are liable to be sued in any action

which might have been maintained against the decedent if he had lived, except actions for slander, libel, and wrongs done to the person. Under this act it is *held* that an action for trespass for mesne profits does not abate by the death of the defendant in ejectment, but survives against his personal representatives. Arundel v. Springer, 71 Pa. St. 398. See Miller v. Wilson, 24 Pa. St. 114.

In New York and North Carolina actions for deceit in the sale of real or personal estate survive against the personal representatives of the defendant. Haight v. Hoyt, 19 N. Y. 464; Arnold v. Lanier, 4 Law Rep. (N. C.) 529. See 1 Chitty, Pl. (16th Am. ed.) 77, n. (b²); Troup v. Smith, 20 John. (N. Y.) 43.

Under the Indiana statute, an action against a physician for malpractice survives. Long v. Morrison, 14 Ind. 595.

In New York, Massachusetts, Ohio, and Georgia, an action for libel does not survive the death of the defendant. More v. Bennett, 65 Barb. (N. Y.) 338; Waters v. Nettleton, 5 Cush. (Mass.) 544; Long v. Hitchcock, 3 Ohio, 274; Browner v. Sterdevant, 9 Ga. 69.

As to actions for breach of promise, see 2 Chitty, Contr. (11th Am. ed.) 1443; 1 Chitty, Pl. (16th Am. ed.) 58, n. (k). See § XII. 3, d, (1), *ante*.

Whenever an action might have been revived against the personal representative, it may be brought against him in the first place. Butner v. Keellin, 6 Jones, L. (N. C.) 60.

Under the Massachusetts statute, the plaintiff can only recover in an action against the representative for the value of the goods taken by the decedent, or for the damage actually sustained, without vindictive or exemplary damages, or damages for outraged feelings. Gen. Stats. Mass. c. 128, § 2.

Actions against Representatives of Deceased Executor or Administrator for Devastavit.—At common law, the executor of a deceased executor was not liable for a *devastavit* committed by his predecessor. Sir Brian Tucke's Case, 3 Leon. (Eng.) 241; Browne v. Collins, 1 Ventr. (Eng.) 292; Wms. Ex. (7th Eng. ed.) 1730.

But in England and most of the States, statutes exist by which the representatives of a deceased representative who has wasted or converted the assets, may be

executor or administrator to recover them back;¹ or trover, laying the conversion to have been by the representative;² or if sold, an action for money, had and received, to recover their value.³ No action can be maintained against an executor for waste committed by the testator,⁴ or for cutting down trees on another's land; yet for the benefit arising from the sale or value of the trees he may be charged.⁵ In many cases the injured party by waiving the tort may obtain redress by bringing an action of *assumpsit* against the representative upon an implied contract with the decedent.⁶

charged in the same manner as their testator or intestate would have been if he had been living. 1 Saund. (Eng.) 219 (*d*), note to *Wheatley v. Lane*; *Coward v. Gregory*, L. R. 2 C. P. (Eng.) 153. As to construction of such statutes in United States, see DEBTS OF DECEDENTS, § 2, p. 243, n. (2); "Special and Limited Administration."

As to executor *de son tort* of executor *de son tort*, see *Hammond v. Gatcliffe*, Andr. (Eng.) 254.

In equity, however, it had been the constant practice to charge the representatives of a trustee with the consequences of a breach of trust by his decedent, and the principle had been applied to the representatives of an executor or administrator. *Price v. Morgan*, 2 Chanc. Cas. (Eng.) 217; *Adair v. Shaw*, 1 Sch. & Lef. (Eng.) 272; *Montford v. Cadogan*, 17 Ves. (Eng.) 489; *Watsham v. Stainton*, 1 De G. J. & S. (Eng.) 678; 1 Hemm. & M. (Eng.) 322; *Brownlee v. Lochart*, 20 N. J. Eq. 239.

1. *Le Mason v. Dixon*, W. Jones (Eng.), 173, 174; 1 Saund. (Eng.) 217, n. (1); *Newsum v. Newsum*, 1 Leigh (Va.), 86.

2. *Hambly v. Trott*, 1 Cowp. (Eng.) 371, 373; *Underhill v. Morgan*, 33 Conn. 105; *Clapp v. Walters*, 2 Tex. 130; *Thompson v. White*, 45 Me. 445; *Denny v. Booker*, 2 Bibb (Ky.), 427; *Walter v. Miller*, 1 Harr. (Del.) 7; *Allen v. Harlan*, 6 Leigh (Va.), 42; *Catlett v. Russell*, 6 Leigh (Va.), 344.

3. *Hambly v. Trott*, 1 Cowp. (Eng.) 377; 1 Saund. (Eng.) 217, note (1); *Wilbur v. Gilmore*, 2 Pick. (Mass.) 250; *Cravat v. Plympton*, 13 Mass. 454; *United States v. Daniel*, 6 How. (U. S.) 11. See, as to waiving the tort and suing in *assumpsit*, 1 Chitty, Pl. (16th Am. ed.) 112, n. (S); *Mellen v. Baldwin*, 4 Mass. 450; *Holmes v. Moore*, 5 Pick. (Mass.) 257; *Towle v. Lovet*, 6 Mass. 394.

Debt may be maintained against the executors of a sheriff for money misapplied by him, although no action could be maintained for the tort after death. *Pickerson v. Gilford*, Cro. Car. (Eng.) 539; s. c., W. Jones (Eng.), 430; *Adair v. Shaw*, 1 Sch. & Lef. (Eng.) 265. See *Packington v. Culliford*, 1 Roll. Abr. 921, tit. "Execu-

tors," 4, pl. 2. But not debt for escape in lifetime of testator, the estate having received no benefit therefrom. *Martin v. Bradley*, 1 Caines (Eng.), 124.

An executor is liable in an action for money had and received for coal tortiously taken from the plaintiff's land by the decedent, if the latter sold it, and received the money; and if the jury believe the fact of sale, the plaintiff may recover, although no direct evidence is given of the actual sum received. *Powell v. Rees*, 7 Ad. & El. (Eng.) 426; s. c., 2 Nev. & P. (Eng.) 571. See *Bishop of Winchester v. Knight*, 1 P. Wms. (Eng.) 406; *Powell v. Aiken*, 4 Kay & J. (Eng.) 352, per Wood, V. C.; *Lansdowne v. Lansdowne*, 1 Madd. (Eng.) 116.

In an action for money had and received, the plaintiff waives all torts and special damages, and can only recover for the money received. *Hanna v. Gagg*, 1 Blackf. (Ind.) 181; *Wilder v. Aldrich*, 2 R. I. 518.

4. 2 Inst. 302, 2 Saund. (Eng.) 252, note to *Green v. Cole*; *Turner v. Buck*, 22 Vin. Abr. 523, pl. 9, tit. "Waste" (S. A.).

5. *Hambly v. Trott*, Cowp. (Eng.) 376, by Lord Mansfield; *Wms. Exrs.* (7th Eng. ed.) 1730.

6. *Collen v. Wright*, 7 El. & Bl. (Eng.) 301; s. c., 8 El. & Bl. (Eng.) 647. See *Perkinson v. Gilford*, Cro. Car. (Eng.) 539; *Hambly v. Trott*, Cowp. 375, by Lord Mansfield; *Powell v. Layton*, 2 New Rep. (Eng.) 370.

If one man take another's horse, and bring him back again, an action of trespass will not lie at common law against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor. *Hambly v. Trott*, Cowp. 375, by Lord Mansfield.

Though the executor of an innkeeper cannot be sued in tort for the loss of a guest's goods, he may be sued on an implied *assumpsit*. *Morgan v. Rarey*, 2 Fost. & F. (Eng.) 283.

At common law an action of trespass for mesne profits will not lie against an executor or administrator, yet it is a question whether an action for use and occupa-

c. Liability of Representative of Husband for Debts of Wife.—At common law, debts contracted by the wife before marriage, on the death of the husband, survive against her, and the representative of the husband is discharged from them.¹ If the husband survive the wife, he cannot be held individually liable for them, however large a fortune he may have received with her,² but, as her administrator, will be answerable to the extent of assets.³ For debts contracted by the wife during coverture for necessities, the representative of the husband is liable to the extent of assets.⁴

d. Liability of Executor to exonerate Specific Legatees.—*Whether Specific Legacies and Leaseholds are taken cum onere.*—See LEGACIES.

e. Work and Labor with a View to a Legacy.—See DEBTS OF DECEDENTS, § 6.

f. Liability to complete Gifts.—A court of equity will not compel an executor to complete a gift which has not been perfected by the testator.⁵

2. *Liability of Executor or Administrator on his Own Contracts.*—*a. In his Representative Capacity and to the Extent of Assets.*—

tion for the rent up to the day of the demise in the action of ejectment may not be sustained. *Cobb v. Carpenter*, 2 Campb. (Eng.) 14, note to *Balls v. Westwood*; *Pulteney v. Warren*, 6 Ves. (Eng.) 86; *Turner v. Cameron's Coalbrook Company*, 5 Ex. (Eng.) 932; *Money Penny v. Bristow*, 2 Russ. & My. (Eng.) 117; *Caton v. Coles*, L. R. 1 Eq. (Eng.) 581; *Harker v. Whitaker*, 5 Watts (Pa.), 474; *Bard v. Nevin*, 9 Watts (Pa.), 328. Compare *Molton v. Mumford*, 3 Hawks (N. C.), 490.

But if there has been a recovery, no action for use and occupation for the rent subsequent to the day of demise laid in the declaration can be maintained against the executor; because the plaintiff, having elected to treat the deceased as a trespasser, cannot afterwards treat him as a tenant. *Birch v. Wright*, 1 T. R. (Eng.) 378. See *Pulteney v. Warren*, 6 Ves. (Eng.) 87; *Bridges v. Smyth*, 5 Bing. (Eng.) 410; s. c., 2 Moo. & P. (Eng.) 740; *Gibson, C. J.*, in *Harker v. Whitaker*, 5 Watts (Pa.), 474, 476; *Bard v. Nevin*, 9 Watts (Pa.), 328.

As to merely bringing an ejectment and service on lessee. *Cobb v. Carpenter*, 2 Campb. (Eng.) 14, note to *Balls v. Westwood*; *Jones v. Carter*, 15 M. & W. (Eng.) 718.

The death of the occupier will not sustain a bill in equity for an account on the ground of accident as to when such bill will be sustained. *Pulteney v. Warren*, 6 Ves. (Eng.) 88; *Money Penny v. Bristow*, 2 Russ. & My. (Eng.) 117; *Caton v. Coles*, L. R. 1 Eq. (Eng.) 581; *Gibson, C. J.*, in *Harker v. Whitaker*, 5 Watts (Pa.), 474.

1. *Woodman v. Chapman*, 1 Campb. (Eng.) 189.

2. *Wentw. Off. Ex.* (14th ed.) 369.

3. *Wentw. Off. Ex.* (14th ed.) 370; *Heard v. Stanford*, Cas. temp. Talb. (Eng.) 173; s. c., 3 P. Wms. (Eng.) 409.

As to whether a husband can throw his wife's funeral expenses upon her separate estate, see *Gregory v. Lockyer*, 6 Madd. (Eng.) 90; *Butie v. Chesterfield*, 9 Mod. (Eng.) 31; *Willeter v. Dobie*, 2 Kay & J. (Eng.) 647. See DEBTS OF DECEDENTS, § 2, p. 250.

4. *Wms. Exrs.* (7th Eng. ed.) 1768.

Death of the husband revokes the wife's authority, and his representative cannot be held liable for necessities supplied to the wife after that event, although the fact of his death was not known at the time they were supplied. *Blades v. Free*, 9 B. & C. (Eng.) 167; *Smart v. Ilbery*, 10 M. & W. (Eng.) 11. Compare 2 Smith, L. Cas. (8th Am. ed.) 393, note to *Thomes v. Davenport*.

For further discussion, see HUSBAND AND WIFE.

5. *Hooper v. Goodwin*, 1 Swanst. (Eng.) 485; *Cotteen v. Missing*, 1 Madd. 176; *Beech v. Keep*, 18 Beav. (Eng.) 285; *Cox v. Bernard*, 8 Hare (Eng.), 310; *Callaghan v. Callaghan*, 8 Cl. & Fin. (Eng.) 374; *Dillon v. Coppin*, 4 My. & Cr. (Eng.) 637; *Shurtleff v. Francis*, 118 Mass. 154.

An executor may be compelled to execute an agreement by the testator to grant an annuity. *Nield v. Smith*, 14 Ves. (Eng.) 491. Compare DEBTS OF DECEDENTS, § 6. See "Gifts mortis causa."

Although the executor or administrator has no power to bind the estate by contract,¹ it has been held that an action may be maintained against him in his representative character upon a promise, made in that character, to discharge an existing liability against the estate. In such cases, it will be observed that the consideration of the promise or the cause of action arose in the lifetime of the decedent, and the liability of the estate existed independently of the promise, although the latter is made the ostensible ground of the action in the declaration. To such an action the representative may well plead *plene administravit*, and the judgment recovered by the plaintiff must be *de bonis testatoris*.² It is

1. § XIII. 9. See also *Miller v. Williamson*, 5 Md. 219; *Underwood v. Milligan*, 8 Ark. 254; *Sims v. Stilwell*, 4 Miss. (How.) 176; *Jones v. Jenkins*, 2 McCord (S. C.), 494; *Nehbe v. Price*, 2 Nott & McC. (S. C.) 328; *M'Eldery v. M'Kenzie*, 2 Porter (Ala.), 33; *Pinkney v. Singleton*, 2 Hill (N. Y.), 343; *May v. May*, 7 Fla. 207, 220; *Davis v. French*, 20 Me. 21, 23; *Hollenback v. Clapp*, 103 Pa. St. 60.

A joint administrator is solely liable for the debts contracted by him in the settlement of the estate. Such debts do not create a liability under the bond. *Taylor v. Mygatt*, 26 Conn. 184. See "Joint Executors and Administrators."

2. *Thomas, J.*, in *Luscomb v. Ballard*, 5 Gray (Mass.), 403, 405; *Austin v. Munro*, 47 N. Y. 360, 366; *Davis v. French*, 20 Me. 21, 23; *Wms. Exrs.* (7th Eng. ed.) 1771-1776; *Piper v. Goodwin*, 23 Me. 251; *Dowse v. Cox*, 3 Bing. (Eng.) 20; s. c., 10 Moore (Eng.), 272; s. c., B. & C. (Eng.) 255; *Powell v. Graham*, 7 Taunt. 581; s. c., 1 B. Moore, 305; *Ashby v. Ashby*, 7 B. & C. (Eng.) 444; s. c., 1 Mann. & Ry. (Eng.) 180.

In causes of action wholly occurring since the decedent's death, the representative is liable individually. *Kerchner v. McRae*, 80 N. C. 219; *May v. May*, 7 Fla. 207; *Davis v. French*, 20 Me. 21.

A count averring an account stated between the plaintiff and the defendant as executor, and that in consideration thereof the defendant as executor promised to pay the balance, does not charge him personally. *Ashby v. Ashby*, 7 B. & C. (Eng.) 444; s. c., 1 Mann. & Ry. (Eng.) 180.

A promise by the executor in consideration of assets to pay a debt of the deceased will sustain a judgment *de bonis testatoris*. *Faxon v. Dyson*, 1 Cranch, C. C. 441; *Dixon v. Ramsey*, 1 Cranch, C. C. 472.

It makes no difference whether the account be averred to have been stated of money due from the deceased to the plaintiff, or of money due from the defendant, as executor, to the plaintiff, provided always that the liability of the estate exists in-

dependently of the promise, and was not originally created by it. *Secar v. Atkinson*, 1 H. Bl. (Eng.) 102; *Ellis v. Bowen*, *Forest*, Ex. Rep. (Eng.) 98; *Powell v. Graham*, 7 Taunt. (Eng.) 580; *Ashby v. Ashby*, 7 B. & C. (Eng.) 444. Compare *Rose v. Bowler*, 1 H. Bl. (Eng.) 108; 2 Saund. (Eng.) 117, h, note to *Coryton v. Littlebye*.

A count for money had and received by the defendant as executor to the use of the plaintiff, charges the executor in his individual capacity. *Ashby v. Ashby*, 7 B. & C. (Eng.) 444. *Contra*, *Collins v. Weiser*, 12 S. & R. (Pa.) 97.

A count alleging that the defendant as executor was indebted to the plaintiff for money lent by the plaintiff to the defendant as executor, or for money had and received by the defendant as executor for the use of the plaintiff, or for goods sold and delivered, or for work done and materials furnished by the plaintiff for the defendant as executor at his request, and that the defendant as executor promised to pay, charges him in his individual, and not in his representative, character. He cannot plead *plene administravit*, and the judgment must be *de bonis propriis*. *Rose v. Bowler*, 1 H. Bl. (Eng.) 108; *Powell v. Graham*, 7 Taunt. (Eng.) 586. See *Jennings v. Newman*, 4 T. R. (Eng.) 347; *Bridgen v. Parkes*, 2 Bos. & Pull. (Eng.) 424; *Ashby v. Ashby*, 7 B. & C. (Eng.) 444; s. c., 1 Mann. & Ry. (Eng.) 180; *Corner v. Shew*, 3 M. & W. (Eng.) 350; *Thomas, J.*, in *Luscomb v. Ballard*, 5 Gray (Mass.), 405.

Where an executor or administrator receives money to the use of a particular individual, the receipt operates as a specific appropriation of that money; and the executor or administrator must be liable for the money so received in his individual capacity, it having nothing to do with the accounts of the decedent. *Littledale, J.*, in *Ashby v. Ashby*, 7 B. & C. (Eng.) 444, 450. See *Churchill v. Bertrand*, 3 Q. B. (Eng.) 550; *Cronan v. Cotting*, 99 Mass. 334, 336.

As to a count for money paid by the

not necessary to aver in the declaration that the defendant had assets.¹

b. In his Individual Capacity and out of his Own Estate.—Every contract made upon a new and independent consideration, moving between the promisee and the personal representative, is the personal contract of the latter binding himself and not the estate.² But a promise by an executor or administrator to pay a debt of the deceased, or answer damages out of his own estate, will not make him personally liable, unless sustained by sufficient con-

plaintiff to the use of the defendant as executor, see *Ashby v. Ashby*, 7 B. & C. (Eng.) 444, 449, 450; *Collins v. Weiser*, 12 S. & R. (Pa.) 97.

A count upon a promise by the defendant as executor for use and occupation after the death of the testator, charges the defendant personally. *Wigley v. Ashton*, 3 B. & Ald. (Eng.) 101. But see *Atkins v. Humphrey*, 2 C. B. 654. So also of the common count for interest, for it alleges a forbearance at his request. But a count charging that the defendant is indebted as executor on a contract by the testator to pay interest as long as the debt should be forborne, charges him in his representative character only. *Bignell v. Harpur*, 4 Ex. (Eng.) 773.

1. *Powell v. Graham*, 7 Taunt. (Eng.) 580; 1 Moore (Eng.), 305; *Dowse v. Cox*, 3 Bing. (Eng.) 20; s. c., 1 Moore (Eng.), 272. See *Pinchon's Case*, 9 Co. 90 b.

2. *Schoul. Exrs. & Admsrs.* § 256; *Austin v. Munro*, 47 N. Y. 360; *Taylor v. Mygatt*, 26 Conn. 184; *Farlin v. Stinson*, 56 Ga. 396; *Clopton v. Globson*, 53 Miss. 466; *Ferry v. Laible*, 27 N. J. Eq. 146. Compare § XIII. See also *Shepley, J.*, in *Davis v. French*, 20 Me. 21, 23; *Seip v. Drach*, 14 Pa. St. 352; *Kerchner v. McRae*, 80 N. C. 219; *Bott v. Barr*, 95 Ind. 243; *Moody v. Shaw*, 85 Ind. 88; *Daily v. Daily*, 66 Ala. 266; *May v. May*, 7 Fla. 207; *Hollenbach v. Clapp*, 103 Pa. St. 60.

"The rule must be regarded as well settled that the contracts of executors, although made in the interest and for the benefit of the estates they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold and delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors, and do not bind the estate, notwithstanding the services rendered, or goods or property furnished, or other consideration moving from the promisee, are such that the executors could properly have paid for the same from the assets, and been allowed for the expenditure in the settlement of their accounts. The principle is, that an executor may disburse and use the funds of the estate for purposes authorized

by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator." *Allen, J.*, in *Austin v. Munro*, 47 N. Y. 360, 366.

An administrator is personally liable on his note for money borrowed for the estate, and cannot be decreed to appropriate the funds of the estate to its payment, although he is bankrupt. *Merchants' Bank v. Weeks*, 53 Vt. 115; s. c., 38 Am. Rep. 661.

The mere fact that the executor describes himself in a bond, note, or bill of exchange "as executor," does not limit his liability unless he expressly confines his stipulation to pay out of the estate. Unlike any other agent, there is no principal for him to bind. *Patterson v. Craig*, 57 Tenn. 291; *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101; *Schmittler v. Simon*, 101 N. Y. 554; 54 Am. Rep. 737. See also *McCalley v. Willum*, 77 Ala. 549; *Johnson v. Clarke*, 15 S. C. 72; *East Tenn. Iron Mfg. Co. v. Gaskell*, 2 Lea (Tenn.), 742; *Courthwaite v. First Nat. Bank of Rockville*, 57 Ired. 268.

The acceptance by an administrator of an order drawn on him by a creditor of the estate, though conditioned to pay "as soon as accruing rents of the estate will permit," held, to render him personally liable. *Perry v. Cunningham*, 40 Ark. 185. See § XIII. 8.

After a mortgage creditor had obtained decrees for sale of the premises, the debtor died testate, giving his executor power to sell lands to pay debts. The executor agreed with the creditors to sell the mortgaged premises, and pay the decrees in full; but, having sold them for more than the amount of the decrees, he paid nothing thereon, but distributed the proceeds to other parties. Held, that this agreement amounted to an "allowance" of the decrees, and that the executor became individually liable to the holder as soon as by parting with the assets he made it impossible for him to pay the decrees. *Western Reserve Bank v. McIntire*, 40 Ohio St. 528.

An administrator is not personally liable for a portion of the cost of a division fence between the land of his intestate and another. *Cummings v. Brock*, 56 Vt. 308.

sideration and reduced to writing, as provided by the Statute of Frauds.¹ The completion of an executory contract of the decedent

1. Wms. Exrs. (7th Eng. ed.), 1776, 1777; Raun v. Hughes, 4 Bro. P. C. (Eng.) 27, Toml. ed.; s. c., 7 T. R. (Eng.) 350, note (a); Philpot v. Briant, 4 Bing. (Eng.) 717; s. c., 1 M. & C. (Eng.) 754; Robinson v. Lane, 14 Sm. & M. (Miss.) 161; Nelson v. Boynton, 3 Met. (Mass.) 396; Loomis v. Newhall, 15 Pick. (Mass.) 166; Stone v. Symmes, 18 Pick. (Mass.) 467; Ellis v. Merriman, 5 B. Mon. (Ky.) 296; Simpson v. Caltan, 4 John. (N. Y.) 422; Bailey v. Freeman, 4 John. (N. Y.) 280; Jackson v. Raynor, 12 John. (N. Y.) 291; Leonard v. Vredenburg, 8 John. (N. Y.) 29; Dodge v. Burdell, 13 Conn. 170; Clark v. Small, 6 Yerg. (Tenn.) 418; Cobb v. Page, 17 Pa. St. 469; 1 Chitty's Contr. (11th Am. ed.) 740, and notes (n⁵) and (n⁶); Byrd v. Holloway, 6 Sm. & M. (Miss.) 199; Sidle v. Anderson, 45 Pa. St. 464; Ciples v. Alexander, 2 Treadw. (S. C.) Const. 967; Taliaferro v. Robb, 2 Call (Va.), 258; Hester v. Wisson, 6 Ala. 415. See Greening v. Brown, Minor (Ala.), 583. "The true doctrine upon this subject appears to be, that, where the *cause of action existed against the deceased*, the executor or administrator may make himself personally liable by a written promise founded upon a sufficient consideration. In such case, the action should be brought against him in his own right if the plaintiff would have judgment against him in preference to one against the estate. But the executor or administrator cannot *create* a debt against the deceased. And it is immaterial how clearly the intent to do so may be expressed; for, having no power to bind the estate, he only binds himself by such contract." Shepley, J., in Davis v. French, 20 Me. 21, 23.

Action upon such contract may be maintained against him personally, although signed in his representative capacity. Carter v. Thomas, 3 Ind. 213; Walker v. Patterson, 36 Me. 273; Ellis v. Merriman, 5 B. Mon. (Ky.) 296; Bradley v. Heath, 3 Sim. (Eng.) 543; 5 B. Mon. (Ky.) 296; Winthrop v. Jarvis, 8 La. Ann. 434; Beatty v. Tete, 9 La. Ann. 130. The fact that no action could have been maintained against the deceased by reason of the Statute of Frauds, or some legal principle intervening for his protection, will not protect the representative from liability upon his own promise to pay the claim. Baker v. Fuller, 69 Me. 152; Rusling v. Rusling, 47 N. J. L. 1. But a promise in writing is no more effective since the statute than before, unless by deed, or supported by sufficient consideration. Sidle v. Anderson, 45 Pa. St. 464; Moseley v. Taylor, 4 Dana (Ky.), 542; Bank of Troy v. Topping, 9 Wend.

(N. Y.) 273; 13 Wend. (N. Y.) 557; Taliaferro v. Robb, 2 Call (Va.), 258; Hester v. Wisson, 6 Ala. 415; Davis v. French, 20 Me. 21; Walker v. Patterson, 36 Me. 273; Winthrop v. Jarvis, 8 La. Ann. 434; Beatty v. Tete, 9 La. Ann. 130; Ciples v. Alexander, 2 Treadw. (S. C.) Const. 967; Douglas v. Fraser, 2 McCord (S. C.), Ch. 105. Compare Thompson v. Maugh, 3 Iowa, 242.

But such an undertaking, although reduced to writing, and supported by sufficient consideration, will not exempt the estate from liability. Douglas v. Fraser, 2 McCord (S. C.), Ch. 105.

What is a Valid Consideration. — Promise in Consideration of Assets. — Forbearance by a creditor, at the request of the representative, to bring suit on his claim, is sufficient consideration for a promise by the latter to pay the debt, and charge him *de bonis propriis*. Gardener v. Fenner, 1 Roll. Abr. (Eng.) 15, tit. "Action," Sur. Case S. pl. 3; Chambers v. Leverage, Cro. Eliz. (Eng.) 644; Hawks v. Smith, 2 Lev. (Eng.) 122; Scott v. Stevens, 1 Sid. (Eng.) 89; Pitt v. Bridgwater, 1 Roll. Abr. 20, pl. 11; s. c., Hardr. (Eng.) 74; Bank of Troy v. Topping, 9 Wend. (N. Y.) 273; Reynolds v. Prosser, Hardr. (Eng.) 71; Russell v. Haddock, 1 Lev. (Eng.) 188, 1 Saund. (Eng.) 210, note (1); Obble v. Dittlesfield, 1 Vent. (Eng.) 153, 1 Saund. (Eng.) 210, note (1). Forbearance to sue for a legacy, where such suit can be maintained, is sufficient consideration to charge the representative *de bonis propriis*, on his promise to pay it. Fish v. Richardson, Yelv. (Eng.) 55, 56; s. c., Cro. Jac. (Eng.) 47; Davis v. Reyner, 2 Lev. (Eng.) 3; s. c., *nom* Davis v. Wright, 1 Vent. (Eng.) 120, 2 Keb. (Eng.) 758. As to actions for legacies, see LEGACIES; 2 Saund. 137, and note to Barber v. Fox; Wms. Exrs. (7th Eng. ed.) 1931, n. (K¹).

A promise by an administrator to pay a debt due by a distributor if the creditor would not attach the distributive share in his hands (such share being unattachable), is without consideration. McElwee v. Story, 1 Rich. (S. C.) 9.

An executor or administrator promising to pay a debt of the estate at a *future day*, or *with interest*, makes the debt his own. The fact that the promise is made as *executor* or *administrator* does not affect his individual liability. In such case, forbearance must be presumed to have been the consideration. Goring v. Goring, Yelv. (Eng.) 11; Brady v. Heath, 3 Sim. (Eng.) 543; Childs v. Monins, 2 Brod. & Bing. (Eng.) 460; s. c., 5 Moore (Eng.), 281. See Barnard v. Pumfret, 5 My. & Cr. (Eng.)

stands upon the same footing as a new contract made by the representative; and although it may be his duty to complete such

71; Lucas v. Williams, 3 Giff. (Eng.) 151; Reech v. Kennegal, 1 Ves. Sen. (Eng.) 126. *Contra*, Bank of Troy v. Topping, 9 Wend. (N. Y.) 273. Compare § XIII. See Ridout v. Bristow, 1 Cr. & Jerv. (Eng.) 231; Bowerbank v. Monteiro, 4 Taunt. (Eng.) 844; Austin v. Monro, 47 N. Y. 360.

The surrender to an administrator of a promissory note, made by his intestate, whether the note, at the time of the surrender, is capable or incapable of being enforced at law, is a sufficient consideration for the giving of a new note by the administrator; and he is personally liable thereon, although, when the new note is given, his final account has been allowed, and no new assets have since come into his hands. Wilton v. Eaton, 127 Mass. 174. See Davis v. Crandall, 101 N. Y. 311; Comthwaite v. First Nat. Bank of Rockville, 57 Ind. 268.

An averment in the declaration, that the defendant, in consideration of the plaintiff's accepting the defendant as his debtor, promised to pay, does not show sufficient consideration to charge the defendant *de propriis*. Forth v. Stanton, 1 Saund. (Eng.) 210. See further as to consideration, Wheeler v. Collier, Cro. Eliz. (Eng.) 406; Hamilton v. Inledon, 4 Bro. P. C. (Eng.) 4 Toml. ed.; Hershaw v. Whitaker, 1 Brev. (S. C.) 9; Nelson v. Boynton, 3 Met. (Mass.) 396; Brightman v. Hicks, 108 Mass. 246, 247; 1 Chitty's Contr. (11th Am. ed.) 740, 750, n. (g), 756, n. (e), 757.

A promise by the representative to pay a particular debt of the decedent, in consideration of having assets, will support an action against him in his individual capacity and judgment *de bonis propriis*. Trewinian v. Howell, Cro. Eliz. (Eng.) 91; Reech v. Kennegal, 1 Ves. Sen. (Eng.) 126; Atkins v. Hill, Cowp. (Eng.) 284; Hawkes v. Saunders, Cowp. (Eng.) 289. See Faxon v. Dyson, 1 Cranch (C. C.), 441; Dixon v. Ramsey, 1 Cranch (C. C.), 472; Bank of Troy v. Topping, 13 Wend. (N. Y.) 557; Greening v. Brown, Minor (Ala.), 553; Sleighter v. Harrington, 2 Taylor (N. C.), 249.

Such promise will also support a judgment *de bonis testatoris*. Faxon v. Dyson, 1 Cranch (C. C.), 441; Dixon v. Ramsey, 1 Cranch (C. C.), 472.

As to the distinction between a bare promise to pay the debt, and a promise in consideration of assets, see Rann v. Hughes, 77 R. (Eng.) 350, n. (a); Reech v. Kennegal, 1 Ves. Sen. (Eng.) 126; 1 Saund. (Eng.) 210, c. 211, n. (1) to Forth v. Staunton; Pearson v. Henry, 5 T. R. (Eng.) 8; Taliaferro v. Robb, 2 Call (Va.), 258; Byrd v.

Holloway, 6 Sm. & M. (Miss.) 199; Hester v. Wesson, 6 Ala. 415; M'Elwee v. Story, 1 Rich. (S. C.) 9.

Where executors gave a bond to pay out of the assets the balance due in settling the accounts of the estate, they were held not responsible beyond the assets which came into their hands. Allen v. Gaffins, 8 Watts (Pa.), 397. See Bowerbank v. Monteiro, 4 Taunt. (Eng.) 844.

In conclusion, it should be observed that where the nature of the debt is such as necessarily to make the defendant liable personally, the judgment will be *de bonis propriis*, although he is charged as promising as executor or administrator. Wms. Exrs. (7th Eng. ed.) 1784; Wigley v. Ashton, 3 B. & Ald. (Eng.) 101; Powell v. Graham, 7 Taunt. (Eng.) 585; Corner v. Shew, 3 M. & W. (Eng.) 350. See Sneed v. Coleman, 7 Grattan (Va.), 3.

What is Sufficient Reduction to Writing? — Under the statute of frauds, 29 Car. II. c. 3, "the agreement upon which such action shall be brought, or some memorandum or note thereof," must be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized; and under the decision in Wain v. Warlters, 5 East (Eng.), 10; Smith's Ld. Cas. (8th Am. ed.) 271, and subsequent decisions, the consideration must appear in the instrument, although, if it can be gathered from its whole tenor, it need not be stated in terms on its face. Forth v. Staunton, 1 Saund. (Eng.) 211, note (d); Wms. Exrs. (7th Eng. ed.) 1784.

The doctrine of Wain v. Warlters has been abolished by statute in England. Stat. 19, 20, Vict. c. 97, s. 3.

In some States it has been accepted, and is still in force: in others, it has been expressly rejected. Sage v. Wilcox, 6 Conn. 81; Bailey v. Freeman, 11 John. (N. Y.) 121; Packard v. Richardson, 17 Mass. 122; Smith v. Ide, 3 Vt. 290; 1 Chitty, Contr. (11th Am. ed.) 91, 92, in note (a), 760, 761.

Cases not within the Statute. — A promise made to the party entitled to administration, to make good any deficiency of assets to discharge the intestate's debts, in consideration of being allowed to be joined in administration, is not within the act, because the party promising was not administrator at the time of making the promise. Creditors can enforce such promise in equity through the medium of trust in the promisee. Tomlinson v. Gill, Ambl. (Eng.) 330. See Griffith v. Sheffield, 1 Eden (Eng.), 77; Gregory v. Williams, 3 Merid. (Eng.) 590.

contract, to protect the State from an action for its breach,¹ in the absence of express legislation, he does so on his individual responsibility, and cannot bind the estate.²

c. Funeral Expenses. — An executor or administrator who orders the funeral himself, or ratifies or adopts the acts of another who has given such orders, is liable individually and not in his representative character for all expenses incurred³ by the order. If a third person orders the funeral, the law implies a promise from an executor or administrator *with assets* to reimburse such third person his reasonable expenses.⁴ In the latter case also the

As to a promise by a party who is neither executor nor administrator, see *Nelson v. Serle*, 4 M. & W. (Eng.) 795.

The statute does not apply to a promise by an heir founded upon forbearance, and not upon the consideration of the debt of the deceased. *Templeton v. Bascom*, 33 Vt. 132.

A promise by an executor to pay rent due by his testator, in consideration of a release of a distress for rent, is an original, and not a collateral, undertaking within the statute of frauds. *Hershaw v. Whitaker*, 1 Brev. (S. C.) 9.

1. Wms. Exrs. (7th Eng. ed.) 1794. See 1, a.

If a man makes half a wheelbarrow, or half a pair of shoes, the executors should complete them, and are not bound to sacrifice the property by selling it in its unfinished condition. So, if the deceased died possessed of a manufactory, his executors would be justified in continuing the works for a reasonable time, until they could be sold to advantage. Such conduct cannot be stigmatized as trading with the assets. *Marshall v. Broadhurst*, 1 Cr. & Jerv. (Eng.) 405; *Garrett v. Noble*, 6 Sim. (Eng.) 501. See 2, f, n.

2. *Smith v. Wilmington Coal Co.*, 83 Ill. 498; *Mowry v. Adams*, 14 Mass. 327. See *McKeown v. Harvey*, 40 Mich. 226.

If losses are sustained, he must bear them; if profits realized, they become assets in his hands for the benefit of the estate. *Smith v. Wilmington*, 83 Ill. 498.

3. Wms. Exrs. (7th Eng. ed.) 1788; *Brice v. Wilson*, 3 Ad. & El. (Eng.) 349, n. (c); s. c., 3 Nev. & M. (Eng.) 512; *Corner v. Shew*, 3 M. & W. (Eng.) 350; *Thomas, J.*, in *Luscomb v. Ballard*, 5 Gray (Mass.), 405, 406; *Trueman v. Tilden*, 6 N. H. 201; *Walker v. Taylor*, 6 C. & P. (Eng.) 752; *France's Est.* 75 Pa. St. 224, 225.

If the administrator who ordered the funeral has died or been removed, no action can be maintained on the contract against the administrator *de bonis non*. *Ferrin v. Myrick*, 41 N. Y. 315.

If, before taking out letters, an administrator orders, or sanctions the orders which

another person gives for the funeral, he will be bound, after he has become administrator, to pay the expenses incurred under the orders. *Lucy v. Walrond*, 3 Bing. N. C. (Eng.) 841.

4. *Tugwell v. Heyman*, 3 Campb. (Eng.) 298; *Rogers v. Price*, 3 Y. & Jerv. (Eng.) 28; *Bayley, J.*, in *Hancock v. Podmore*, 1 B. & Ad. (Eng.) 262; *Green v. Salmon*, 8 Ad. & El. (Eng.) 348; s. c., 3 Nev. & P. (Eng.) 388; *Jervis, C. J.*, in *Ambrose v. Kerrison*, 10 C. B. (Eng.) 779; *Putnam, J.*, in *Hapgood v. Houghton*, 10 Pick. (Mass.) 154, 156. See *Jennison v. Hapgood*, 10 Pick. (Mass.) 77; *Adams v. Batts*, 16 Pick. (Mass.) 344, 346; *Thomas, J.*, in *Luscomb v. Ballard*, 5 Gray (Mass.), 405; *France's Estate*, 75 Pa. St. 220; *Campfield v. Ely*, 1 Green, 150; *Palmer v. Stevens*, R. M. Charl. (Ga.) 56; *Parker v. Lewis*, 2 Dev. Eq. (N. C.) 21; *Patterson v. Patterson*, 59 N. Y. 574, 582-586; *Fitzhugh v. Fitzhugh*, 11 Gratt. (Va.) 300; *Trueman v. Tilden*, 6 N. H. 201. *Contra*, *Coleby v. Coleby*, 12 Jur. N. S. 496, in neither of which were any of the above cases cited in argument.

As to the expense of a tombstone erected at the request of the widow, see *Muldoon v. Muldoon*, 139 Mass. 304; s. c., 52 Am. Rep. 708.

In North Carolina, it has been held that no action can be maintained unless the representative has been notified of the expenses within a reasonable time. *Ward v. Jones*, Busb. L. (N. C.) 127; *Gregory v. Hooker*, 1 Hawks (N. C.), 394.

It would seem that, if the funeral has been ordered by a third person, to whom the credit was given, the undertaker cannot recover from the executor, unless the order was ratified by him. *Patterson, J.*, in *Brice v. Wilson*, 8 Ad. & El. (Eng.) 349, n. (c); s. c., 3 Nev. & M. (Eng.) 512.

Where the executor or administrator orders the funeral himself, or adopts and ratifies the orders given by another, his liability arising from the priority of contract extends to all the expenses incurred under the order. But where he is sought to be charged on his implied contract to pay for a funeral which he has not himself

representative is liable in his individual, and not in his representative, character; but since the maintenance of the action depends upon his being a representative *with assets*, it is a good defence, under the general issue, that the decedent left none.¹

d. Personal Responsibility of Representative on Submission to Arbitration.—An executor or administrator who submits a claim against the estate to arbitration, in broad terms, to pay whatever shall be awarded, without protesting against the reference being taken as an admission of assets, is personally bound to perform the award whether he has assets or not,² upon the ground that the submission amounts to an admission of assets sufficient for the purpose.

*e. Liability of Representative for Acts of Agents.*³—See § XIII. II.

ordered nor sanctioned, the liability, depending upon the possession of assets, extends only to the *reasonable* expenses; i.e., to so much of the cost as he might reasonably pay, and expect to have allowed in his accounts, and no more. *Brice v. Wilson*, 8 Ad. & El. (Eng.) 349, n. (c); *Green v. Salmon*, 8 Ad. & El. (Eng.) 348. See *France's Est.* 75 Pa. St. 224, 225; *Foley v. Bushway*, 71 Ill. 386; *Samuel v. Thomas*, 51 Wis. 549; *Lesch v. Emmett*, 44 Ind. 331. *Compare* § XVII. 7; *Wms. Exrs.* (7th Eng. ed.) 1788.

1. *Hayter v. Moat*, 2 M. & W. (Eng.) 56; *Corner v. Shew*, 3 M. & W. (Eng.) 350; s. c., 8 Ad. & El. (Eng.) 349, n.; *Ferrin v. Myrick*, 41 N. Y. 315. See *Rappelyea v. Russell*, 1 Daly (N. Y.), 214. *Compare* *Laird v. Arnold*, 25 Hun (N. Y.), 4.

In some States the action may be brought against the executor or administrator in his representative character, and judgment rendered *de bonis decedentis*. *Hapgood v. Houghton*, 10 Pick. (Mass.) 154; *Samuel v. Thomas*, 51 Wis. 549; *Campfield v. Ely*, 13 N. J. L. 150; *Rappelyea v. Russell*, 1 Daly, 214.

2. *Pearson v. Henry*, 5 T. R. (Eng.) 7, per *Kenyon*, *Worthington v. Barlow*, 7 T. R. (Eng.) 453; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Swicard v. Swicard*, 2 Treadw. (S. C.) Const. 218; *Powers v. Douglass*, 53 Vt. 471; s. c., 38 Am. Rep. 699.

The plea of *plene administravit* is no bar to an action on the award. *Riddell v. Sutton*, 5 Bing. (Eng.) 200.

The only distinction between a submission by bond, and one by note, is, that the consideration of the bond cannot be explained, while that of the note, as between the original parties, and all parties having notice of the consideration, may. *Robinson v. Lane*, 14 Sm. & M. (Miss.) 161; *Shoonmaker v. Dewitt*, 17 John. (N. Y.) 304; *Ten Eyck v. Vanderpoel*, 8 Johns.

(N. Y.) 120; *Bank of Troy v. Topping*, 9 Wend. (N. Y.) 273; *Peaseley v. Boatright*, 2 Leigh (Va.), 195.

Exceptions.—If the arbitrator merely awards that a certain sum is due from the estate, *without awarding* that the representative shall pay it, or that he shall pay the sum awarded out of the assets, the representative is not thereby precluded from denying that he has assets. *Pearson v. Henry*, 5 T. R. (Eng.) 6; *Worthington v. Barlow*, 7 T. R. (Eng.) 453; *Love v. Honeybourne*, 4 Dowl. & Ryl. (Eng.) 814. See also *In re Joseph v. Webster*, 1 Russ. & My. (Eng.) 486; *Walker v. Patterson*, 36 Me. 273; *Tallman v. Tallman*, 5 Pick. (Mass.) 325; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Dickey v. Sleeper*, 13 Mass. 244; *Chadbourn v. Chadbourn*, 9 Allen (Mass.), 173; *Bennett v. Pierce*, 28 Conn. 315; *McKeen v. Oliphant*, 3 Harrison (N. J.), 442; *Strodes v. Patton*, 1 Brock. (C. C.) 228; *Wheatley v. Martin*, 6 Leigh (Va.), 62.

3. An executor or administrator who employs an attorney or other agent to transact the business of the estate, is personally liable for his compensation, in the absence of an express agreement that he shall look only to the estate. The liability of the agent for loss to the estate by misconduct or negligence is directly to the personal representative, and not to the parties in interest. The claim of the latter for any loss which such agent may have caused the estate is against the executor or administrator. *Long v. Rodman*, 58 Ind. 58; *Succession of Harris*, 29 La. An. 743; *Denegre v. Denegre*, 33 La. An. 694; *Compton v. Whitehouse*, 48 N. Y. Super. Ct. 208.

In North Carolina, if an executor necessarily employs an agent to carry out the directions of a will, the agent's right against the executor, and the executor's right to reimbursement from the assets of the es-

f. Carrying on Testator's Trade.—An executor or administrator who carries on his decedent's trade is personally liable for all debts contracted by himself in the management of the concern.¹

tate, can be enforced under the code system, in one proceeding. *Edwards v. Love*, 94 N. C. 365.

As to whether a general power of attorney to transact the affairs of the estate will enable the agent to bind the representative personally by accepting a bill of exchange drawn by a creditor for a debt due from the decedent, see *Gardner v. Baillie*, 6 T. R. (Eng.) 591; *Howard v. Baillie*, 2 H. Bl. (Eng.) 618.

It would seem that if the representative admits that such a bill which has been so accepted with his knowledge, is for a just debt, and that it ought to be paid, such admission affords sufficient evidence of an authority given by him to the agent to accept that particular bill without resorting to the letter of attorney. *Wms. Exrs.* (7th Eng. ed.) 1787; *Howard v. Baillie*, 2 H. Bl. (Eng.) 618.

1. *Ex parte Garland*, 10 Ves. (Eng.) 119; *Ex parte Richardson*, 1 Buck (Eng.), 209; *Thompson v. Brown*, 4 John. Ch. (N. Y.) 619; *Ames v. Downing*, 1 Bradf. Sur. (N. Y.) 321; *Barker v. Barker*, 17 R. (Eng.) 295; *Lucht v. Behrens*, 23 Ohio St. 231; *Gratz v. Bayard*, 11 Ser. & R. (Pa.) 41; *Tyson v. Watston*, 83 N. Car. 90; *Stephens v. James* (Ga.), 3 S. E. Rep. 160; *Succession of Sparrow* (La.), 2 So. Rep. 501.

At common law he is personally responsible for the debts contracted in the business since the testator's death, to the extent of all his own property; also in his person where imprisonment for debt exists, and he may be proceeded against as a bankrupt though he is but a trustee. *Ex parte Garland*, 1 T. R. (Eng.) 295; *Ex parte Richardson*, 1 Buck (Eng.), 209.

The fact that the executor carries on the trade avowedly in his representative character, and is entitled to a lien on the assets for reimbursement, does not exempt him from personal liability; nor does the propriety of his conduct as between himself and those beneficially interested in the estate, give creditors of the trade becoming so after his death the rights of creditors of the testator; and so far as they are concerned, it is immaterial that the trade was continued under partnership articles. *Labouchere v. Tupper*, 11 Moore, P. C. (Eng.) 198, 221. See *Tyson v. Walston*, 83 N. C. 90.

An executor or administrator who carries on the decedent's trade with surviving partners, becomes personally liable as a partner for debts contracted after the decedent's death. *Labouchere v. Tupper*, 11 Moore, P. C. (Eng.) 198, 220; *Wightman v. Toun-*

roe, 1 M. & Sel. (Eng.) 412; *Alsop v. Mather*, 8 Conn. 584; *Stedman v. Fieldler*, 20 N. Y. 437; *Muntz v. Brown*, 11 La. An. 472.

But he cannot be compelled to assume such liability, and a covenant between partners that they and their respective executors and administrators shall continue partners for a term of years binds only the estate of the deceased partner. *Downs v. Collins*, 9 Hare (Eng.), 418, 438.

Where articles of partnership provide that upon the death of a partner during the partnership term, his executor shall be entitled to the place of the deceased partner in the firm, with the capital of the deceased partner in the firm-business, the executor has an option to come in or not, and a reasonable time within which to elect. If he elects to come in, he comes in with all the rights and liabilities of a partner, and is personally liable as a partner for debts incurred in the business.

Articles of partnership which simply provide that, on the death of one partner, his capital shall be left in the business until the end of the partnership term, do not require the admission of the executor of a deceased partner to the management or control of the business; and, if he does not personally engage in the business, he will not be personally liable for the debts, though he leaves the testator's capital in the business. *Wild v. Davenport*, 7 Atl. Rep. 295. See *Travis v. Milne*, 9 Hare (Eng.), 295.

But if without proper authority he allows the property of the decedent to remain in the firm, and instead of accepting interest on the money value of his decedent's share, he accept on behalf of the estate his ratable proportion of the profits, he may be held as a partner, although he took no share in the management, derived no personal advantage, and the trade was carried on under the old firm-name. *Wightman v. Tounroe*, 1 M. & Sel. (Eng.) 412; *Labouchere v. Tupper*, 11 Moore, P. C. (Eng.) 198. See PARTNERSHIP.

As to permitting a representative to become a partner in his decedent's firm *bona fide*, employing his own capital, and taking no undue advantage from the assets, see *Simpson v. Chapman*, 4 De G. M. & G. (Eng.) 154.

Joint Stock Companies.—Executors of deceased shareholders in a joint stock company who accept reserved shares offered by the directors to them as executors, must nevertheless be put upon the list of contributories in their own right, and not

If expressly authorized to carry on the trade by the will, or otherwise duly empowered, he has a lien for his reimbursement upon such assets as the will directs to be employed. Out of this right grows an equity of trade creditors to resort to this fund for payment after exhausting the personal representative.¹ But their equity is dependent upon his heir; and unless, after paying their debts, he could have reimbursed himself from the fund, they have no claim on it.² But neither the representative nor the trade creditors can look to other assets for payment than those lawfully embarked in the trade.³ An executor or administrator who undertakes to trade with the assets without authority is guilty of

in their representative capacity. The fact that the new shares were offered to, and accepted by, the executors in their representative character, and that the directors had no power to offer the shares to them in any other character, does not preclude the executors from being personally liable as between themselves and other contributors. *In re Leeds Banking Company*, L. R. 1 Ch. App. 231. See further as to liability of executors of deceased shareholders, *In re Herefordshire Bank*, 33 Beav. (Eng.) 435; *In re East of England Bank*, L. R. 1 Eq. 219; *Baird's Case*, L. R. 5 Ch. App. 725; *Spence's Case*, 17 Beav. (Eng.) 203.

On the other hand, it seems that on the death of a shareholder in a joint stock company, his estate, and consequently his executors or administrators in their representative character, continues liable until a new personal liability has been created pursuant to the deed of settlement. *In re Northern Coal Mining Case*, 13 Beav. (Eng.) 133; s. c., *nom. Blakeley's Case*, 3 Mac. & G. (Eng.) 726; *Keen's Executor*, 3 De G. M. & G. (Eng.) 272; *Howard v. Wheatley*, 3 De G. M. & G. (Eng.) 628; *Gouthwaite's Case*, 3 Mac. & G. (Eng.) 187. Compare *Powis v. Butler*, 4 C. B. N. S. (Eng.) 469.

1. *Labouchere v. Tupper*, 11 Moore, P. C. (Eng.) 198; *Boulle v. Tompkins*, 5 Redf. (N. Y.) 472; *Gratz v. Baylord*, 11 Ser. & R. (Pa.) 41; *Laughlin v. Lorenz*, 48 Pa. St. 275; *Laible v. Ferry*, 32 N. J. Eq. 791; *Jones v. Walker*, 103 U. S. 444.

Creditors must first exhaust the personal representative. *Alsop v. Mather*, 8 Conn. 584, 587.

Where executors, carrying on business under a will, had, without authority, used the proceeds of the business to improve lands of the testator not subject to the risks of trade, and which, under the will, belonged in remainder to married women and infants, it was held that this would not justify the court in charging the estate of these remainder-men to any extent with

the trade debts. *Laible v. Ferry*, 32 N. J. Eq. 791.

2. *Pillgrem v. Pillgrem*, 45 L. T. Rep. N. S. 183. See *Smith v. Ayer*, 101 U. S. 320; Appeal of First Nat. Bank (Pa.), 7 Atl. Rep. 207.

An executor conducting his testator's trade under the will is bound by its provisions, and parties dealing with him are affected with notice thereof. Trade creditors cannot compel a transfer of stock pledged to secure debts of the business if the will gives him no such authority. Appeal of First Nat. Bank, 7 Atl. Rep. (Pa.) 207.

Where an executor, in carrying on a trade under a power contained in the will, abuses his authority by taking out a new lease of the premises in his own name, and then borrows money on the security of the lease, the equity of the testator's estate to the renewed lease will take precedence of the lender's equity to such security. *Pillgrem v. Pillgrem*, 45 L. T. 183.

3. *Ex parte Garland*, 10 Ves. (Eng.) 110; *Toller*, 487; *Thompson v. Andrews*, 1 My. & K. (Eng.) 116; *Ex parte Richardson*, 1 Buck (Eng.), 202; *Cutbush v. Cutbush*, 1 Beav. (Eng.) 184; *Kirkman v. Booth*, 11 Beav. (Eng.) 273; *Travis v. Milne*, 9 Hare (Eng.), 141; *Smith v. Ayres*, 101 U. S. 320; *Jones v. Walker*, 103 U. S. 444; *Stanford v. Owen*, 14 Gray (Mass.), 195; *Bacon v. Pomeroy*, 104 Mass. 597.

In *Smith v. Ayres*, 101 U. S. 320, it was held that "a testator might authorize the continuance of a partnership, in which he was engaged at the time of his death, without subjecting any more of his property to the vicissitudes of the business than what was then embarked in it, and that unless he had expressly placed the whole or some other part of his estate under the operation of the partnership, it would not be presumed that he so intended." *Miller, J.*, in *Jones v. Walker*, 103 U. S. 444, 445. See *Stanford v. Owen*, 14 Gray (Mass.), 195; *Bacon v. Pomeroy*, 104 Mass. 577, 585; *McNeillie v. Acton*, 4 De G. M. & G. (Eng.) 744. But see *Laughlin v. Lorenz*, 48 Pa. St. 275, 283.

a breach of trust: no lien for reimbursement exists in his favor, and consequently none for trade creditors, and he must make good to the estate all losses, and account for all profits.¹

3. *Liability of the Executor or Administrator for his own Tortious or Negligent Acts.* — a. *To Third Persons.* — For injuries to third

1. *Ex parte* Garland, 10 Ves. (Eng.) 110; Toller, 487; *Ex parte* Richardson, 1 Buck (Eng.), 202; Wood's Est. 1 Ashm. (Pa.) 314; Lucht v. Behrens, 23 Ohio St. 231; Merritt v. Merritt, 60 Mo. 150; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619; Wms. Exrs. (7th Eng. ed.) 1792, 1793; Barker v. Barker, 1 T. R. (Eng.) 295; Perry, Trusts, § 429; Stedman v. Fielder, 20 N. Y. 437; Pitkin v. Pitkin, 7 Conn. 307; Burwell v. Mandeville, 2 How. (U. S.) 560; Hooper v. Hooper's Exrs. (W. Va.), 1 S. E. Rep. 280; Holloway's Est. 13 Phila. (Pa.) 317; Field v. Colton, 7 Ill. App. 379.

In many of the Southern States statutes exist authorizing an executor or administrator to work the decedent's plantations for the benefit of the plaintiff. As to construction of such statutes, see Tex. Rev. St. art. 1931; Hinson v. Williamson, 74 Ala. 180; Dwyer v. Kattayer (Tex.), 5 S. W. Rep. 75.

Carrying on Trade distinguished from winding up Business. — Merely completing the testator's executory contracts, or even purchasing ingredients needed to render testator's unfinished stock in trade salable, does not render the personal representative liable as a trader, although for the particular articles purchased he may be liable in his individual, and not in his representative capacity. Toller, 487; Marshall v. Broadhurst, 1 Cr. & Jerv. (Eng.) 405; Edwards v. Grace, 2 M. & W. (Eng.) 190; Dakin v. Cope, 2 Russ. (Eng.) 170; Harding v. Evans, 3 Porter (Ala.), 221; Lovell v. Field, 5 Vt. ante. See ante, 2, b, n.

The distinction appears to be, that, if an executor or administrator only buys with an intent to sell the testator's stock as soon as it can conveniently be done, he will not be considered a trader; but if he carries on the trade with a view to continuing it indefinitely, and to make a general profit for the benefit, either of himself or of those beneficially entitled to the stock, he clearly will be a trader. Wms. Exrs. (7th Eng. ed.) 1794; Eden, Bankr. (Eng.) 5.

Reasonable discretion must be allowed the representative in closing up the business; and if, in order to wind it up successfully, and convert the property to advantage, he continues the enterprise for a reasonable time *bona fide*, and according to his best judgment, he cannot be charged with loss by the estate. Garrett v. Noble,

6 Sim. (Eng.) 504; Collinson v. Lister, 20 Beav. (Eng.) 356, 365, 366. See Bowker's Estate, 12 Phila. (Pa.) 88; Gilman v. Wilber, 1 Dem. (N. Y.) 547.

Authority to carry on Trade. — Conduct and Management. — It is a rule without exception, that to authorize executors to carry on a trade with the property held by them in trust, there ought to be the most distinct and positive authority and direction given by the will itself for that purpose. Kirkman v. Booth, 11 Beav. (Eng.) 273. See Travis v. Milne, 9 Hare (Eng.), 141; Hollingsworth v. Hollingsworth, 65 Ala. 321.

Such a diversion of trust funds cannot be justified by proof of oral instructions of the testator. Malone v. Kelly, 54 Ala. 532.

In Illinois it is held that the county court cannot confer such authority. Field v. Colton, 7 Ill. App. 379.

As to power of court of chancery to confer such authority, see Lord Mansfield in Barker v. Barker, 1 T. R. (Eng.) 295; *Ex parte* Garland, 10 Ves. (Eng.) 119.

It is perfectly proper for an executor to take the place of his testator in the firm when authorized so to do by the terms of agreement. Laughlin v. Lorenz, 48 Pa. St. 275; Wild v. Davenport, 7 Atl. Rep. 295.

In the conduct of the business, a reasonable discretion is allowed the executor in carrying out the testator's directions; and where the will directed the executor to raise crops on his estate until debts were paid, an administrator with the will annexed is not bound, regardless of time and circumstances, to go on cultivating indefinitely. Johnson v. Henagen, 11 S. C. 93.

Where a testator directs his executors to continue his business, and to use his real estate for that purpose, they are not chargeable with the rental value of the real estate so used. *Re* Jones, 37 Hun (N. Y.), 430. See Johnson v. Henagan, 11 S. C. 93; Succession of Sparrow (La.), 2 So. Rep. 501.

Bad debts and losses are chargeable to income, not to principal, as is also the cost of replacing and restoring personal property worn out in the ordinary course of the business. *Re* Jones, 37 Hun (N. Y.), 430.

An executor who conducts the business as directed by the testator is not absolved thereby from accounting for profits. Daniel v. Lewis, 3 Dem. (N. Y.) 602.

persons caused by his own tortious or negligent acts in the administration of the estate, the representative is personally responsible.¹ If no direct pecuniary advantage resulted to the estate by reason of such tortious or negligent conduct, he is liable in his individual, and not in his representative, character;² but for property or money not belonging to the estate lawfully recovered or received under a mistake, after the death of his decedent, in virtue of his official character, and held by him as assets, or appropriated to the use of the estate, he is liable in either his individual or representative character at the election of the party who has a good title.³

1. *Herd v. Herd* (Iowa), 32 N. W. Rep. 469; *Lamorere v. Cox's Succession*, 32 La. An. 246; *Thompson v. Canterbury*, 2 McCrary, C. Ct. 332; *Dailey v. Dailey*, 66 Ala. 266.

An executor is personally liable to injured creditors for mispayments. *Van Voorhis's Appeal*, 4 Pa. (L. ed.) 840; 10 Cent. Rep. 412; 11 Atl. Rep. 233.

An executor or administrator receiving money by mistake, as assets of his decedent's estate, will not be excused from his liability to refund the same on the ground that the money has been applied by him in due course of administration. *McCustian v. Ramey*, 33 Ark. 142.

The better opinion is, that want of notice on the part of the administrator cannot alter the rights of the party to whom the fund ultimately belongs. *Valengin's Admrs. v. Duffy*, 14 Peters (U. S. S. C.), 232; *United States v. Walker*, 109 U. S. 258; 2 Lomax on Executors (2d ed.), pp. 465-466; *Pooley v. Ray*, 1 P. Wms. (Eng.) 355; *Hirzy v. Dirriwood*, 2 Ves. Jr. (Eng.) pp. 92-93; *Pickering v. Lord Stamford*, 2 Ves. J. 582. *Contra*, *Mulford v. Mulford*, 40 N. J. Eq. 163; *Call v. Houdlette*, 70 Me. 308. In such case, the representative's remedy is to compel the overpaid creditors to refund. 2 Lomax Exrs. (2d ed.) 465-466.

Advice to Widow.—An executor is not bound to give the widow of his testator any advice as to accepting or electing against the will; but, if he consent to do so, he must exercise good faith and reasonable diligence. Hence, if the executor fraudulently induces the widow not to dissent from her husband's will within the time required by law, the proceedings assigning her year's support are binding on him. *Bolin v. Barker*, 75 N. C. 47.

2. *Clayton v. Boyce*, 62 Miss. 390. See *Simpson v. Snyder*, 54 Iowa, 557, 558.

A succession should not be condemned in damages for an abuse by the administrator of the process of injunction. *Lamorere v. Cox's Succession*, 32 La. An. 246.

3. *De Valengin's Admrs. v. Duffy*, 14

Pet. (U. S. S. C.) 283, 290; *Baring v. Putnam*, 1 Holmes (U. S. S. C.), 261; *Conger v. Atwood*, 28 Ohio St. 134; *Simpson v. Snyder*, 54 Iowa, 557. See *Wall v. Kellogg*, 16 N. Y. 385; *Collins' Admr. v. Weiser*, 12 S. & R. (Pa.) 97; *Steel v. Dowell*, 9 S. & M. (Miss.) 193; *Ashby v. Ashby*, 7 B. & C. (Eng.) 444; *Corner v. Shew*, 3 M. & W. (Eng.) 350.

A banker may maintain an action against an administrator *de bonis non* as such to recover money credited by him (the banker) to the intestate in his lifetime by mistake, which was drawn by and paid to the original administrator in his representative character, in the belief that it belonged to the estate. *Baring v. Putnam*, 1 Holmes (C. C.), 261.

On the same principle, an administrator who collects rents of his intestate's real estate without authority, and spends them as assets in paying the debts of the estate, may be held liable in his representative character to the party rightfully entitled. *Conger v. Atwood*, 28 Ohio St. 134, 140. See *Crowder v. Shackelford*, 35 Miss. 359; *Satterwhite v. Littlefield*, 13 S. & M. (Miss.) 302; *Terry v. Furguson's Admr.*, 8 Porter (Ala.), 500.

Where the defendant as administrator took possession of the plaintiff's property, and sold it as assets of the estate, it was held that a judgment for the value of the property was properly rendered against him in his representative character. *Simpson v. Snyder*, 54 Iowa, 557. But in *Daily's Admr. v. Daily*, 66 Ala. 266, it was said by *Stone*, J. (p. 269), "Such claim against an administrator in his representative capacity presents a solecism. If the chattels converted were the property of the plaintiff, then the appointment of the administrator gave him no authority over them. He was authorized to possess himself of the goods which were of the estate of his intestate. Such conversion would be the personal tort of the administrator, and he alone and personally would be responsible for such conversion. If the chattels belonged to the estate of the intestate, then neither the

b. Liability to the Estate. — (1) *Devastavit.* — *Standard of Responsibility in the Care, Custody, and Management of the Assets.* — *Liability for Loss.* — A *devastavit* may be defined to be such a wasting of the assets through the mismanagement, misconduct, or negligence of the executor or administrator in the performance of the duties of his office as will make him personally responsible (out of his own pocket) to the estate, to the extent to which he would have had assets, had the trust been properly administered.¹ Executors and administrators may be guilty of a *devastavit*, not only by direct acts of abuse or maladministration,² but by culpable negligence in the management of the estate.³ In the conduct

plaintiff nor any one else could maintain an action for their value."

At all events it seems clear that —

(1) There can be no recovery against the executor or administrator in his representative character unless the property or money has been appropriated to the use of the estate; and the burden of showing such appropriation rests on the plaintiff. *Clayton v. Boyce*, 62 Miss. 390. See *Call v. Houdlette*, 70 Me. 308.

(2) The action should be in contract for the value of the property taken or money received, and not in tort for the conversion. *Beck, J., in Simpson v. Snyder*, 54 Iowa, 557, 558. See *Thompson v. Canterbury*, 2 McCrary (C. C.), 332; *Baring v. Putnam*, 1 Holmes (C. C.), 261; *De Valengin's Admr. v. Duffy*, 14 Pet. (U. S. S. C.) 283, 290; *Conger v. Atwood*, 28 Ohio St. 134, 141.

(3) That the injured party may always elect to hold the representative personally liable; and, if he does so, the court will not substitute him as administrator. *Herd v. Herd* (Iowa), 32 N. W. Rep. 469.

1. It may also be defined to be "a mismanagement of the estate and effects of the deceased in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators shall answer out of their own pockets as far as they had, or might have had, assets of the deceased." *Bac. Abr. Exors. L. 1*; *Wms. Exrs. (7th Eng. ed.) 1796*; *Edmundson v. Roberts*, 2 How. (Miss.) 822.

An executor is personally liable in equity for all breaches of the ordinary trusts which, in courts of equity, are considered to arise from his office. Where a trust is annexed to the office of executor, an executor who proves the will is held to have accepted the trust. *Wms. Exrs. (7th Eng. ed.) 1796*. See *Armstrong v. Cooper*, 11 Ill. 560; *Buchanan v. Pue*, 6 Gill (Md.), 115; *Beall v. Hilliary*, 1 Md. 189; *Groton v. Ruggles*, 17 Me. 137; *Stiles v. Guy*, 4 Y. & Coll. (Eng.) 571, 575; *Williams v. Nixon*, 2 Beav. (Eng.) 472; *Worth v. M'Arden*, 1 Dev. & Bat. Eq. (N. C.) 199.

As to distinction between the offices of executor and trustee, see § XII. 2, c. As to when testamentary trust is to be considered annexed to the office of executor, see § XII. 2, c.

2. Instances of direct abuse are where an executor or administrator spends or consumes the assets, converts them to his own use, or applies them to the payment of his own debt to a third party. *Bac. Abr. Exors. L. 1*; *Camp v. Smith*, 68 N. C. 537; *Grant v. Bell*, 90 N. C. 558.

Paying debts out of legal order, making mispayments, paying legacies before debts, or applying the assets in undue funeral expenses, are instances of maladministration. *Moye v. Albritton*, 7 Ired. Eq. (N. C.) 62; *Place v. Oldham*, 10 B. Mon. (Ky.) 400; *Cobb v. Muzzey*, 13 Gray (Mass.), 58, 59. See *Hinton v. Kennedy*, 3 S. C. 459; *Nichols v. Shearon* (Ark.), 4 S. W. Rep. 167. See § XIV. 4, 5.

An administrator who delivers the property of the estate to the next of kin, leaving the debts unpaid, is guilty of a *devastavit*. *M'Nair v. Ragland*, 1 Dev. Ch. (N. C.) 516.

So where an executor pays over to the residuary legatee the yearly balances remaining after the payment of annuities given by the will, without making provision for future payments of the annuities, he will be held personally liable to the annuitants. *Stephenson v. Axson*, 1 Bailey, Eq. (Eng.) 274.

In *Wheatley v. Lane*, 1 Saund. (Eng.) 218, it was said that if an executor paid an inferior debt with his own money, though it be to the value of the testator's goods in his hands, it will not be a *devastavit*; for the property of the assets will not be changed thereby, but they remain as against a creditor of a superior degree in the same plight as they were before. See *Com. Dig. Admon. i. 2*.

As to effect of order of distribution and final discharge on executor's liability for mispayments, see § XVII. 6.

3. *Tedds v. Carpenter*, 1 Madd. (Eng.) 298; *Dean v. Rathbone*, 15 Ala. 328; *Harris v. Parker*, 41 Ala. 54.

of the business of the estate, the executor or administrator is bound to act in good faith, and to exercise such skill, prudence, and diligence as men ordinarily bestow upon their own affairs.¹ Thus, if the representative receives notes not shown to be desperate, and makes no effort to collect them,² or by his delay in com-

Although the general principle is, that the realty descends to the heir, and the executor has nothing to do with it, except in case of deficiency of assets, yet when, as matter of fact, he assumes control over it, and collects the rents, or when the will gives him authority to sell it, and he exercises the authority, he is liable on his bond as executor if he fails to account for the rents or for the proceeds of the sales. *Dix v. Morris*, 66 Mo. 514. *Compare* *Brigham v. Elwell*, 5 New Eng. Rep. 469, 2 Mass. (L. ed.) 855; *Haukins v. Kimball*, 57 Ind. 41; *Hartworth v. Fegan*, 3 Mo. App. 1; *Hooper v. Hooper's Exrs.* (W. Va.), 1 S. E. Rep. 280. See *ante*, § XII. 3, *e*.

Sections 118, 119, of N. J. Rev. 778, are intended to protect the estates of decedents from misapplication or waste by executors, etc., and, being remedial, must be liberally construed. *Perrine v. Petty*, 34 N. J. Eq. 193.

Completion of Executory Contracts.—See *ante*, 2, *b*, and *f*, *n*.

Paying Assessments.—When shares of stock are of market value, it is proper for the representative, in the exercise of a sound discretion, to pay the assessments and redeem them for the benefit of the estate. Otherwise if the shares are worthless. *Ripley v. Sampson*, 10 Pick. (Mass.) 373. See *Tuttle v. Robinson*, 33 N. H. 104; *Stow's Estate*, *Myrick* (Cal.), 97.

Taxes and Purchase-Money on Real Estate.—The value of real property lost to the estate by reason of the failure of the administrator to pay taxes and instalments of purchase-money and interest on school lands, held under a certificate of purchase, he having under his control sufficient money belonging to the estate to pay such taxes, instalments, and interest, is properly chargeable to him in his final account. *In re Herteman* (Cal.), 15 Pac. Rep. 121.

But in States in which the representative's title does not extend to the realty, it is not incumbent upon him to pay taxes accumulating after the death of the deceased, which he does not need for the payment of debts. *Reading v. Weir*, 29 Kan. 429. See *Thompson v. Thompson*, Mich. 587 (Ga.). *Compare* § XII. 3, *e*. **DEBTS OF DECEDENTS**, § 3, *p*. 256.

Redeeming Pledges.—An administrator may redeem pledged property of the estate without waiting for a claim to be presented, provided he is willing to take the risk that the debt will not exceed the value of the

property pledged. *Eidenmuller's Estate*, *Myrick's Probate* (Cal.), 87. See § XII. 3, *a*.

1. *Dean v. Rathbone*, 15 Ala. 328; *Harris v. Parker*, 41 Ala. 604; *Mikell v. Mikell*, 5 Rich. Eq. (S. C.) 220; *Twitty v. Houser*, 7 S. C. 153; *Estate of Bosie*, 2 Ashm. (Pa.) 437; *Rubottom v. Morrow*, 24 Ind. 202; *Whitney v. Peddiard*, 63 Ill. 249; *Stevens v. Gage*, 55 N. H. 175; *Upson v. Badeau*, 3 Bradf. Surr. (N. Y.) 13; *Eaves v. Hickson*, 30 Beav. (Eng.) 136; *Hopgood v. Packin*, Q. R. 11 Eq. (Eng.) 74; *Tedds v. Carpenter*, 1 Madd. (Eng.) 298.

Mr. Schouler is of opinion that in England he is only held to the standard of a gratuitous bailee, and slight diligence is all that can be required. This would seem to be undoubtedly true in regard to loss of assets of which the representative once had possession. *Wms. Exrs.* (7th Eng. ed.) 1857; *Job v. Job*, L. R. 6 Ch. D. 582.

In the *United States* he is generally allowed commissions for time and responsibility, and is held to the standard of a bailee for hire, as stated in the text. *Schoul. Exrs. & Admsrs.* § 315.

But if the representative can once establish that he has acted in good faith, he will not be charged with loss, except upon clear proof of his neglect of duty. *Nyce's Estate*, 5 Watts & S. (Pa.) 254; *Noble v. Jones*, 35 Tex. 692; *Williams v. Maitland*, 1 Ired. Eq. (N. C.) 92; *Deas v. Spann*, 1 Harp. Ch. (S. C.) 176; *Calhoun's Estate*, 6 Watts (Pa.), 185; *Voorhees v. Stoothoff*, 11 N. J. L. 145; *Dowd v. Sanders*, 1 Harp. Ch. (S. C.) 277; *Perry v. Maxwell*, 2 Dev. Ch. 488; *Whitter v. Webb*, 2 Dev. & Bat. Ch. (N. C.) 442; *Webb v. Bellinger*, 2 Desau. (S. C.) 482; *Huson v. Wallace*, 1 Rich. Ch. (S. C.) 1; *Cartwright v. Cartwright*, 4 Hayw. 134; *Strong v. Wilkison*, 14 Mo. 116; *Pitts v. Singleton*, 44 Ala. 363. See *Ormiston v. Olcott*, 84 N. Y. 339; *Gety's Estate*, 12 Phila. (Pa.) 143; *Lyell v. Hammond*, 2 Lea (Tenn.), 378; *Wayland v. Wayland*, 79 Va. 602; *Klein v. French*, 57 Miss. 662; *Cooper v. Cooper*, 77 Va. 198.

Errors of judgment not amounting to malfeasance are not sufficient cause for the removal of an administrator, or to authorize one of his sureties to withdraw from his bond. *Succession of Sparrow* (La.), 2 So. Rep. 501. See § XI. 6.

2. *Clark v. Holland*, 19 Beav. (Eng.) 271; *Lowson v. Copeland*, 2 Bro. C. C.

mencing suit enables the debtor to protect himself by the statute of limitations,¹ or allows the assets to remain outstanding, he is guilty

(Eng.) 156; Ratcliff v. Winch, 17 Beav. (Eng.) 217; Gates v. Whetstone, 8 S. C. 244; Schaffer's Estate, 46 Pa. St. 131; Cooley v. Van Syckle, 14 N. J. Eq. 496; Jennings v. Weeks, 1 Rice (S. C.), 453; Moore v. Beauchamp, 4 B. Mon. (Ky.) 71; Abercrombie v. Skinner, 42 Ala. 633; Stirling v. Wilkinson (Va.), 3 S. E. Rep. 533; Coco's Succession, 32 La Ann. 325; Sander-son v. Sanderson, 20 Fla. 292.

An executor holding a bond and mortgage of one who makes an assignment for the benefit of creditors is in *laches* in not presenting the claim on the bond to assignee. Wilson v. Staats, 33 N. J. Eq. 524.

An administrator is not excused from liability for his failure to bring suit on a promissory note due the estate, where the debtor had unincumbered property to more than the amount of the note, by the fact that the debtor was largely indebted in excess of his property, and other prudent creditors had not brought suit. — Munden v. Bailey, 70 Ala. 63, — nor for failing to collect claims due the estate in the State where he was appointed, by the fact that there was another administrator first appointed in the State of the domicile. State v. Gregory, 88 Ind. 110.

Under what circumstances it is negligence not to take out letters in an adjoining county to collect debt of non-resident. Williams v. Williams, 79 N. C. 417.

An administrator who is debtor to the intestate individually or as surviving co-partner is chargeable as administrator with the amount of the debt; and the statute of limitations will not protect him against accounting for it, so long as he remains accountable for assets generally. Thompson v. Thompson (Ga.), 3 S. E. Rep. 26. See Hellman v. Wellenkamp, 71 Me. 407.

An executor is responsible for a debt due the testator's estate, where it appears that the debtor occupied intimate family relations with him, and was engaged in business for some time, during which no steps were taken to collect the same, and no excuse given for the neglect. Wilson v. Lineberger, 88 N. C. 416.

But the representative is liable for loss by the insolvency of the debtor only when he has failed to exercise the same care that a prudent man would exercise in the conduct of his own affairs. Glover v. Glover, 1 McMullan, Ch. (S. C.) 153; O'Dell v. Young, 1 McMullan, 155; Bryant v. Russell, 23 Pick. (Mass.) 566; Traddell's Appeal, 5 Pa. St. 15; Sollee v. Croft, 7 Rich. Eq. (S. C.) 46; Neff's Appeal, 57 Pa. St. 91; Gray v. Lynch, 8 Gill, 403; Travease

v. Ball, 1 McCord, 456; Campbell v. Miller, 38 Ga. 304; King v. King, 15 Ala. 328; Rayner v. Pearsall, 3 John. Ch. (N. Y.) 578; Dean v. Rathbone, 15 Ala. 328; Browne v. Montgomery, 48 Ala. 353; Anderson v. Piercy, 20 W. Va. 282; Julian v. Abbott, 73 Mo. 580; James v. Wingo, 7 Lea (Tenn.), 148.

For an instance of gross business in competence, see Davis v. Chapman (Va.), 1 S. E. Rep. 472.

An administrator who has promptly reduced a claim to judgment, and had repeated returns of *nulla bona*, may treat the claim as worthless if he has no reasonable grounds to suspect that the debtor had made a fraudulent conveyance before the judgment. Without such grounds, he is not liable for a failure to enroll the judgment in the county where the property alleged to have been so conveyed lies. Conwill v. Livingston, 61 Miss. 641.

When the evidence shows that the representative has made an honest effort to protect the interest of the succession and heirs, the maxim *contra spoliatores omnia presumuntur* does not apply. Stafford v. Succession of McIntosh (La.), 2 So. Rep. 596.

It has been held that an executor or administrator is not bound to attempt the collection of bad or doubtful claims; and if he can prove that proper measures to obtain payment would have failed, he will be exonerated. Succession of Pool, 14 La. Ann. 677; Sanborn v. Goodhue, 28 N. H. 48; Griswold v. Chandler, 5 N. H. 492; Cook v. Cook, 29 Md. 538; Bowen v. Montgomery, 48 Ala. 353; Hepburn v. Hepburn, 2 Bradf. Sur. (N. Y.) 74; Romily, M. R., in Clark v. Hoiland, 19 Beav. (Eng.) 271, 272; Stiles v. Guy, 16 Sim. (Eng.) 230. See Mitchell v. Trotter, 7 Gratt. (Va.) 136; Nelson v. Page, 7 Gratt. (Va.) 160; Lowson v. Copeland, 2 Bro. C. C. (Eng.) 156; Ivey v. Coleman, 42 Ala. 409; Miller's Exrs. v. Simpson, 2 S. W. Rep. 171; Smith v. Collamer, 2 Dem. (N. Y.) 147.

Particularly is this true if prudence required that the debtor should be nursed. Turner v. Bennett, 33 Gratt. (Va.) 251.

But the burden rests on the administrator to show that the debt was uncollectable. Turbeville v. Flowers, (S. C.) 3 S. E. Rep. 542.

Before an executor or administrator should be charged with uncollected debts, marked by the appraisers on the inventory as good, there should be some proof of collection or of negligence in failing to collect. Tompkins v. Tompkins, 18 S. C. 1.

1. Holt, C. J., in Hayward v. Kinsey, 12

of a *devastavit*.¹ So, an executor or administrator who allows interest-bearing debts to run on after they have become payable when he has sufficient funds in hand to discharge them, commits a *devastavit* as to the accrument, unless he can show that the assets were insufficient to discharge the debt immediately.² The principle is further illustrated in getting a fraudulent transfer by his decedent set aside,³ in selling or transferring the assets, in resisting unnecessary⁴

Mod. (Eng.) 573; *In re Sanderson* (Cal.), 13 Pac. Rep. 497; *Booker v. Armstrong* (Mo.), 4 S. W. Rep. 727. But see *East v. East*, 5 Hare (Eng.), 348; *Thomas v. White*, 3 Litt. (Ky.) 177.

Where for more than three years the executors allowed money to remain due on bond to their testator, without inquiring into the circumstances and condition of the obligor, or calling upon him for payment, on the bankruptcy of the obligor it was held that they were liable. *Powell v. Evans*, 5 V. es. (Eng.) 832. See also *Atty.-Gen. v. Higham*, 2 Y. & Coll. C. C. (Eng.) 634; *Long's Estate*, 6 Watts (Pa.), 46; *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540; *Cartwright v. Cartwright*, 4 Hayw. (Tenn.) 134; *Schultz v. Pulver*, 11 Wend. (N. Y.) 361; *Slack v. Hernton*, 2 Green, Ch. 301.

On the other hand, he is not chargeable for not suing upon a note immediately when the maker continued in good credit. *Keller's Appeal*, 8 Pa. St. 288. See *Neff's Appeal*, 57 Pa. St. 41; *Kee v. Kee*, 2 Gratt. (Va.) 116; *Mikell v. Mikell*, 5 Rich. (S. C.) Eq. 220; *Cook v. Cook*, 29 Md. 538; *Deas v. Span*, 1 Harper (S. C.), 176; *Ruggles v. Sherman*, 44 John. (N. Y.) 446; *Hartsfield v. Allen*, 7 Jones, L. (N. C.) 439; *Rubottom v. Morrow*, 24 Ind. 202; *Patterson v. Wadsworth*, 89 N. C. 407.

As to subjecting the estate to the liability of a surety or indorser where there was a principal debtor to pursue, *Tuggle v. Gilbert*, 1 Duv. 340; *Atley v. Rawlins*, 2 Dev. & B. Eq. (N. C.) 438; *Chambers's Appeal*, 11 Pa. St. 288.

An executor is not liable for indulging a debtor with acquiescence of the distributees. *Perry v. Wooton*, 5 Humph. (Tenn.) 506.

But he cannot delay taking measures for the collection of a debt until requested by the distributees. *Harrington v. Keteltas*, 92 N. Y. 60.

An executor who has been guilty of gross negligence or wilful default in failing to collect a debt, will be charged with the debt, and sometimes with interest. *Oglesby v. Howard*, 43 Ala. 144; *Southall v. Taylor*, 14 Gratt. (Va.) 49; *Charlton's Est.*, 34 Pa. St. 473; *Holamb v. Holamb*, 11 N. J. Eq. 281; *Smith v. Hurd*, 8 Sm. & M. (Miss.) 682; *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540; *Brandon v. Judah*, 7

Ind. 545; *Schultz v. Pulver*, 3 Paige (N. Y.), 182.

Failure to collect debts as they become due, or collecting them in illegal or worthless funds, has been held good ground for removal. *Oglesby v. Howard*, 43 Ala. 144. See *Moore's Estate*, 1 Tuck. (N. Y. Sur.) 41.

1. *Styles v. Guy*, 1 Mac. & G. (Eng.) 422; s. c., 4 Y. & Coll. (Eng.) 571; *Dix v. Burford*, 19 Beav. (Eng.) 409. Compare *Padon v. Richardson*, 7 DeG. M. & G. (Eng.) 563. See *Willis v. Willis*, 16 Ala. 652.

2. *Hall v. Hallett*, 1 Cox, 134, 138; *Dornford v. Dornford*, 12 Ves. (Eng.) 130 (2d ed.); n. 29; *Seaman v. Everard*, 2 Lev. (Eng.) 40; *Com. Dig. Admon. I. 1*; *Bac. Abr. Exors. L. 1*; *Bate v. Robbins*, 32 Beav. (Eng.) 73; *Forward v. Forward*, 6 Allen (Mass.), 494, 499.

But under the English practice, where there is a sufficiency of assets for the payment of debts, executors may pay simple contract debts not bearing interest, before specialty debts bearing interest, if not objected to by specialty creditors, and legatees can make no objection. *Turner v. Turner*, 1 Jac. & W. (Eng.) 39.

An executor who neglects to save the penalty of a bond by performing the condition, is guilty of a *devastavit* if he have assets. 1 Saund. 333 a, n. (7), to *Hancock v. Prowd*.

3. *Danzey v. Smith*, 4 Tex. 411; *McLandon v. Woodward*, 25 Ga. 252; *ante*, § XII. 3, a.

The representative is chargeable with the value of personal property belonging to the estate and lost through his negligence, although it never came into his possession, unless he was excusably ignorant of its existence. *Tuttle v. Robinson*, 33 N. H. 104; *Jones v. Wara*, 10 Yerg. (Tenn.) 160. See § XII. 3, a, n.

Though an illegal bailment by the executor or administrator cannot be avoided by him, he may recover the property after it has expired. *English v. McNair*, 34 Ala. 40.

4. *Fry v. Fry*, 27 Beav. (Eng.) 144; *Selby v. Bowie*, 4 Giff. (Eng.) 300; *Dugan v. Hollins*, 11 Md. 41; *Griswold v. Chandler*, 5 N. H. 492; *Smith v. Ayer*, 101 U. S. 320.

Thus an executor who has a lease for years determinable upon a life, will be

payments,¹ in accounting with the probate court for the due performance of his duties,² and in the conduct of a successor in investigating the acts and conduct of his predecessor.³ It is incumbent upon him to collect dividends, interest, and income upon invested funds not lying idle, with the same care, diligence, prudence, and good faith as apply to collecting the principal of the assets.⁴

(2) *Loss by Casualty.*—*Failure of Banker.*—*Loss caused by Attorney or Agent, or by following Erroneous Advice of Counsel.*—In equity, an executor or administrator is not chargeable with loss by casualty, as by theft, robbery, or accidental fire, to which his own negligence or bad faith in no way contributed.⁵ Nor will he

liable for its value at the death of the testator, if he neglects to sell until the life falls in. *Phillips v. Phillips*, 2 Freem. (Eng.) 12; *Taylor v. Tabrum*, 7 Sim. (Eng.) 28.

The same principle applies to sales of perishable goods. Lord Wensleydale in *Wightwick v. Lord*, 6 H. L. Cas. (Eng.) 234, 235; *Whitley v. Alexander*, 73 N. C. 444.

On the other hand, a sale of a bond belonging to the estate at a large discount, when the circumstances of the estate do not require it, will charge the representative with the loss. *Pinchard v. Woods*, 8 Gratt. (Va.) 140.

An administrator who sells bonds of a foreign corporation, which were not collectible without considerable delay and expense, to pay off a debt of the estate, is not liable for more than he received. *Trevelyan's Admr. v. Lofft* (Va.), 1 S. E. Rep. 901.

Under Code Civil Proc. Cal. §§ 1613, 1614, providing that an executor shall be charged with the whole of the estate at the appraised value, and with the interests and profits thereof, and any access at which he sells it, an executor who sells stock at more than the appraised value is liable for the price received and interest. *In re Radovich's Est.* (Cal.), 16 Pac. Rep. 321.

Where the executor *collusively* sells the testator's goods at an under value, when he might have obtained a higher price for them, it is a *devastavit*, and he shall answer the real value. Went. Off. Ex. (14th ed.) 302; *Rice v. Gordon*, 11 Beav. (Eng.) 265; *Matter of Saltus*, 3 Abb. (N. Y.) App. Dec. 243; *Pinchard v. Woods*, 8 Gratt. (Va.) 140.

If an administrator sells property on which he has no right to administer, and buys it in himself, through a third person, he is not entitled, like a *bona fide* purchaser, to be allowed for the improvements afterwards made by him, except as a set-off against *mesne* profits. *Houston v. Bryan* (Ga.), 1 S. E. Rep. 252.

An administrator or guardian who from improper motives procures an advantageous sale of the property of his distributees or wards, to be set aside for technical reasons avoiding it against the will of the purchaser, and procures re-sale at a loss, will be held to make up the loss. *Mountcastle v. Mills*, 11 Heisk. (Tenn.) 267.

An executor is liable on his bond to devisee whose land has been sold under a license obtained by a false representation of the insufficiency of the personality. *Chapin v. Waters*, 110 Mass. 195. See also *Tisomingo Sav. Inst. v. Duke* (Miss.), 1 So. Rep. 165; *Debts of Decedents*, § 4, pp. 269-279.

1. *Smith v. Cuyler* (Ga.), 3 S. E. Rep. 406.

For any injury to the beneficiaries from a failure to resist unjust or unfounded claims, he is liable upon his bond. *Smith v. Cuyler* (Ga.), 3 S. E. Rep. 406. See § XI. 7.

An administrator cannot be held liable for not paying a judgment more than seven years old, which has not been revived. *Groves v. Williams*, 68 Ga. 598.

An administrator having paid an allowance made by the court for the widow and minor children, in preference to a creditor's claim (previously allowed, but not paid, because the claimant was a minor), is not shown to be in fault in so doing by the fact that the widow's application for allowance came too late, if nothing is shown as to whether, or to what extent, the administrator resisted the application. *Buttschaw v. Miller* (Iowa), 33 N. W. Rep. 642.

2. *Kee v. Kee*, 2 Gratt. (Va.) 116; *post*, § XVII.

3. *Cock v. Carson*, 38 Tex. 284. See *Williams v. Williams*, 79 N. C. 417; *Grant v. Reese*, 94 N. C. 720.

4. *Ray v. Doughty*, 4 Blackf. (Ind.) 115; *Dortch v. Dortch*, 71 N. C. 224.

5. *Croft v. Lyndsay*, 2 Freem. (Eng.) 1; *Jones v. Lewis*, 2 Ves. Sen. 240; *Lord Eldon in Massey v. Banner*, 1 Jac. & W.

be charged with losses caused by the failure of his banker,¹ or the embezzlement, misconduct, or insolvency of his attorney² or agent,³ where the employment of such banker, attorney, or agent was necessary to the proper conduct of the estate, and in accordance with the ordinary course of business, if he has acted in good faith, and been guilty of no negligence in employing the particular individual.⁴

(Eng.) 248; *Stevens v. Gage*, 55 N. H. 175; 2 Cent. Law Jur. 589. See *State v. Meagher*, 44 Mo. 356; *Fudge v. Dam*, 51 Mo. 264; *Farnam v. Coe*, 1 Caines, 96; *Campbell v. Miller*, 38 Ga. 304; *Mikell v. Mikell*, 5 Rich. Eq. (S. C.) 220; *Rubottom v. Morrow*, 24 Ind. 202; *Estate of Secondo Bossio*, 2 Ashm. (Pa.) 437; *Neff's Appeal*, 57 Pa. St. 91; *Stirling v. Lawrason*, 31 La. An. 169.

Formerly it was held otherwise at common law. See *Lord Ellenborough in Crosse v. Smith*, 7 East (Eng.), 258. Compare (7), *post*.

An administrator must adopt such precautions against loss, and exercise such forethought for the security of property which comes into his care, as ordinarily prudent men are accustomed to employ in regard to their own property. Where there is evidence tending to show a want of such care and prudence on his part, the Supreme Court will not reverse a judgment against him on the mere weight of the evidence. *Cooper v. Williams* (Ind.), 9 N. E. Rep. 917; *Rice's Estate*, 14 Phila. (Pa.) 325.

Insurance.—It seems that it is not incumbent upon the personal representative to insure, or continue the insurance, of his decedent. *Bailey v. Gould*, 4 Y. & Coll. (Eng.) 221; *Dorch v. Dorch*, 71 N. C. 224.

The burden of proof is on those charging an executor with negligence in not insuring the assets. *Johnson's Estate*, 11 Phila. (Pa.) 83.

But assessments for losses, happening after the death of the intestate, and paid by the administrator, to continue the policy, will be allowed. *Tuttle v. Robinson*, 33 N. H. 104, 114.

The death of the assured intestate is not an alienation within the meaning of a clause in the charter providing that if the property assured should be alienated by sale or otherwise, the policy should become void. *Burbank v. Rock. Mut. F. Ins. Co.*, 4 Foster (N. H.), 550.

Confederate Money and Confederate Bonds.—Many of the principles governing the liability of an executor or administrator for loss by casualty are well illustrated by cases as to the liability of an executor or administrator for receiving Confederate money during the civil war, and investing assets in Confederate bonds. See *Tomp-*

kins v. Tompkins, 18 S. C. 1; *Robertson v. Trigg*, 32 Gratt. (Va.) 76; *Douglass v. Stephenson*, 75 Va. 747; *Le Grand v. Fitch*, 76 Va. 635; *Wayland v. Crank*, 79 Va. 602; *Lipse v. Spear*, 4 Hughes (C. Ct.), 535; *Moffit v. Loughridge*, 51 Miss. 211; *Wilson v. Powell*, 75 N. Car. 468; *Cabell v. Cox*, 27 Gratt. (Va.) 182; *Tosh v. Robertson*, 27 Gratt. (Va.) 270; *Young v. Cabell*, 27 Gratt. (Va.) 761; *Mills v. Mills*, 28 Gratt. (Va.) 442; *Dietz v. Mitchell*, 12 Heisk. (Tenn.) 676; *Estill v. McClintie*, 11 W. Va. 399; *Succession of Womack*, 29 La. An. 577; *Brandon v. Rowe*, 58 Ga. 536; *Lingle v. Cook*, 32 Gratt. (Va.) 262; *Patterson v. Bondurat*, 30 Gratt. (Va.) 94; *Stewart v. Lee*, 56 Ala. 53; *Hutchinson v. Owen*, 59 Ala. 582; *Carter v. Dulaney*, 30 Gratt. (Va.) 192; *Rockhold v. Blevins*, 6 Baxter (Tenn.), 715; *West v. Canthen*, 9 S. C. 45; *Ferguson v. Epes*, 77 Va. 499; *Sharpe v. Rockwood*, 78 Va. 24.

1. *Lord Cottenham in Clough v. Bond*, 3 My. & Cr. (Eng.) 496; *Wms. Exrs.* (7th Eng. ed.) 1817-1820; *Churchill v. Hobson*, 1 P. Wms. (Eng.) 1818; *Knight v. Lord Plymouth*, 3 Atk. (Eng.) 486; s. c., 1 Dick. (Eng.) 120; *Adams v. Claxton*, 6 Ves. (Eng.) 26; *Swinfen v. Swinfen*, 29 Beav. (Eng.) 211; *Johnson v. Newton*, 11 Hare (Eng.), 160; *Mendes v. Guedalla*, 2 Johns. & H. (Eng.) 259; *Fenwicke v. Clarke*, 31 L. J. Ch. (Eng.) 728; *Norwood v. Harness*, 98 Ind. 134; s. c., 49 Am. Rep. 739; *Twitty v. Houser*, 7 S. C. 153; *Jacobus v. Jacobus*, 37 N. J. Eq. 17.

Local statutes requiring funds collected by fiduciaries, to be deposited in particular banks, or after a particular manner, must be followed. *Livermore v. Wortman*, 25 Hun (N. Y.), 341; *Ex parte Shipley*, 4 Md. 493; *Succession of Pasquier*, 11 La. An. 279; *Reed v. Crockett*, 12 La. An. 445.

Under the Maryland statute, if the deposit is made without an order of the Orphans' Court, the representative is liable. *Bacon v. Howard*, 20 Md. 191.

2. *Bacon v. Bacon*, 5 Ves. (Eng.) 334, 335; *Castle v. Warland*, 32 Beav. (Eng.) 660; *Rayner v. Pearsall*, 3 John. Ch. (N. Y.) 578; *Calhoun's Estate*, 6 Watts (Pa.), 185.

3. *Edmond v. Peake*, 70 Beav. (Eng.) 239; *Christy v. McBride*, 2 Ill. 75; *Julian v. Abbott*, 73 Mo. 580.

4. *Lord Cottenham in Clough v. Bond*,

3 My. & Cr. (Eng.) 496; Wms. Exrs. (7th Eng. ed.) 1817-1820. See also *Wren v. Kirton*, 11 Ves. (Eng.) 377; *Massey v. Banner*, 4 Madd. (Eng.) 413; *Robinson v. Ward, Ry. & Mood*. (Eng.) 274; s. c., 2 C. & P. (Eng.) 59; *Bacon v. Bacon*, 5 Ves. (Eng.) 335; *Telford v. Barry*, 1 Iowa, 591; *Calhoun's Estate*, 6 Watts (Pa.), 185; *Blight v. Schenck*, 10 Pa. St. 285; *Hawley v. James*, 5 Paige (N. Y.), 187; *Lewis v. Reed*, 11 Ind. 239; *Case v. Abeel*, 1 Paige (N. Y.), 393; *Kellett v. Rathbun*, 4 Paige (N. Y.), 102; *Watson v. Stone*, 40 Ala. 451; *Dockey v. McDonald*, 40 Ala. 476; *Neilson v. Cook*, 40 Ala. 498. Compare *Lyon v. Lyon*, 1 Tenn. Ch. 225; *Succession of Baum*, 9 La. An. 412; *Marshall v. Moore*, 27 B. Mon. (Ky.) 69; *Green v. Hanbury*, 2 Brock. (C. C.) 403.

"Necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing, possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator." *Lord Cottenham in Clough v. Bond*, 3 My. & Cr. (Eng.) 496. See *Langford v. Gascoyne*, 11 Ves. (Eng.) 333; *Trutch v. Lamprell*, 20 Beav. (Eng.) 116; *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *Julian v. Abbott*, 73 Mo. 580; *McCloskey v. Gleason*, 5 Vt. 264; s. c., 48 Am. Rep. 770.

See the principle applied as to co-executors. *Chandler v. Tillett*, 22 Beav. (Eng.) 257; *Hewitt v. Foster*, 6 Beav. (Eng.) 259; *Broadhurst v. Balguy*, 1 Y. & Coll. C. C. (Eng.) 16; *Edmonds v. Crenshaw*, 14 Pet. (U. S.) 166; *Hall v. Carter*, 8 Ga. 383; *Mesick v. Mesick*, 7 Barb. (N. Y.) 120; *Clark v. Clark*, 8 Paige (N. Y.), 153; *Schenck v. Schenck*, 1 Green. (N. J.) 174; *Wayman v. Jones*, 4 Md. Ch. 500; *Stewart v. Conner*, 9 Ala. 803; *Ducommon's Appeal*, 17 Pa. St. 268; *McNair's Appeal*, 4 Rawle (Pa.), 154; *Monell v. Monell*, 5 John. Ch. (N. Y.) 283, 296; *Ames v. Armstrong*, 106 Mass. 18; *Deaderick v. Canttiell*, 10 Yerg. (Tenn.) 254; *Thomas v. Scruggs*, 10 Yerg. (Tenn.) 401; *Jones' Appeal*, 8 Watts & S. (Pa.) 147; *Maccubbin v. Cromwell*, 7 Gill & J. (Md.) 157; *Barrings v. Willing*, 4 Wash. (C. C.) 251.

Executors have been held liable for loss by failure of a bank, where no necessity has been shown for making the deposit, or they have made the deposit on their own account, and mixed the money with their own funds. *Darke v. Martyn*, 1 Beav. (Eng.) 525; *Rehden v. Westley*, 29 Beav. (Eng.) 213; *Wren v. Kirton*, 11 Ves. (Eng.) 377; *Robinson v. Ward, Ry. & Mood*. (Eng.) 274; s. c., 2 C. & R. 59; *Case v. Abeel*, 1 Paige (N. Y.), 393; *Kellett v.*

Rathbun, 4 Paige (N. Y.), 102. As to mingling trust and individual funds, see *post*.

An administrator who has been unnecessarily dilatory in the settlement of the estate, has been held liable for the loss of a deposit, by the failure of a broker, although the deposit was made in the ordinary course of business, and the broker in good credit at the time; for the necessity for making the deposit was occasioned by his negligence in making the settlement. *Wood v. Myrick*, 17 Minn. 408.

Where an executor, instead of using cash on hand to pay debts, deposits the cash in bank, and uses his own money to pay the debts, and the bank fails, the executor must bear the loss. *Guthrie v. Wheeler*, 51 Conn. 207.

So it has been held that trustees who deposited trust funds with a banker for investment, and allowed the fund to remain in their hands for five months without inquiring whether they had made the investment, at the end of which time the bankers became bankrupt, were liable. *Challen v. Shippam*, 4 Hare (Eng.), 555.

Where trustees for sale sold the trust property, and placed the conveyance executed by them, and had their receipt indorsed in the hand of a solicitor who received and misapplied the purchase money, or where trustees left exchequer bills in which they had properly invested trust funds in the hands of a broker, they were held personally liable. *Ghost v. Waller*, 9 Beav. (Eng.) 497; *Matthews v. Brise*, 6 Beav. (Eng.) 239. See *Bostock v. Floyer*, L. R. 1 Eq. (Eng.) 26; *Sutton v. Wilders*, L. R. 12 Eq. Cas. (Eng.) 373; *Rowland v. Witherden*, 3 Mac. & G. (Eng.) 568.

Upon the same principle, the personal representative is not chargeable with debts lost in pursuing remedies where he acts in good faith and under the advice of competent counsel. *King v. Morrison*, 1 Pen. & W. (Pa.) 188; *James v. Wings*, 7 Lea (Tenn.), 148; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619.

Otherwise, as to money lost through the negligence of a solicitor in investigating a title. *Hopgood v. Parkin*, L. R. 11 Eq. (Eng.) 74, per Romilly, M. R. But see *Calhoun's Estate*, 6 Watts (Pa.), 185, 189.

An executor has been held liable for acts done under the advice of counsel. *Doyle v. Blake*, 2 Sch. & Lef. (Eng.) 243; *Veaz v. Emery*, 5 Ves. (Eng.) 141; *Wyman's Appeal*, 13 N. H. 18. But see *In re Sanderson* (Cal.), 13 Pac. Rep. 497; *Perring v. Vreeland*, 33 N. J. Eq. 102.

It is culpable negligence to employ as agent one manifestly incompetent to attend to the business when the estate could have paid for a competent person. *Wakeman v. Hazleton*, 3 Barb. Ch. (N. Y.) 148. See *Marshall v. Moore*, 2 B. Mon. (Ky.) 69.

(3) *Investments. — Depreciation of Securities. — Effect of Direction in Will upon Representative's Liability.* — Although a personal representative acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, and a loss be thereby sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive.¹ In England and most of the States an executor or administrator, in the exercise of due care and diligence, may with perfect safety invest the money of the estate upon good real security;² but if, without an order of court,³ he lends the money of his decedent upon bond

Executors are not responsible for the negligence of an attorney selected to conduct the suit by the testator in his lifetime. They are justified in trusting one in whom the testator reposed confidence. *Calhoun's Est.* 6 Watts. See *Churchill v. Hobson*, 1 P. Wms. (Eng.) 343. See principle applied as to allowing deposits to remain with testator's banker. *Routh v. Howell*, 3 Ves. (Eng.) 567.

As to paying money to a co-executor. *Joy v. Campbell*, 1 Sch. & Lef. (Eng.) 341.

But where the testator directs in the will that a particular individual shall be employed as agent for a particular purpose, the executors are not warranted by the confidence thus reposed by the testator in employing him for another and different purpose. Thus, a direction that E. P. shall carry on the testator's business, does not warrant the executors in allowing him to get in the outstanding debts. *Pister v. Dunbar*, 1 Anstr. (Eng.) 107.

At Common Law. — "Generally speaking," at common law, "if an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually received it, and will be assets in his hands; and consequently, appointing another to receive it who will not repay, is a *devastavit*." Wms. Exrs. (7th Eng. ed.) 1817; *Jenkins v. Plombe*, 6 Mod. (Eng.) 93. But the rule has been modified in equity, as stated in the text. By stats. 22 & 23 Vict. c. 35, § 28, the rule at law is made to conform to the rule already established in equity.

1. *Lord Cottenham in Clough v. Bond*, 3 My. & Cr. (Eng.) 496.

2. *Brown v. Litton*, 1 P. Wms. (Eng.) 141; *Norbury v. Norbury*, 4 Madd. (Eng.) 191; *Wilson v. Stats*, 33 N. J. Eq. 524.

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But see *Garesche v. Priest*, 9 Mo. App. 270.

Usually only what are called first-class mortgages, or mortgages the value of whose security is considerably larger than the loan, should be taken. *Brown v. Litton*, 1 P. Wms. (Eng.) 141; *Stickney v. Sewell*, 1 M. & Cr. (Eng.) 8; *Ingle v. Partridge*, 34 Beav. (Eng.) 411; *McLeod v. Annesley*, 16 Beav. (Eng.) 600; *Phillipson v. Gatty*, 7 Hare (Eng.), 516; *Farrar v. Baraclough*, 2 Sm. & G. (Eng.) 231, 235; *Bogart v. Van Velsor*, 4 Edw. Ch. (N. Y.) 718; *Wilson v. Stats*, 33 N. J. Eq. 524.

The mere fact that the executor invested the fund after it became payable by the terms of the will, does not render him liable for subsequent depreciation, provided the investment was made in good faith upon real security, which was ample at the time it was made. *Perrine v. Vreeland*, 33 N. J. Eq. 102, 596. Nor will the fact that he released one mortgage at the solicitation of the mortgagor and a prospective purchaser, and accepted another upon lands which, though of less value, afforded ample security at the time, render him chargeable with the loss of the debt through the subsequent depreciation of the land. *Baldwin v. Hatchett*, 56 Ala. 461. See *Mosman v. Bender*, 80 Mo. 579.

An investment by a trustee or executor of trust funds upon real security outside the State is generally improper, and should never be made unless in the presence of a clear and strong necessity, or a very pressing emergency. *Finch, J.*, in *Ormiston v. Olcott*, 84 N. Y. 339. But a purchase-money mortgage upon lands outside the State, which were sold by the executors, is within the exception. *Denton v. Sanford*, 9 (N. Y.) N. E. Rep. 490, 492.

3. But where the act authorizing the

or promissory note, or invests it in any other form of personal security not expressly authorized by statute, he will be chargeable with any loss sustained.¹ Where, as in some States, no restric-

investment is unconstitutional, an order of court affords no protection. *Horn v. Lockhart*, 17 Wal. (U. S.) 570. See *Sharpe v. Rockwood*, 78 Va. 24; *Ferguson v. Epes*, 77 Va. 499.

1. Wms. Exrs. (7th Eng. ed.) 1809; *Terry v. Terry*, Prec. Chanc. (Eng.) 273; s. c., *Gillb. Eq. Rep.* 10; *Ryder v. Bickerton*, 3 Swanst. 80, note; *Adye v. Feuilletau*, 1 Cox (Eng.), 24; s. c., 3 Swanst. (Eng.) 84. • *Vigrass v. Binfield*, 3 Madd. (Eng.) 62; *Bacon v. Clark*, 3 My. & Cr. (Eng.) 294. See *Moore v. Hamilton*, 4 Fla. 712; *Moore v. Felkel*, 7 Fla. 44; *King v. King*, 3 John. Ch. (N. Y.) 552; *Davis v. Yerby*, 1 Sm. & M. Ch. (Miss.) 508; *King v. Talbot*, 40 N. Y. 77; *Tucker v. Tucker*, 33 N. J. Eq. 235; *Crane v. Howell*, 35 N. J. Eq. 374; *Lefever v. Hasbrouck*, 2 Dem. (N. Y.) 567; *Nyce's Estate*, 5 W. & S. (Pa.) 254, 258; *Sullivan v. Howard*, 20 Md. 194; *Johnson's Appeal*, 43 Pa. St. 471; *Wilson's Appeal* (Pa.), 9 Atl. Rep. 473. Compare *Brown v. Campbell*, Hopk. (N. Y.) Ch. 233; *State v. Johnson*, 7 Blackf. (Ind.) 529; *Tomkies v. Reynold*, 17 Ala. 109; *Garesche v. Priest*, 78 Mo. 126; s. c., 9 Mo. App. 270; *Moyer v. Petway*, 76 N. C. 327; *Bohde v. Bruner*, 2 Redf. (N. Y.) 333; *Matter of Mount*, 2 Redf. (N. Y.) 405; *Sherin v. Public Admr.*, 2 Redf. (N. Y.) 421; *Marsh v. Gilbert*, 2 Redf. (N. Y.) 465; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349.

Under stats. 22 & 23 Vict. c. 35, § 32; 23 & 24 Vict. c. 38, § 12, the choice of investments is extended to real securities in any part of the United Kingdom, East-India stock, and national bank stock.

In Massachusetts, an investment upon good personal security will not charge the trustee. *Lovell v. Minot*, 20 Pick. (Mass.) 119.

Under Mass. St. 1873, c. 224, § 1, the probate court may direct the investment of money belonging to the estate in securities approved by the judge. So in New Jersey. *Tucker v. Tucker*, 33 N. J. Eq. 235. See *Sullivan v. Howard*, 20 Md. 194.

An administrator who loans money of the estate upon an unsecured note commits a *devastavit*. *Thornton v. Smiley*, Bresse (Ill.), 14; *Johnston v. Maples*, 49 Ill. 101; *Lacey v. Stamper*, 27 Gratt. (Va.) 42; *King v. John*, 3 John. Ch. (N. Y.) 552; *Davis v. Yerby*, 1 Sm. & M. Ch. 508. See *Wells v. Grigsby*, 42 Ala. 473; *Judge v. Mathews*, 60 N. H. 433. *Contra*, *Pope v. Mathews*, 18 S. Car. 444.

Municipal bonds and bank stock cannot be taken without permission of the court. *Tucker v. Tucker*, 33 N. J. Eq. 235; *Bohde*

v. Bruner, 2 Redf. (N. Y.) 333; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349, 358. See *Woodruff v. Ward*, 35 N. J. Eq. 467.

Investments made by an executor voluntarily, which, on application of the legatees, the court would have compelled him to make, will be protected. *Bodley v. McKenney*, 9 Sm. & M. (Miss.) 339; *Howe v. Earl of Dartmouth*, 7 Ves. (Eng.) 150.

• **Government Securities.**—In England, it is held that if an executor invests unemploy money of the testator in three per cent consols, he is not liable for a fall in stocks, since the court of chancery would, if applied to, have directed the investment. *Holland v. Hughes*, 16 Ves. (Eng.) 114; *Norbury v. Norbury*, 4 Madd. (Eng.) 191; *Howe v. Lord Dartmouth*, 7 Ves. (Eng.) 150.

But if he invests in any other fund which afterwards falls in value, he will be liable for the loss occasioned by his buying the other stock instead of the three per cents. *Gordon v. Bowden*, 6 Madd. (Eng.) 342; *Hynes v. Redington*, 1 Jones & Lat. (Eng.) 589. *See *Ex parte Champion*, cited in *Hutcheson v. Hammond*, 3 Bro. C. C. (Eng.) 147; *Fonbli. Eq. bk.* 2, c. 7, sect. 6, note (1).

In the United States, government securities have been by no means so highly favored. The national government itself can make no directions for investment, and State securities have not in all instances been a judicious investment for trust moneys. *Perry v. Stout*, 23 Gratt. (Va.) 241; *Horn v. Lockhart*, 17 Wall. (U. S.) 570. But see *King v. Talbot*, 40 N. Y. 77.

In general it may be stated that the valid act of a State legislature authorizing investments to be made in specified securities, should shield the personal representative who in good faith, and not carelessly, invests accordingly. See the principle applied as to Confederate securities, *Trotter v. Trotter*, 40 Miss. 704; *Manning v. Manning*, 12 Rich. Eq. (S. C.) 410; *Leake v. Leake*, 75 Va. 992.

But an act of a State legislature authorizing the investment of trust funds in confederate bonds is held to be unconstitutional and void by the courts of the United States. *Horn v. Lockhart*, 17 Wal. (U. S.) 570. See *Copeland v. McCue*, 5 W. Va. 264.

Confederate Money and Confederate Bonds.—See § XV. 3, b, (1), n.

Duty to Invest.—Interest.—Property given for Life with Remainder over.—When an executor or administrator has money of the estate in his hands, and there is no reason why he should retain it, and

tions are imposed by law upon the executor or administrator, as to the kinds of securities in which the trust funds shall be placed, or the mode of making the investment, he is still held to the exercise of good faith and due diligence.¹ An investment of personal assets in real estate, being technically a conversion, is improper.² In England, executors and administrators are bound to

he has an opportunity of paying it over to the legatees or next of kin, he should do so, and will not be heard to say that he had loaned it out for the sake of interest. But if there are reasons why he should retain it in order to meet the exigencies of his office, or to pay debts, if established, or because there was no one here authorized to receive it, he is not only permitted, but encouraged, to invest it in interest-bearing securities for the benefit of the fund. *Dortch v. Dortch*, 71 N. C. 224, 226; *Wood v. Myrick*, 17 Minn. 408; *Dexter v. Arnold*, 3 Mason, 248; *Toller*, 480. Compare § XVII. 5, n.

When personal property is given for life generally, and the trust of investing appears to have been confided to the executor rather than to a trustee, an investment should be made so as to secure the interest or income to the life legatee. *Jones v. Stiles*, 19 N. J. Eq. 324; *Evans v. Inglehart*, 6 Gill & J. (Md.) 71; *Chisholm v. Lee*, 53 Ga. 611; *Calkins v. Calkins*, 1 Redf. (N. Y.) 337.

In England, under such circumstances, before the passage of stats. 23 & 24 Vict. c. 145, sect. 25, it was the duty of the executor to convert the property into three per cents, and the tenant for life was entitled only upon that principle. *Wms. Exrs.* (7th Eng. ed.) 1812-1814.

In general, when perishable property is given by will to one for life with remainder to another, it is the duty of the executors to sell the estate and invest the fund, the interest of which only will belong to the life-tenant. But where the will indicates the intention of the testator, that the life-tenant shall enjoy the property *in specie*, no such sale can be made, and the remainder-man is entitled only to such part of the property as shall remain after the life shall fall. The accessions to the property in the latter case also belong to the life-tenant. *Woods v. Sullivan*, 1 Swan (Tenn.), 507.

Effect of Decree to Account.—In England, it is a rule never to permit a trustee or executor after a decree to account to lay out money on mortgage, or deal with the assets for the purpose of investment, without leave of court. If the executor makes the investment on his own responsibility, the *cestui que trust* is entitled to the advantage. But if the investment turn out badly, the court will consider the fund as money, and make the executor bring it into court. *Wms. Exrs.* (7th Eng. ed.) 1809;

Widdowson v. Duck, 2 Meriv. (Eng.) 494, 498, 499.

Security for Purchase-Money at Judicial Sale.—But an administrator is accountable for money left in the hands of a purchaser at a judicial sale without security. *Dillabaugh's Estate*, 4 Watts (Pa.), 177; *Betts v. Blackwell*, 2 Stew. & P. (Ala.) 373; *Palmer, Appellant*, 1 Doug. (Mich.) 422; *King v. King*, 3 John. Ch. (N. Y.) 552; *Davis v. Yerby*, 1 Sm. & M. Ch. (Miss.) 508.

In Alabama it is proper to take a note indorsed by two parties. *Wells v. Grigsby*, 42 Ala. 473. *Contra*, *Palmer, Appellant*, 1 Doug. (Mich.) 422.

Depreciated and Legal-Tender Currency.

—If practicable, the personal representative is bound to employ depreciated currency in the payment of debts. Such money may be deposited, but should not be hoarded. *Rogers v. Tullos*, 51 Miss. 685. But see *Tompkins v. Tompkins*, 18 S. C. 1.

An executor, at the time of the enactment of the United States statutes making treasury notes a legal tender for payment of debts, was not bound thereupon to convert money in his hands into coin, nor thereafter to require payment in coin of debts due the estate; nor was he guilty of maladministration in receiving and paying treasury notes as money in the execution of his trust; nor could he be required to account in coin for the assets. *Jackson v. Chase*, 98 Mass. 286. See the principle applied as to Confederate money. *Succession of Lagarde*, 20 La. An. 148; *Shaw v. Coble*, 63 N. C. 379; *Glenn v. Glenn*, 41 Ala. 571; § XV. 3, b, (2), n.

1. *Kinmouth v. Brigham*, 5 Allen (Mass.), 277, per Hoar, J.; *Harvard College v. Amory*, 9 Pick. (Mass.) 446.

2. *Schoul. Exrs. & Admsrs.* § 323.

As to title of executor to land bought in by him for estate on foreclosure of mortgage or execution sale, see § XII. 3, c, n.

Such purchase is proper when necessary to save the estate from loss; and, if the land be taken without breach of trust by the personal representative, it may be turned over in lieu of the fund on settlement of the estate. *Valentine v. Belden*, 20 Hem. (N. Y.) 537; *Perrine v. Vreeland*, 33 N. J. Eq. 102.

An administrator who invests assets in land, and takes a deed to himself, though

call in money on personal security as soon as it can be done without loss to the estate.¹ Where the will directs a particular form of investment, or leaves the conversion of particular assets to the discretion of the executors, they are not liable to legatees for a loss caused by following its direction in good faith and with ordinary prudence.² When executors or trustees are bound by

perhaps liable to a suit for *devastavit*, can nevertheless give a title free of claims by the distributees. *Richardson v. McLemore*, 60 Miss. 315.

1. Wms. Exrs. (7th Eng. ed.) 1815; *Powell v. Evans*, 5 Ves. (Eng.) 832; *Moyle v. Moyle*, 2 Russ. & My. (Eng.) 710; *Johnson v. Newton*, 11 Hare (Eng.), 168, 169; *Bullock v. Wheatley*, 1 Coll. (Eng.) 130; *Lacey v. Stamper*, 27 Gratt. (Va.) 42; *Lacey v. Davis*, 4 Redf. (N. Y.) 402; *Wilson's Appeal* (Pa.), 9 Atl. Rep. 473; *Bosios' Estate*, 2 Ash. (Pa.) 437.

As to allowing money to remain on unsecured notes and bonds, see *Pope v. Mathews*, 18 S. C. 444; § XV. 3, *b*, (1), n.

An executor is equally chargeable with neglect in allowing a part of the estate to remain outstanding in an improper state of investment, whether the party in whose hands it is outstanding is a co-executor or a stranger. *Styles v. Guy*, 1 Mac. & G. (Eng.) 422; *Wilson's Appeal* (Pa.), 9 Atl. Rep. 473.

The personal representative has the right to determine upon the exact time of the conversion, and can only be held to the standard of good faith and ordinary prudence in so doing. *Bosios' Estate*, 2 Ash. (Pa.) 437; *Neff's Appeal*, 57 Pa. St. 91; *Williamson's Estate*, 13 Phila. (Pa.) 195. A difference of opinion between two executors as to the propriety of converting the assets at a particular period, followed by a demand made by one of them upon the other to concur in effecting an immediate conversion, does not deprive the latter of the right to exercise his own discretion, or render him liable for the loss that may arise from the delay consequent on his declining to comply with the demand. *Buxton v. Buxton*, 1 My. & Cr. (Eng.) 80; *Pepys, M. R.* See *East v. East*, 5 Hare (Eng.), 348; *Hughes v. Empson*, 22 Beav. (Eng.) 181; *M'Rae v. M'Rae*, 3 Bradf. Sur. (N. Y.) 199; *Re Gray*, 27 Hun (N. Y.), 455.

Where an executor, in due course of administration and in the exercise of reasonable care, sold certain railroad stock which had depreciated on his hands, it was held that he was not liable to the estate for the loss sustained, although the market value of the stock afterwards increased. *Re Green*, 37 N. J. Eq. 254.

In some States, executors and administrators are not liable for losses caused by leaving money outstanding on investments

made by the decedent. *Parker v. Glover* (N. J.), 9 Atl. Rep. 217; *Pope v. Mathews*, 18 S. C. 444. But compare *Lacey v. Davis*, 4 Redf. (N. Y.) 402; *Williamson's Estate*, 13 Phila. (Pa.) 195; *Wilson's Appeal* (Pa.), 9 Atl. Rep. 473; *Lacey v. Stamper*, 27 Gratt. (Va.) 42.

Even in States in which there is no impropriety in allowing the assets to remain upon good personal security, it is the duty of the personal representative to convert the fund if there is danger of loss or depreciation. *Brazier v. Clark*, 5 Pick. (Mass.) 96. See *Boyd v. Boyd*, 3 Gratt. (Va.) 113.

In mode of conducting the sale, the personal representative is bound to act in good faith and ordinary discretion, and is liable for any loss resulting from his negligence. *Brackett v. Brackett*, 4 N. H. 208. See § XIII. 7; § XV. 3, *b*, (1), n.

It is not the duty of executors to call in money on real security where no risk is apparent. *Howe v. Dartmouth*, 7 Ves. (Eng.) *137, *150.

Where executors have neglected to realize assets which are outstanding on an improper investment, there is no fixed period at which the loss is to be calculated. It depends on the particular nature of the property, and the evidence affecting it. *Hughes v. Empson*, 22 Beav. (Eng.) 181. See *McRae v. McRae*, 3 Bradf. Sur. (N. Y.) 199.

Specific Legacies.—A specific legacy may remain invested in the stocks set apart and designated by the testator for the purpose in his will, unless the executor has cause to apprehend their depreciation, in which case he should protect the estate by converting them. *Ward v. Kitchen*, 30 N. J. Eq. 32.

2. Wms. Exrs. (7th Eng. ed.) 1809; *Forbes v. Ross*, 2 Cox (Eng.), 116; *Hogan v. De Pyster*, 20 Barb. (N. Y.) 100; *McCall v. Peachy*, 3 Munf. (Va.) 288; *Smyth v. Burns*, 25 Miss. 422; *Lacey v. Stamper*, 27 Gratt. (Va.) 42; *Nelson v. Hall*, 5 Jones, Eq. (N. C.) 32; *Re Gray*, 27 Hun (N. Y.), 455; *Gilbert v. Walsh*, 75 Ired. 557; *Pleasant's Appeal*, 77 Pa. St. 356, 369; *McKenzie v. Anderson*, 2 Woods (U. S. C. C.), 359, 367; *Williamson's Estate*, 13 Phila. (Pa.) 195. As to creditors, see § XV. 3, *b*, (7). But oral instructions of the decedent cannot justify a diversion of trust funds. *Malone v. Kelley*, 54 Ala. 532.

The executor is bound by the directions

the terms of the trust to invest the money in a particular stock, and, instead of doing so, they retain the money in their hands, or

of the will, and cannot justify a departure. *Re Shepard*, 5 Dem. (N. Y.) 183. See *Peacock v. Harris*, 85 N. Y. 146; *Meeker v. Crawford*, 5 Redf. (N. Y.) 450.

A direction that a legacy shall be put at interest, means that the fund be loaned at interest, or invested in interest-bearing securities; and investing the fund in bank-stock is not a compliance. *Gilbert v. Walsh*, 75 Ired. 557.

Under such a direction; it has been held the duty of the executor to compound the interest as it accrued by investing it as soon as practicable thereafter. *Perrine v. Petty*, 34 N. J. Eq. 193. See *Hollingsworth v. Hollingsworth*, 65 Ala. 321. An orphans' court cannot, by its order directing executors to pay a legacy, relieve them of the active and continuing duty imposed on them by the will of investing the amount of the legacy, and paying the income thereof, for a certain time, to another than the legatee. *Hindman v. State*, 61 Md. 471.

An executor, when so directed in the will, is warranted in applying the assets to the support and maintenance of the family plantation in same style as in testator's lifetime, and in making the usual charitable and religious contributions. *Brabham v. Crosland* (S. C.), 1 S. E. Rep. 33.

When so directed, he may also apply them to the erection of a monument for the deceased. *Bainbridge's Appeal*, 97 Pa. St. 482. Compare § XV. 2, c.

But though the will gives the executors power to lend on personal security, this does not enable them as against creditors to accommodate a trader with a loan on his bond. *Langston v. Ollivant, Coop.* (Eng.) 33. Compare § XV. 3, d, (7).

Where executors are directed by the will to place money at interest for a stipulated time by depositing it in bank, or loaning it upon mortgage, they have a discretion to loan it for a less period than the whole time named, and to relend it from time to time, and change the securities as they deem prudent. *Miller v. Proctor*, 20 Ohio St. 442.

A power in a will to change investments of personal estate as may be thought most advantageous for the estate will authorize the executors to dispose of an unproductive and constantly depreciating stock at less than par, although the testator expressed a wish that that stock should not be sold for less than par, unless thought necessary. *Stephens v. Milnor*, 24 N. J. Eq. 358.

A direction in a will to "put out on interest" means that the money shall be secured by judgment or mortgage on real

estate, and does not warrant the purchase of stocks. *Nyce's Estate*, 5 W. & S. (Pa.) 254, 258.

So a direction to invest "in productive funds upon good securities" means only those designated by law. *Ward v. Kitchen*, 30 N. J. Eq. 32.

Where a testator's estate was directed by the will to be realized at a time falling within the time of the war, when confederate money was the only legal currency in use, his executor cannot be held liable for losses resulting from realizing at that time in confederate money, or investing the proceeds in confederate bonds; and the inference from his realizing at that time is that he received the proceeds in confederate money. *Brabham v. Crosland* (S. C.), 1 S. E. 33.

When a will confers on the executors the power to choose the time for selling the real estate, they are not chargeable with a loss resulting from a delay in effecting a sale, they having used their best judgment in the matter. *Hancox v. Meeker*, 95 N. Y. 528; *Weston v. Ward*, 4 Redf. (N. Y.) 415. See *Woodruff v. Lounsberry*, 40 N. J. Eq. 545; *Re Gray*, 27 Hun (N. Y.), 455; *Campbell v. Purdy*, 5 Redf. (N. Y.) 434.

Where a testator directed his executors to invest certain funds in "first-class interest-paying securities," the Orphans' Court has no power under the statutes to order that the investment of the funds be continued in the securities left by the testator. *Woodruff v. Ward*, 35 N. J. Eq. 467.

But for negligence or want of ordinary prudence in carrying out the direction of the will, the executor is liable. *Bacon v. Clark*, 3 My. & Cr. (Eng.) 294; *Lowry v. Fulton*, 9 Sim. (Eng.) 115; *Ihmsen's Appeal*, 471 Pa. St. 431.

Loans to Co-Executor. — Where a testator empowers his executors to lend money on personal security, he must be taken to rely upon the united vigilance of them all, with respect to the solvency of the borrowers. If one of them lends to the other, this object is defeated; consequently such a loan is a breach of trust and a misappropriation of the fund; and if any mischief arises to the estate therefrom, the executors are liable. *Wms. Exrs.* (7th Eng. ed.) 1810; *Gleadow v. Atkin*, 2 Cr. & Jerv. (Eng.) 548, 555; s. c., 2 Tyrwh. (Eng.) 593.

But a bond of indemnity from the borrower to the lender, to protect him from the consequences of such a breach of trust, is valid. *Warwick v. Richardson*, 10 M. & W. (Eng.) 284.

invest it upon an insufficient security, parties in interest may elect to charge them with the amount of the money, or the amount of the stock which they might have purchased.¹ But where discretion is given to the executors or trustees as to the character of the investment, they are only chargeable with the whole amount of the trust fund and legal interest.² And whether there is any direction in the will as to the character of the investment or not, parties in interest may always elect to accept the unauthorized investment made.³

(4) *Mingling Trust and Individual Funds.*—An executor or administrator who mixes the property of the estate with his own so that the identity of the trust fund is lost, as by making a deposit in bank, or taking an investment with trust money in his own name, by loaning the money to himself, or by using it in his own business, is guilty of a breach of trust; and for any loss sustained while the funds are so mingled, he may be held accountable by parties in interest as though for conversion.⁴

1. *Pride v. Fooks*, 2 Beav. (Eng.) 430; 1 De G. M. & G. (Eng.) 206; Wms. Exrs. (7th Eng. ed.) 1815; *Shepherd v. Moulds*, 4 Hare (Eng.), 503, 504. Compare *Blauvelt v. Ackerman*, 5 C. E. Greene (N. J.), 141, 148; *Darling v. Hammar*, 5 C. E. Greene (N. J.), 220.

Yet even in such case it has been held that if the executor can establish that sound business management forbade his making the investment directed, and that the legatee approved his conduct at the time, he will escape all liability. *Perry v. Smart*, 23 Gratt. (Va.) 241. See *Morton v. Smith*, 1 Desau. (S. C.) 123.

If the testator's directions cannot be followed because no such securities as he directs are offered, the representative may prudently deposit on interest in a savings bank. *Lansing v. Lansing*, 45 Barb. (N. Y.) 182.

Reasonable delay in following the directions of the will as to investment and conversion is excusable. *Stretch v. McCampbell*, 1 Tenn. Ch. 41.

2. *Robinson v. Robinson*, 1 De G. M. & G. (Eng.) 244; *Shepherd v. Moulds*, 4 Hare (Eng.), 503, 504. See *Knott v. Cottee*, 16 Beav. (Eng.) 80, 81; *Ihmsen's Appeal*, 43 Pa. St. 431; *Nyce's Estate*, 5 W. & S. (Pa.) 254.

As to the rate of interest, and when compound interest will be charged, see § XVII. 5, n.

3. *Clough v. Bond*, 3 My. & Cr. (Eng.) 496.

When the executor or administrator is charged with, and accounts for, the fund so used, it becomes his individual property, and he acquires the full rights of a beneficial owner. *Waring v. Lewis*, 53 Ala. 615.

4. *Wren v. Kirton*, 21 Ves. (Eng.) 377;

Robinson v. Ward, Ry. & Mood (Eng.) 274; 2 C. & P. (Eng.) 59; *Commonwealth v. McAlister*, 28 Pa. St. 480; *Robinet's Appeal*, 36 Pa. St. 174; *Gilbert's Appeal*, 78 Pa. St. 266; *Nettles v. McCown*, 5 S. C. 43; *McKenzie v. Anderson*, 2 Woods (U. S. C. C.), 357; *Kirkman v. Benham*, 28 Ala. 501; *Ditmar v. Bogle*, 53 Ala. 169; *Henderson v. Henderson*, 58 Ala. 582; *Case v. Abeel*, 1 Paige (N. Y.), 393; *Kellett v. Rathbun*, 4 Paige (N. Y.), 102; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Leake's Exrs. v. Leake*, 75 Va. 792; *Hagthorp v. Hook*, 1 Gill & J. (Md.) 270; *Rorke v. McConville*, 4 Redf. (N. Y.) 291; *Perkins's Estate* (Vt.), 7 Atl. Rep. 605; *Lacoste's Estate*, *Myrick's Probate* (Cal.), 67.

The fact that the representative acted in good faith, and with ordinary prudence, is no excuse. *Commonwealth v. McAlister*, 28 Pa. St. 480; *Henderson v. Henderson*, 58 Ala. 582.

An administrator is personally liable for funds of the estate, deposited by him in a bank in his individual name, even though he had no other funds in the bank, and informed the receiving teller, when he deposited the funds, that the same were held by him in trust. *Williams v. Williams*, 55 Wis. 300; s. c., 42 Am. Rep. 708.

Upon the death of an executor, who was also a legatee, the fact that rents that he had collected were found to be on deposit in his individual name, was held to be legitimate proof of an intention to retain them in part payment of his legacy. *Hanbest's Estate*, 12 Phila. (Pa.) 72.

A. was appointed executor, and, under the same will, guardian of his children. He kept no separate accounts, and intermingled his own money with that held by him as executor and as guardian. He

(5) *Effect of Advice of Parties or Direction of Court upon Representative's Liability for Acts otherwise improper.* — An executor or administrator cannot be held personally liable for acts not strictly within the line of his duty when expressly authorized by the advice and assent of all the parties in interest,¹ or directed by the court,²

bought land, and paid for it partly with his own money, and partly with money in his hands as executor, and had it conveyed to his children. *Held*, that the land was chargeable with the amount of the money in his hands as executor which was expended in its purchase, although the children to whom it was conveyed had no knowledge of the fraud. *Hedricks v. Tuckwiller*, 20 W. Va. 489.

Merely completing the contracts of the deceased, or putting the assets into salable condition, however improper the conduct of the representative may be in other respects, is not in itself a mingling of the assets so as to render him liable. *Newton v. Poole*, 12 Leigh (Va.), 112. *Compare* § XV. 2, *b*. See further, as to mingling, *Calvert v. Marlow*, 6 Ala. 337.

As to the law in *Virginia* and *Maryland* as to deposit by trustee of trust funds in individual name, see *Thomson v. Brooke*, 76 Va. 160; *Kirby v. State*, 51 Md. 383.

To create such liability, there must be actual loss while the funds are so mingled. If, therefore, all the assets received by one who is both executor and trustee, have been transferred by operation of law from himself as executor to himself as trustee, the mere fact that while acting as executor he mingled his own moneys with the trust fund in bank, and drew on both indiscriminately, will not support an action against the sureties on his executor's bond. *State v. Cheston & Carey*, 51 Md. 352, 381; *Kirby v. State*, 51 Md. 383.

When an executor who has mingled trust funds with his own, wishes to separate them to avoid liability for future loss, he must mark the separation by some plain and unmistakable act. Merely withdrawing the trust fund from bank, and depositing it in a separate bank, still in his own name, or making a proper investment, is not enough. *Ditmar v. Bogle*, 53 Ala. 169, 171; *Henderson v. Henderson*, 58 Ala. 582; *McKenzie v. Anderson*, 2 Woods (U. S. C. C.), 357, 359, 364.

1. *Poole v. Munday*, 103 Mass. 176, 177; *Perry v. Wooten*, 5 Humph. (Tenn.) 524.

"An administrator who, in a particular transaction, acts in good faith, under the direction of all the personal representatives who are interested in the estate, is to be protected in rendering his accounts in the probate court, from a claim, on the part of such representatives, that he has not administered strictly according to law

in respect to such transaction. He may prosecute or defend suits, compromise claims upon the estate, or deal with the assets in a particular way not usual or strictly legal, as by continuing the estate in business, and the personal representatives by whose request or assent it has been done, will not be permitted to charge him with maladministration." *Colt, J.*, in *Poole v. Munday*, 103 Mass. 176, 177. See *Watkins v. Stewart*, 78 Vt. 111.

Where an executor or administrator relies upon such assent to justify his conduct, he must show that he acted in entire good faith, and obtained such assent upon full and fair representations and information communicated to them of all the facts and circumstances attending the risk to the fund, and of the proposed investment. *Ward v. Tinkham* (Mich.), 32 N. W. Rep. 901; *Suers v. Brunjes*, 5 Redf. (N. Y.) 32.

Subsequent acquiescence without original concurrence will release the executors, but the court will inquire into all the circumstances that induced the alleged concurrence or acquiescence, to ascertain whether the conduct of the interested parties really amounts to such a previous sanction or subsequent ratification as ought to relieve the executors or administrators from responsibility. *Wms. Exrs.* (7th Eng. ed.) 1836; *Griffiths v. Porter*, 25 Beav. (Eng.) 236; *Burrows v. Walls*, 5 De G. M. & G. (Eng.) 233; *Davies v. Hodgson*, 25 Beav. (Eng.) 177.

A testator's widow and A. were executrix and executor. A son of the testator was permitted to manage the estate. He made injudicious and improvident investments, as, for instance, in second mortgages, from which losses resulted.

A. contended that not himself, but the widow, should be charged with the losses, as it was by her wish that the son assumed control.

A. had joined in executing satisfaction prices, etc., when requested.

Held, that both were liable, and that the income due the widow from a fund belonging to remainder-men should be applied to make good the loss. *Earle v. Earle*, 93 N. Y. 104.

2. *Richardson v. Knight*, 69 Me. 285; *Smith v. Wilmington Coal Co.* 83 Ill. 498.

In many States, statutes exist enabling the representative to obtain the direction of the court as to selling, pledging, and investing the assets; performing the con-

unless, in carrying out such directions, he was guilty of negligence or bad faith.¹

(6) *Rule when Control is taken out of Representative's Hands.* — When the control of the property of the estate is taken out of the hands of the executor or administrator by act of law, as by an order of court or decree in equity, or other paramount authority, he will not be regarded as standing in a fiduciary relation to it, and his liability for its care and management is at an end.²

(7) *Distinction as to Executor's Liability between Creditors and Legatees.* — Legatees are bound by the terms of the will, creditors are not; hence, if a loss is sustained by following the directions of the will in good faith, and with ordinary prudence, as regards a legatee, the executors may justify themselves by the directions of the will, but not as against a creditor.³

XVI. Remedies. — I. *Actions at Law.* — a. *By Executors and Administrators.* — (1) *Power to sue.* — *Parties.* — *Co-Executors.* — From the exclusive character of his title,⁴ an action to recover the personal assets of the estate must be brought by the personal representative.⁵ Where there are several executors or administrators

tracts of the decedent, and compromising or submitting claims to arbitration. Such acts relieve the representative from responsibility so long as he exercises good faith and diligence in carrying out the direction, but do not require him to seek judicial direction in advance, if he chooses to act upon his own responsibility. *Smith v. Wilmington Coal Co.*, 83 Ill. 498; *Richardson v. Knight*, 69 Me. 285. See § XIII.; § XVI. 3, (1), (2).

1. *Re McDonald*, 4 Redf. (N. Y.) 321.

2. *Hall's Appeal*, 40 Pa. St. 409.

An executor who pays the funds of the estate into the hands of the probate judge, although under a verbal order, and receives his discharge, cannot be held liable to the legatees until the order of discharge has been impeached or set aside. *Doogan v. Elliott*, 43 Iowa, 342.

In New York a public administrator may be required, by the surrogate, to place the trust fund at interest. *Lockhart v. Public Administrator*, 4 Bradf. (N. Y.) 21.

As to effect of decree in equity upon liability of out-going ordinary to pay over to successor, see *Fowle v. Thompson*, 5 Rich. Eq. (S. C.) 491.

3. *Doyle v. Blake*, 2 Sch. & Lef. (Eng.) 239; *McNair's Appeal*, 4 Rawle (Pa.), 148; *Sadler v. Hobbs*, 2 B. C. C. (Eng.) 117; *Lewin, Trusts* (8th Eng. ed.), 263; *Getz's Estate*, 12 Phila. (Pa.) 143; *Bruner's Appeal*, 57 Pa. St. 46.

In *Churchill v. Hobson*, 1 P. Wms. (Eng.) 242, it was held, by Lord Harcourt, that if co-executors join in a receipt, they are both bound as against creditors, but not as against legatees. This distinction

was justified by Lord Redesdale on the ground that the receipt would be conclusive as against creditors in an action at law, but that legatees being compelled to come into equity to enforce payment of a legacy, a court of equity would only hold that executor liable who actually received the money. *Doyle v. Blake*, 2 Sch. & Lef. (Eng.) 239.

Lord Harcourt's distinction between creditors and legatees, as to the effect of joining in a receipt, said to be overruled. *Lewin, Trusts* (8th Eng. ed.), 263; *Sadler v. Hobbs*, 2 B. C. C. (Eng.) 17; *Doyle v. Schwab*, 2 Sch. & Lef. (Eng.) 239. Nevertheless, it has been followed in Pennsylvania. *Browne's Appeal*, 1 Dall. (Pa.) 311; *Verner's Estate*, 6 Watts (Pa.), 250.

4. § XII. 2, a.

A suit brought by the administratrix, as such, on a note due the estate, may be sustained, although a receiver has been appointed by the court to take charge of the estate, it not appearing that the suit was so brought without the authority of the court, and no objection being made by the court or the receiver. *Barbour v. Albany Lodge, etc., Masons (Ga.)*, 3 S. E. Rep. 560.

Where the representative's title does not extend to the property in litigation, he cannot sue. *Ayers v. Dixon*, 78 N. Y. 318.

5. The principle also applies to bills in equity. *Pope v. Boyd*, 22 Ark. 535; *Webster v. Tibbitts*, 19 Wis. 438; *Fauley v. Pauley*, 7 W. (Pa.) 159; *Linsinbiger v. Gourley*, 56 Pa. St. 166; *Middleton v. Robinson*, 1 Bay (S. C.), 58; *Davis v. Rhame*, 1 McCord, Ch. (S. C.) 191; *Baxter v. Buck*, 10 Vt. 548; *Clason v. Lawrence*, 3

at common law, they must all join in bringing actions, though some be within the age of seventeen years, have not proved the will, or renounced.¹

Edw. (N. Y.) 48; Woodin v. Bagley, 13 Wend. (N. Y.) 453; Howell v. Howell, 37 Mich. 124; Cheely v. Wells, 33 Mo. 106; Sears v. Carrier, 4 Allen (Mass.), 339; Snow v. Snow, 49 Me. 159; Hellen v. Wideman, 10 Ala. 846; Johnson v. Pierce, 12 Ark. 599; Brunk v. Means, 11 B. Mon. (Ky.) 214; Labit v. Perry, 28 La. An. 591.

Unless the suit be against the heirs, or special statutes enact otherwise, an order from the probate court is generally unnecessary. Jordan v. Pollock, 14 Ga. 145; Reid v. Butt, 25 Ga. 28.

An executor or administrator cannot, as such, maintain a suit in one State by virtue of letters granted in another. Moseby v. Burrow, 52 Tex. 396. See FOREIGN AND ANCILLARY ADMINISTRATION.

In Nebraska the right of an administrator, foreign or domestic, to sue, is recognized by statute. Hendrix v. Reenan, 6 Neb. 516.

As to the effect of marriage upon the status of *feme sole* executrix or administratrix, see HUSBAND AND WIFE.

As to construction of Wagner's Mo. St. 71, § 5, 75, § 34, see Vielhafer v. Eyerman, 1 Mo. App. 115.

Where a suit has been brought by intestate's counsel at his instance, the counsel may go on and prosecute for fees; and for this purpose the administrator may be made a party, security against costs being given him if required. Manning v. Manning, 61 Ga. 137.

Cal. Code, C. C. §§ 1658, 1660, does not authorize the personal representative to petition for a partial distribution of the estate. *In re Letellier's Estate* (Cal.), 15 Pac. Rep. 847, 849.

After final discharge, and settlement of his accounts, the personal representative cannot sue to collect a demand due the estate, but omitted from the inventory. Goebel v. Foster, 8 Mo. App. 443. See § XVII. 6.

Although the personal representative cannot bring an action against himself to recover a debt due him from the deceased, the mere fact that he has an interest in the thing sued for, through assignment from a legatee, does not affect his right of action. Portlins v. Se Ifsam, 11 R. I. 270; Trimmer v. Thomson, 10 S. C. 164. See § XIV. 5, c.

As the representative's title is exclusive, the next of kin need not be joined in a suit brought to recover property which properly belongs to his estate. Hubbard's Admr. v. Clark, 7 (N. J.) Atl. Rep. 26. See § XII. 2, a.

The executor or administrator of a

patentee may not only sue for infringements, but may assign the right to do so to others. May v. County of Logan, 30 F. 250. See § XII. 3, b; § XIII.

But in a suit by an administrator to obtain possession of land, the title to which is in question, the heirs are necessary parties. Sisk v. Almon, 34 Ark. 391. See also Wise v. Walker (Pa.), 10 Atl. Rep. 28; Le Doux v. Burton, 30 La. An. pt. i. 576; Labanor v. Slack, 31 La. An. 134.

Otherwise in Texas and Montana, under local statutes giving executors and administrators possession of real estate. Gunter v. Fox, 51 Tex. 383; Black v. Story (Mont.), 14 Pac. Rep. 703. See § XII. 3, e, n.

But where the interest of the administrator is antagonistic to a claim for the recovery of land for the estate, suit may be brought by another than the administrator. Rogers v. Kennard, 54 Tex. 30.

As against an administrator suing to get possession of an undorsed note to the order of his intestate for the balance of the purchase-money of land sold by him, an indorsement or assignment is not necessary to give title. In such case the question of ownership is one of fact, and is for the jury. Thompson v. Onley (N. C.), 1 S. E. Rep. 220.

Pub. St. Mass. c. 197, § 12, providing that an administrator may sue within two years after letters granted, on any cause of action of his decedent, which survives, does not mean that the administrator shall not collect debts due the estate by suits brought after two years, when the debts are not otherwise barred. Converse v. Johnson (Mass.), 14 N. E. Rep. 925.

Suing in Forma Pauperis.—An executor or administrator will not be allowed to sue or defend, in his representative character, *in forma pauperis*. This applies to suits, both at law and in equity. Paradise v. Sheppard, 1 Dick. (Eng.) 136; Beames on Costs, 78; Fowler v. Davies, 16 Sim. (Eng.) 182. See Bayly v. Bayly, 11 Beav. (Eng.) 256; McCoy v. Broderick, 3 Sneed (Tenn.), 203; Barber v. Frazier, 9 Lea (Tenn.), 348.

Misjoinder of Plaintiffs.—It is plainly a misjoinder of plaintiffs for an executor or administrator to sue in the common money courts with another plaintiff. Bellingham v. Clark, 1 B. & S. (Eng.) 332.

1. Wms. Exrs. (7th Eng. ed.) 1867; Brooks v. Stroud, 1 Salk. (Eng.) 3; 1 Chitty, Pl. (Eng.) (16th Am. ed.) 22, 23; Waukford v. Waukford, 1 Salk. (Eng.) 307; 1 Saund. (Eng.) 291, 1, note to Cabell v. Vaughan; Creswick v. Woodhead, 4 M. & Gr. (Eng.)

(2) *When Suit to be brought by the Executor or Administrator in his Representative Character.* See § XV. 2, *a, b.* — Every action brought by an executor or administrator, where the cause of action accrued in the lifetime of the decedent, must be brought in the *detinet* only, and in his representative character;¹ but where the cause of action accrues after the death of the decedent, the executor or administrator may sue in his representative character, or in his own name, at his option.² Thus, for any injury done to the goods and chattels of the deceased, after his death the executor or

811; s. c., 5 Scott, N. R. (Eng.) 779; Turner v. Debell, 2 A. K. Marsh. (Ky.) 48; Hill v. Smalley, 1 Dutcher (N. J.), 374; Judson v. Gibbons, 5 Wend. (N. Y.) 224; Bodle v. Hulse, 5 Wend. (N. Y.) 313; 1 Chitty, Pl. (16th Am. ed.) 22.

But if an action in contract or tort be brought by one only of several executors or administrators, the non-joinder of the others can be taken advantage of only by a plea in abatement. 1 Chitty, Pl. (16th Am. ed.) 23; Packer v. Wilson, 15 Wend. (N. Y.) 343; Gordon v. Goodwin, 2 Nott & McCord (S. C.), 70.

If an action be brought in the name of several executors, and one or more will not join, the court will issue a summons *ad sequendum semel*, and upon their non-appearance will give judgment of severance, so as to enable the others to proceed without them. At common law an executor who had been so severed cannot sue execution if he live to judgment, nor can he acknowledge satisfaction. Wentw. Off. Ex. (14th ed.) 212, 225.

Under 20 & 21 Vict., an executor who has renounced need not be joined. Wms. Exrs. (7th Eng. ed.) 1868.

In North Carolina, only executors who qualify are required to join. Alston v. Alston, 3 Ired. L. (N. C.) 447. See Moore v. Willett, 2 Hilton, 522.

In actions which the representative should bring in his own name, co-executors should not be joined. See § XVI. 1, *a, (2).*

Arrest. — At common law an executor or administrator might have arrested the defendant in cases where a plaintiff, suing in his own right, might have done so. An executor might have exercised this power before probate. Wms. Exrs. (7th Eng. ed.) 1870.

1. Wms. Exrs. (7th Eng. ed.) 1871; 1 Saund. note to Dean of Bristol v. Guysse; Gallant v. Bonteflower, 3 Dougl. (Eng.) 36; Fesmire v. Brock, 25 Atk. (Eng.) 20; Buckland v. Gallup, 2 N. Y. 811; 7 Cent. Rep. 703; 11 N. E. Rep. 843.

His declaration must show that he sues in his representative character, otherwise he will be presumed to sue in his own right. Mohr v. Sherman, 25 Ark. 7.

2. Wms. Exrs. (7th Eng. ed.) 1871; Gallant v. Bonteflower, 3 Dougl. (Eng.) 36, per Buller, J.; Wyllie v. King, Ga. Dec. 7; Knox v. Bigelow, 15 Wis. 615; Merrett v. Seaman, 6 Barb. (N. Y.) 330; Laycock v. Oleson, 60 Ill. 30; Lawson v. Lawson, 16 Gratt. (Va.) 230; Carlisle v. Burley, 3 Greenl. (Me.) 250; Buckland v. Gallup, 2 N. Y. 811; 7 Cent. Rep. 703; 11 N. E. Rep. 843; Yarborough v. Ward, 34 Ark. 206.

The principal stated in the text has not been established without much conflict. The rule to be deduced from the early English decisions is, that "where the action is on a contract with *the decedent*, or for a tort to the goods before they have actually come to the *executor's possession*, it can be maintained by him only in a representative character; but where it is on a contract, express or implied, which has sprung up or been created since the decedent's death, or for a tort to the goods in the executor's possession, or for converting or detaining them, having escaped from his possession, or for the price of them having been sold by him, it can be maintained by him only in his own right, and naming himself executor will not change its nature." Gibson, C. J., in Kline v. Guthart, 2 P. & W. (Pa.) 491. See Betts v. Mitchell, 10 Mod. (Eng.) 315; Lord Ellenborough in Ord v. Fenwick, 3 East (Eng.), 106; Buller, J., in Cockerill v. Kynaston, 4 T. R. (Eng.) 281; Hornblower, C. J., in Stewart v. Richey, 2 Harr. (N. J.) 164, 165. Compare Solliday v. Bissey, 2 Jones (Pa.), 350; Patchen v. Wilson, 4 Hill (N. Y.), 57; McKnight v. Morgan, 2 Barb. (N. Y.) 171; Manuel v. Briggs, 17 Vt. 176; Carter v. Estes, 11 Rich. (S. C.) 363; Cravens v. Logan, 2 Eng. (Ark.) 103; West v. Chappell, 5 Gill (Md.), 228.

The distinction thus broadly laid down cannot be considered law at the present time. See TEXT.

A good practical test as to whether the action *must* be brought by the executor or administrator in his representative capacity, is whether he can maintain the action without proving his letters. Adams v. Campbell, 4 Vt. 449.

administrator may bring trover, or trespass, either in his own name or in his representative character,¹ whether he was actually possessed of the property or not,² and although the injury was done before probate or administration granted.³ The same option exists in actions on contracts with the executor or administrator in his representative character in all cases where the money recovered will be assets;⁴ but where the action is on a contract

1. Wms. Exrs. (7th Eng. ed.) 876; *Bollard v. Spencer*, 7 T. R. (Eng.) 358; *Hollis v. Smith*, 10 East (Eng.), 295; *Bonafores v. Walker*, 2 T. R. (Eng.) 126; *Ham v. Anderson*, 50 Cal. 367; *Maxwell v. Briggs*, 17 Vt. 176. See *Patchen v. Wilson*, 4 Hill (N. Y.), 57, 58; *Carlisle v. Gurley*, 3 Greenl. (Me.) 450; *Gage v. Johnson*, 20 Miss. 437; *Sims v. Boynton*, 23 Ala. 353; *Snider v. Orery*, 2 Johns. (N. Y.) 227.

Replevin may also be maintained by the representative upon the same principle. *Branch v. Branch*, 6 Fla. 314.

2. *Hollis v. Smith*, 10 East (Eng.), 294; 1 Chitty, Pl. (16th Am. ed.) 171; Wms. Exrs. (7th Eng. ed.) 876; *Bollard v. Spencer*, 7 T. R. (Eng.) 358; *Grimstead v. Shirley*, 2 Taun. (Eng.) 197; *Holbrook v. White*, 13 Wend. (N. Y.) 591; *Valentine v. Jackson*, 9 Wend. (N. Y.) 302. In *Cockerill v. Kynaston* (overruled by *Bollard v. Spencer*, 7 T. R. (Eng.) 10, East (Eng.), 294), *Buller, J.*, laid down, that, if the goods which were the subject of the action were never in the actual possession of the executor or administrator, he must sue in his representative character. A similar view seems to have been taken by *Gibson, C. J.*, in *Kline v. Guthart*, 2 P. & W. (Pa.) 490, 491. See *Kelkeimer v. Chapman*, 32 Ala. 676. The position in the text is founded upon the principle that the property of personal chattels draws to it the possession. *Bev. Trespass*. (Eng.) 303; *Hudson v. Hudson, Latch* (Eng.), 214.

If executors or administrators sue in their representative character, they may either declare that the deceased was possessed of the goods, and the trespass committed after his death, to the damage of the executors or administrators, or declare in their own possession as executors or administrators. *Adams v. Cheverel*, Cro. Jac. (Eng.) 113; 2 Saund. (Eng.) 49, in note to *Wilbraham v. Snow*. See *Carlisle v. Burley*, 3 Greenl. (Me.) 200. So in the action of trover, if the goods of the testator are taken and converted after his death, and before the executor has obtained possession of them, he may bring an action in his own name without alleging himself executor; or he may sue as executor, and declare either that the testator was possessed of the goods, and the defendant, after his death, converted them; or he may allege

that he himself was possessed as executor, and the defendant converted them. Wms. Exrs. (7th Eng. ed.) 877. See *Fraser v. Swansea Canal Co.*, 1 Ad. & El. (Eng.) 354; 3 Nev. & M. (Eng.) 391; *Hudson v. Hudson, Latch*, 214; *Valentine v. Jackson*, 9 Wend. (N. Y.) 302.

3. Wms. Exrs. (7th Eng. ed.) 630, 637, 877; *Bollard v. Spencer*, 7 T. R. (Eng.) 358; *Hollis v. Smith*, 10 East (Eng.), 294; *Ham v. Henderson*, 50 Cal. 369; *Buckland v. Gallup*, 2 N. Y. 811; 7 Cent. Rep. 703; 11 N. E. Rep. 843.

4. Wms. Exrs. (7th Eng. ed.) 871; *Cowell v. Watts*, 6 East (Eng.), 410, 411, 412; *Powley v. Newton*, 6 Taunt. (Eng.) 453; 2 Marsh. (Eng.) 149; *Webster v. Spencer*, 3 B. & Ald. 362, 364; *Partridge v. Court*, 5 Price (Eng.), 412; *Heath v. Chilton*, 12 M. & W. (Eng.) 637, per Parke, B.; *Bolingbroke v. Kerr*, L. R. 1 Ex. (Eng.) 222; *Abbott v. Parfitt*, L. R. 6 Q. B. (Eng.) 346; *Shipman v. Thompson, Willes* (Eng.), 103. See *Boggs v. Bard*, 2 Rawle (Pa.), 102; *Heron v. Hoffner*, 3 Rawle (Pa.), 393; *Kline v. Guthart*, 2 P. & W. (Pa.) 490; *Evans v. Gordon*, 8 Porter (Ala.), 346; *James v. Johnson*, 44 Ala. 629; *Flower v. Garr*, 20 Wend. (N. Y.) 668; 1 Chitty, Pl. (16th Am. ed.) 23; *Seaman v. Merritt*, 6 Barb. (N. Y.) 330; *Adams v. Campbell*, 4 Vt. 447; *Moulton v. Wendell*, 37 N. H. 406; *Sherburne v. Goodwin*, 44 N. H. 275; *Hemphill v. Hamilton*, 11 Ark. 425; *Aiken v. Bridgman*, 37 Vt. 249; *Haskell v. Brown*, 44 Vt. 579; *Gayle v. Ennis*, 1 Tex. 184; *McDonald v. Williams*, 16 Ark. 36; *Daniel v. Hollingshead*, 18 Ga. 190; *Carlisle v. Burley*, 3 Greenl. (Me.) 250; *Brookshire v. Dubose*, 2 Jones, Eq. (N. C.) 276; *Brooks v. Floyd*, 2 McCord (S. C.), 364; *Campbell v. Baldwin*, 6 Blackf. (Ired.) 364; *Talmage v. Chapel*, 16 Mass. 71, 73; *Trecothick v. Austin*, 4 Mason (U. S. C. C.), 16, 34, 35; *Sheets v. Peabody*, 6 Blackf. (Ired.) 120; *Brown v. Lewis*, 9 R. I. 497; *Stevens v. Gregg*, 10 S. & R. (Pa.) 234; *Perries v. Aycienena*, 3 W. & S. (Pa.) 64; *Lea v. Hopkins*, 7 Pa. St. 385; *Boyle v. Townes*, 9 Leigh (Va.), 158; *Mosman v. Bender*, 80 Mo. 579.

Thus, an executor may declare as such in *assumpsit*, not only on an account stated with him as executor concerning money due to the testator from the defendant, but also

with the decedent, or for a tort to the property of the estate in his lifetime, the suit must be brought by the executor or adminis-

on an account stated with him as executor *concerning money due to him as executor*. *Needham v. Croke*, 1 Freem. (Eng.) 538; *Thompson v. Stent*, 1 Taunt. (Eng.) 322; *Cowell v. Watts*, 6 East (Eng.), 405; 1 Chitty, Pl. (16th Am. ed.) 226, 227; *Brown v. Lewis*, 9 R. I. 497.

So an executor may maintain an action in his representative character for money lent by him as executor, — *Webster v. Spencer*, 3 B. & Ald. (Eng.) 365; *Gallant v. Bonteflower*, 3 Dougl. (Eng.) 34. See *Clark v. Hougham*, 2 B. & C. (Eng.) 149, — or for money had and received to his use as executor to recover money belonging to the estate of the testator received after his death. *Foxwist v. Tremaine*, 2 Saund. (Eng.) 208; *Petrie v. Hannay*, 3 T. R. (Eng.) 659; *Webster v. Spencer*, 3 B. & Ald. (Eng.) 364.

So upon a contract made with reference to the sale or disposition of particular assets, or to recover the price thereof. *Evans v. Gordon*, 8 Porter (Ala.), 346; *Goodman v. Walker*, 30 Ala. 482; *Oglesby v. Gilmore*, 5 Ga. 56; *Gun v. Hodge*, 32 Miss. 319; *Laylock v. Olesen*, 60 Ill. 30; *Catlin v. Underhill*, 4 McLean (U. S.), 337; *Peebles v. Overton*, 2 Murph. (Tenn.) 384; *Haskell v. Bowen*, 44 Vt. 579; *Eagle v. Fox*, 28 Barb. (N. Y.) 473.

When an administrator pays a debt for which the intestate was surety, he may recover of the debtor, either in his own name or in his representative character. *Ord v. Fenwick*, 3 East (Eng.), 105, 106; *Mowry v. Adams*, 14 Mass. 327; *Williams v. Moore*, 9 Pick. (Mass.) 432.

It has been expressly held that an executor might sue *as such* for work done by him as executor. *Edward v. Grace*, 2 M. & W. (Eng.) 190.

Thus, where the executors had continued to work the leasehold quarries of their testator, and had shipped off for the defendant, from time to time, cargoes of stone, dug partly before and partly after the testator's death, and the defendant had accepted bills for the price of some of the cargoes, drawn by the plaintiffs as executors, it was held that they might well sue *as executors* for the price of the remainder of the cargoes. *Aspinall v. Wake*, 10 Bing. 51; 3 M. & Scott (Eng.), 423.

It seems that in such cases the plaintiff cannot sue for the price as for goods sold and delivered by the deceased, but should sue for goods sold and delivered by himself as executor or administrator. *Werner v. Humphreys*, 2 M. & Gr. (Eng.) 853.

Where an agent having property of his principal in his hands, and being ignorant

of the death of his principal, for the purpose of transmitting the property, obtained a bill of exchange for the value, and indorsed it specially to his principal, it was held that as the property for which the bill was remitted belonged to the principal's estate, it was competent for his administrator to elect to take the bill as a mode of payment, and that he acquired a right to sue upon the bill in his representative character. *Murray v. E. I. Company*, 5 B. & Ald. (Eng.) 204. Compare *Foster v. Bates*, 12 Mees. & W. (Eng.) 225.

In some States where the estate is the real party in interest, the executor or administrator *must* sue in his representative capacity. *Rogers v. Gooch*, 87 N. C. 442. See *Collins v. Greene*, 67 Ala. 211; *Moore v. Randolph*, 70 Ala. 575.

In New York an executor who has sold property of the estate on credit may sue for the price in his own name. Nothing in N. Y. Code, § 449, requiring actions to be brought by the real party in interest, or in § 1814, requiring actions brought by executors on causes of action belonging to them as such, to be brought by them in their representative capacity, implies the contrary, as, in such case, the executor is the real party in interest. In such an action, a debt against the testator may not be made the subject of a counter-claim. *Thompson v. Whitmarsh*, 100 N. Y. 35. See Or. Gen. L. tit. 3, § 29; *Buckland v. Gallup*, 2 N. Y. 811; 7 Cent. Rep. 703; 11 N. E. Rep. 843.

After an administrator has settled the estate, and been discharged without being charged with the proceeds of a contract made with him in his representative character, he can maintain no action thereon, and the right to sue passes to his successor. *Collins v. Greene*, 67 Ala. 211.

As to suits by administrators *de bonis non*, see *Buckland v. Gallup*, 2 N. Y. 811; 7 Cent. Rep. 703; 11 N. E. Rep. 843; *Lansdell v. Winstead*, 76 N. C. 366.

In an action by an administrator to avoid a sale of chattels for fraud practised by the buyer on the intestate, an allegation that the intestate was induced to make the sale in fraud of his creditors, does not make the action one by the administrator as trustee for the creditors. *Curry v. Brockway*, 12 Daly (N. Y.), 17.

Where the administrator would be the sole beneficiary of any recovery in a suit maintainable in his own name, he cannot, as administrator, sue *in forma pauperis*. *Barbee v. Frazier*, 9 Lea (Tenn.), 348. See § XVI. 1, a, (1), n.

trator in his representative character.¹ If a man names himself executor or administrator, and it appears that the cause of action

Promissory Notes and Bills of Exchange.

— Where the personal representative receives a negotiable instrument, whose avails when collected will be assets, he may sue upon it, either in his own name or in his representative character, at his option. *Schoul. Exrs. & Admsrs.* § 293; *King v. Thorn*, 1 T. R. (Eng.) 487; 10 Bing. (Eng.) 55; *Partridge v. Court*, 5 Price (Eng.), 413; 7 Price (Eng.), 891; *Murray v. E. I. Co.*, 5 B. & Ald. (Eng.) 204; *Catherwood v. Chabaud*, 1 B. & C. (Eng.) 150; *Abington v. Tyler*, 6 Coldw. (Tenn.) 502; *Laycock v. Oleson*, 60 Ill. 30. See *Rittenhouse v. Ammerman*, 64 Mo. 197; *Barlow v. Myers*, 24 Hun (N. Y.), 286. But see *Moore v. Randolph*, 70 Ala. 575.

A foreign executor can sue in his own name on a note belonging to the estate, and payable to bearer; and any claim held by the defendant against the estate, can be presented as a set-off. But if the note were now negotiable or payable to order, and not indorsed, the executor should sue in his official character. *Knapp v. Lee*, 42 Mich. 41.

An executor or administrator, in his representative capacity, may maintain an action as bearer on a note payable to the deceased or bearer, although such note was not delivered until after the death. *Baxter v. Buck*, 10 Vt. 548.

On the other hand, like any other "bearer," he may bring the action in his own name. *Holcomb v. Beach*, 112 Mass. 450. See *Lyon v. Marshall*, 11 Barb. (N. Y.) 241; *Brooks v. Floyd*, 2 McCord (S. C.), 364; *Sanford v. McCurdy*, 28 Wis. 103; *Rittenhouse v. Ammerman*, 64 Mo. 197; *Barron v. Vandvert*, 13 Ala. 232.

An administrator *de bonis non* may sue in his own name as such, on a note or bill of exchange given to his predecessor as administrator. *Catherwood v. Chabaud*, 1 B. & C. (Eng.) 150; *Barron v. Vandvert*, 13 Ala. 232; *Maraman v. Tunnell*, 3 Metc. (Ky.) 146; *Barrus v. Boulbac*, 2 Bush (Ky.), 39. See *Hiest v. Smith*, 7 T. R. (Eng.) 182; *Sullivan v. Holker*, 15 Mass. 374; *Dikes v. Woodhouse*, 3 Rand. (Va.) 287; *Hemphill v. Hamilton*, 6 Eng. (Ark.) 425. But see *West v. Chappel*, 5 Gill (Md.) 228.

Suits to recover Mispayments. — *Devastavit.* — English authorities establish that when the executor or administrator discovers that he has, in his representative character, made a mispayment, he may in the same character recover it again, although the original payment amounted to a *devastavit*. "The money was assets; and if the suit be as executor or administrator,

it will continue assets; but if the suit be in the individual capacity, the demand will be in the first instance subject to a set-off, or, when recovered, will be liable to the plaintiff's debts. A *devastavit* is a wrong, and the law will not compel an executor to persevere in a wrong." Bayley, J., in *Clark v. Hougham*, 2 B. & C. (Eng.) 155. Formerly the opinion was otherwise. Buller, J., in *Nuent v. Stokes*, 4 T. R. (Eng.) 501.

Joint Executors and Administrators. — If one of several co-executors or administrators sells goods of the estate, or makes a contract on his own account alone, he only can maintain an action on the contract; and the suit must be brought in his own name, notwithstanding the money recovered will be assets. *Wms. Exrs.* (7th Eng. ed.) 1869; *Brassington v. Ault*, 2 Brig. (Eng.) 177.

Thus, if two out of three executors, authorized by will to sell land, enter into a contract for that purpose, the third having renounced, an action for its breach must be brought by those only by whom the contract was made, and in their own names. *Heron v. Hoffner*, 3 Rawl. (Pa.) 393.

Where two of three executors (who had alone proved the will) authorized an attorney to receive rents due to the estate of the testator, and to give receipts in their names, and the rents were received, and receipts given accordingly, it was *held* that the three executors could not jointly sue the attorney for the money, unless it were found by the jury that the two contracted with him on account of themselves and the other co-executor, or generally on account of the estate, with a view to the interference of the co-executor, in case he should choose to take part in the management. *Heath v. Chilton*, 12 M. & W. (Eng.) 632.

1. *Stewart v. Richey*, 2 Harr. (N. J.) 164; *Kline v. Guthart*, 2 P. & W. (Pa.) 491; *Thornton v. Smiley*, 1 Ill. 13; *Buckland v. Gallup*, 2 N. Y. 811; 7 Cent. Rep. 703; 11 N. E. Rep. 843.

Where the executor or administrator grounds his action upon a contract with the decedent, he must sue in his representative character, although the date of payment or performance had not arrived at the time of the death. *Bronson, J.*, in *Patchen v. Wilson*, 4 Hill (N. Y.), 57. See *Flower v. Carr*, 20 Wend. (N. Y.), 668; *Wms. Exrs.* (7th Eng. ed.) 883, 884.

The mere fact that the executor holds a lease as executor, does not prevent his suing for the rent in the *debit* and *detinet*. *Holman v. Choate*, Cro. Jac. 685. See

is in his own right, it will be merely surplusage, and no objection;¹ but if the action be in the *debet* and *detinet*, when it should be in the *detinet* only, or *contra*, it is said to be substance.²

Solliday v. Bessey, 2 Jones (Pa.), 347; *Yarborough v. Ward*, 34 Ark. 206.

In an action against a railroad company for the killing of the intestate, the plaintiff must necessarily sue in his representative character. *Denver, etc., Ry. Co. v. Woodward*, 4 Col. 1.

Novation. — Judgments. — Bonds. — An executor or administrator may bring an action on a judgment recovered by him as executor or administrator, either in his own name or in his representative character. *Crawford v. Whittall*, Dougl. note (1). *Bonafores v. Walker*, 2 T. R. (Eng.) 126; *Adams v. Campbell*, 4 Vt. 447.

He may sue in debt upon it, although recovered in his representative capacity in another State. *Slaughter v. Chenoweth*, 7 Ind. 211; *Trecothick v. Austin*, 4 Mason (U. S. C. C.), 16, 34, 35; *Young v. O'Neal*, 3 Sneed (Tenn.), 55; *Talmage v. Chapel*, 16 Mass. 71; *Biddle v. Wilkins*, 1 Peters (U. S.), 586.

It has also been held that if an executor or administrator takes a bond from a simple contract debtor, though it be given to him as executor or administrator, he cannot sue in his representative capacity upon such bond, because the effect of taking it is to extinguish the simple contract debt, creating a new and personal obligation of a higher nature. *Hosier v. Lord Arundel*, 3 Bos. & Pull. (Eng.) 7; *Partridge v. Court*, 5 Price (Eng.), 419, 420, 421; *Price v. Moulton*, 10 C. B. 561.

But this position has been sharply criticised by Gibson, C. J., in *Kline v. Guthart*, 2 P. & W. (Pa.) 490. Compare *Stewart v. Richey*, 2 Harr. (N. J.) 164; *West v. Chappell*, 5 Gill (Md.), 228.

1. *Aspinall v. Wake*, 10 Bing. (Eng.) 51, 54; s. c., 3 M. & Scott (Eng.), 426; *Hargraves v. Holden*, 1 Cr. M. & R. 580, n. (2); *Merritt v. Seamen*, 2 Selden, 367; *Allen, J.*, in *Austin v. Munro*, 47 N. Y. 366, 367; *Laycock v. Oleson*, 60 Ill. 30; *Daniels v. Richie*, 7 Blackf. (Ind.) 391. But see *Hooker v. Wells*, 35 Miss. 159; *Burdyn v. Mackey*, 7 Mo. 374.

2. *Wms. Exrs.* (7th Eng. ed.) 1872; *Reynell v. Langcastle*, Cro. Jac. (Eng.) 545; *Com. Dig. Pleader*, 2 D. 1. See Gibson, C. J., in *Kline v. Guthart*, 2 P. & W. (Pa.) 490, 492. But see *Collett v. Collett*, 3 Dowl. (Eng.) 211; *Ferguson v. Mitchell*, 4 Dowl. (Eng.) 513; 2 Cr. M. & R. (Eng.) 687.

Such defect is aided after verdict by stat. 16 & 17 Car. II. c. 8, and by stat. 5 & 6 Ann. c. 16, on general demurrer, or after judgment by default. *Lee v. Pilney*, 4 Ld. Raym. (Eng.) 1513.

Averment of Official Character. — In an action by administrators, a petition which in ordinary, concise language sets out the time, place, and fact of their intestate's death, their appointment, and the issuance of letters, and that they have ever since been, and still are, his legal and actual administrators, is sufficient to show their title to sue. *Central Bank U. P. R. Co. v. Andrews* (Kan.), 14 Pac. Rep. 509.

An allegation in the complaint that the plaintiff has been duly appointed administrator by the probate court, or by the judge of probate of the proper county, is sufficient. *Dial v. Tappan*, 20 S. C. 167; *Chamberlain v. Tiner*, 31 Minn. 371; *Hurst v. Addington*, 84 N. C. 143.

But an allegation in a complaint that the plaintiff "is the duly qualified and acting executrix of the last will and testament of A., deceased," is not a sufficient averment of her official character. *Judah v. Fredericks*, 57 Cal. 389.

If the complaint in an action by an administrator avers that he sues as such, it is immaterial that the complaint misdescribes the mode of his appointment; as, for instance, that he was appointed by the "judge," instead of by the "court." He may prove his due appointment. *Parish v. Eden*, 62 Wis. 272.

When the complaint is so framed as to give the plaintiff a representative character in the litigation, and make the cause of action, if any, devolve upon him solely in that character, the omission of the word "as" between his name and the words descriptive of the capacity in the title of the action does not prevent him from claiming in that capacity. *Beers v. Shannon*, 73 N. Y. 292; *Cordier v. Thompson*, 8 Daly (N. Y.), 172.

In a suit by the personal representative of a deceased special commissioner, upon a bond given for a deferred payment of the purchase-money of lands sold to him, it is sufficient to aver in the declaration that the suit is for the use of the substituted commissioner; and, if the defendant doubt the averment, he can, upon motion, have a rule calling upon such commissioner to avow and prosecute, or disavow and dismiss, the action. *Triplétt v. Goff* (Va.), 3 S. E. Rep. 525.

When a person brings a suit as administratrix, and alleges that she has fully administered the estate, and made her final settlement, and is the sole distributee thereof, she is really suing in her own right, and neither as administratrix, assignee, nor distributee. *White v. Pulley*, 27 Fed. Rep. 430.

(3) *Foinder of Counts*.—The plaintiff cannot join counts on causes of action which are laid to have been vested in him in his representative capacity with counts on causes of action which accrued to him in his own right.¹ Such misjoinder is a defect in substance, and bad on general demurrer, in arrest of judgment or in error.²

1. *Hosier v. Lord Arundel*, 3 Bos. & Pull. (Eng.) 7; *Partridge v. Court*, 5 Price (Eng.), 419, 420, 421; 1 Chitty, Pl. (16th Am. ed.) 226; *Seip v. Drach*, 14 Pa. St. 352; *Bogle v. Kreitzer*, 46 Pa. St. 465; *Robins v. Gillett*, 2 Chand. (Wis.) 96; *French v. Merrill*, 6 N. H. 465; *Bulkley v. Andrews*, 39 Conn. 523; *Mason v. Norcross*, *Coxe*, 252; *Epes v. Dudley*, 5 Rand. (Va.) 437; *Grahame v. Harris*, 5 Gill & J. (Md.) 489; *Yates v. Kimmel*, 5 Mo. 87; *Pugsley v. Aiken*, 14 Barb. (N. Y.) 114; *Lucas v. N. Y. & C. R. Co.*, 24 Barb. (N. Y.) 245; *Moody v. Ewing*, 8 B. Mon. (Ky.) 521; *Frink v. Taylor*, 4 Green (Iowa), 196; *McDaniel v. Parks*, 19 Ark. 671; *Kennedy v. Stalworth*, 18 Ala. 368; *Jefford v. Ringgold*, 6 Ala. 544; *Godbold v. Roberts*, 20 Ala. 354; *Cassels v. Vernon*, 5 Mason (U. S. C. C.), 332; *Brown v. Webber*, 5 Cush. (Mass.) 560.

But it is now settled that if the money recovered on each of the counts will be *assets*, the counts may be joined in the same declaration. 2 Saund. (Eng.) 117, g, note to *Coryton v. Lithebye*; *Gallant v. Bonteflower*, 3 Dougl. (Eng.) 34; *Fry v. Evans*, 8 Wend. (N. Y.) 530; *Sullivan v. Holker*, 15 Mass. 374; *Sebring v. Keith*, 2 Bailey (S. C.), 192; *Hemphill v. Hamilton*, 11 Ark. 425; *Bank v. Haldiman*, 3 Pa. 161; *Fry v. Evans*, 8 Wend. (N. Y.) 530; *Clark v. Lamb*, 6 Pick. (Mass.) 512.

Therefore the same declaration which contains counts on promises to the testator may contain a count on an account stated with the plaintiff *as executor*, concerning money due to the testator by the defendant, or concerning money due to the plaintiff *as executor*,—*Needham v. Corke*, 1 Freem. (Eng.) 538; *Thompson v. Stent*, 1 Taunt. (Eng.) 322; *Cowell v. Watts*, 6 East (Eng.), 105; *Brown v. Lewis*, 9 R. I. 497,—or a count for money lent by the plaintiff *as executor*,—*Webster v. Spencer*, 3 B. & Ald. (Eng.) 364; *Webster v. Bonteflower*, 3 Dougl. (Eng.) 34,—or for money had and received by the defendant to the use of the plaintiff *as executor*,—*Dowbiggen v. Harrison*, 9 B. & C. (Eng.) 669; *Patterson v. Patterson*, 59 N. Y. 574, 582,—or for money paid by the plaintiff *as executor* to the use of the defendant,—*Ord v. Fenwick*, 3 East (Eng.), 103,—or for goods sold and delivered by the plaintiff *as executor*,—*Cowell v. Watts*, East (Eng.), 405; *Dowbiggen v. Harrison*, 9 B. & C. (Eng.) 669; *Hapgood*

v. Houghton, 10 Pick. (Mass.) 154; *Lowe v. Bowman*, 5 Blackf. (Ind.) 410; *Boyle v. Townes*, 9 Leigh (Va.), 758; *Stevens v. Gregg*, 10 S. & R. (Pa.) 234; *Peries v. Acinena*, 3 Watts & S. (Pa.) 64; *Lea v. Hopkins*, 7 Pa. St. 385; *Sebring v. Keith*, 2 Bailey (S. C.), 192,—or for materials furnished and work and labor done by the plaintiff *as executor*,—*Dowbiggen v. Harrison*, 9 B. & C. (Eng.) 669,—or count on a bill of exchange indorsed to the plaintiff *as executor*, or on a promissory note made to him *as executor*. Wms. Exrs. (7th Eng. ed.) 1; 1 Chitty, Pl. (16th Am. ed.) *226.

In a declaration in debt, a count on a judgment recovered by the plaintiff *as executor* may be joined with counts on debts which accrued to the testator. *Crawford v. Whittall*, 1 Dougl. 4, note (1), *ante*. See *Lashley v. Wiley*, 8 Humph. (Tenn.) 659; *Robbins v. Gillett*, 2 Chand. (Wis.) 96; *Stevens v. Gregg*, 10 Ser. & R. (Pa.) 234; *Malin v. Bull*, 13 S. & R. (Pa.) 441; *Bank v. Haldiman*, 1 Ga. 161.

An executor may in the same declaration declare for rent due in his own time, and for that which accrued in the testator's time. *Taylor v. Holmes*, 1 Freem. (Eng.) 367.

In every count, stating a debt or promise to the executor or administrator in that character, the words "as executor," etc., must be inserted. It is not enough to say that it accrued to him, "executor or being executor as aforesaid," but it must be averred that it accrued to him "as executor." 1 Chitty, Pl. (16th Am. ed.) *227. See 2 Saund. (Eng.) 117, h, note; *Tidd* (9th ed.), 13; *Lancefield v. Allen*, 1 Bligh (N. S.), 592; *Williams v. Moore*, 32 Ala. 506; *Ikelheimer v. Chapman*, 32 Ala. 676; *Sherman v. Christian*, 6 Rand. (Va.) 49; *Allen, J.*, in *Austin v. Munro*, 47 N. Y. 367; *Hemphill v. Hamilton*, 6 Eng. (Ark.) 425. But when the declaration discloses a cause of action, which, from its nature and terms, could only accrue to the plaintiff in his representative capacity, as where the note upon which suit is brought is made payable to decedent, the word "executor" without the "as" preceding it is sufficiently explicit to indicate that the suit is in the representative capacity. *Hemphill v. Hamilton*, 6 Eng. (Ark.) 425. Compare § XV. 1. a, (2), n.

2. *Tidd* (9th ed.), 12; 2 Saund. (Eng.) 117, c, note to *Coryton v. Lithebye*.

(4) *Profert*. — At common law, where the cause of action accrued to the deceased in his lifetime, and the executor or administrator necessarily declares in his representative character, he must make *profert* of his letters; ¹ but where the cause of action accrues to the executor or administrator in his own time, and he can sustain the action in his own right, *profert* is unnecessary, and, if made, will be treated as surplusage. ²

(5) *Evidence of Title*. — *When necessary*. — *Pleas ne unques Executor and General Issue*. — Where the plaintiff declares in his representative capacity upon a cause of action arising in the lifetime of the decedent, or in his individual capacity in trespass or trover, relying upon his constructive possession as executor or administrator, although he does not name himself as executor or administrator in the declaration, nor make any *profert*, yet, if his right to maintain the action or his title to the property is put in issue by the pleadings, he must establish his title as executor or administrator at the trial; ³ and this he can do only by proving

1. Wms. Exrs. (7th Eng. ed.) 1875; Shaw, C. J., in *Rand v. Hubbard*, 4 Met. (Mass.) 252, 256; *Ligon v. Bishop*, 43 Miss. 527; *Linder v. Monroe*, 33 Ill. 388; *Carr v. Wyley*, 23 Ala. 821; *Matherson v. Grant*, 2 How. (U. S.) 263; *Daws v. Taylor*, 4 Jones, Law (N. C.), 499; *Cocke v. Walters*, 6 Ark. 404; *Fugate v. Bronaugh*, 3 Cranch, C. C. 65. The declaration should also contain an averment of the representative's official character. Wms. Exrs. (7th Eng. ed.) 1875; *Fugate v. Bronaugh*, 3 Cranch (C. C.), 65. See § XVI. 1, a, (1), (2). See further, as to necessity of *profert*, *Langdon v. Potter*, 11 Mass. 313, 314; *Ellis v. Appleby*, 4 R. I. 462; *Beale v. Hall*, 22 Ga. 431; *Wyant v. Wyant*, 38 Ind. 48; *Axers v. Musselman*, 2 Browne (Pa.), 117; *Dawes v. Taylor*, 4 Jones, L. (N. C.) 499.

The want of *profert*, in an action by an administrator, is fatal on special demurrer. *McDonald v. Browning*, 4 Phila. (Pa.) 21.

At common law if an executor, declaring as such, made *profert* of the letters testamentary, not having in fact at that time obtained probate, the defendant, in order to raise the objection, must have demanded oyer, for if he had pleaded that the plaintiff never was nor is executor in manner and form as alleged in the declaration, the plaintiff would have succeeded on this issue, if he had obtained probate at any time before the trial. But by demanding oyer the defendant made it impossible for the plaintiff to proceed, till he could produce the probate. Wms. Exrs. (7th Eng. ed.) 304, 1875. See *Thompson v. Reynolds*, 3 C. & P. (Eng.) 123; *Campbell v. Baldwin*, 6 Blackf. (Ind.) 364; *Collins v. Myers*, 13 Ill. 358; *Cocke v. Walters*, 1 Eng. (Ark.) 404.

As to effect of pleading general issue, see § XVI. 1, a, (5).

Under Common-Law Procedure Act (1852), sect. 55, *profert* and oyer are abolished. On its being shown that the executor who has declared *as such*, has not obtained probate, proceedings will be stayed. Wms. Exrs. (7th Eng. ed.) 1876.

2. *Anderson v. Wilson*, 13 Ark. 409, 413; *Thames v. Richardson*, 3 Strobb. (S. C.) 484; *Savage v. Meriam*, 1 Blackf. (Ind.) 176; *Campbell v. Baldwin*, 6 Blackf. (Ind.) 364; *Biddle v. Wilkins*, 1 Peters (U. S.), 686; *Talmage v. Chappell*, 16 Mass. 71; *Harlin v. Levi*, 6 Ala. 399; *Callier v. Dade*, Minor (Ala.), 20; *Walt v. Walsh*, 10 Heisk. (Tenn.) 314.

If *profert* is unnecessarily made, the plaintiff is not bound to produce the letters upon prayer of oyer. 1 Chitt. Pl. 430; 1 Saund. (Eng.) 9, n. d.

If the plaintiff sue in his representative character, where he might have brought the action in his own name, he need not make *profert* of his letters. *Savage v. Meriam*, 1 Blackf. (Ind.) 176; *Campbell v. Baldwin*, 6 Blackf. (Ind.) 364; *Talmage v. Chappell*, 16 Mass. 71; *Biddle v. Wilkins*, 1 Peters (U. S.), 686; *Anderson v. Wilson*, 13 Ark. 409, 413.

3. Wms. Exrs. (7th Eng. ed.) 304, 305, 1887, 1888; 2 Saund. (Eng.) 473, note to *Wilbraham v. Snow*; *Blainfield v. March*, 7 Mod. (Eng.) 141, by Holt, C. J.; s. c., 1 Salk. (Eng.) 285, Holt (Eng.), 44; *Hunt v. Stevens*, 3 Taunt. (Eng.) 113; *Campbell v. United States*, 13 Court of Claims (U. S.), 108.

Where the application of an administrator to be made party plaintiff to a suit, in the subject-matter of which his intestate was interested, contains all the essential

the probate or grant of administration.¹ To put the title of the executor or administrator in issue, the defendant must plead *ne unques executor*, or *ne unques administrator*.² By pleading the general issue, he admits the title stated in the declaration.³ Where

allegations as to the capacity in which he desires to prosecute the suit, it is not error to admit him as a party, without first compelling him to prove his legal appointment, when the defendant neither pleads any denial of such appointment, nor attempts to prove that he has been appointed. *Hamilton v. Lamphear*, 7 Atl. Rep. 19.

If the administrator once succeeds in reducing the note to judgment, his title-makers cannot annul the judgment on the ground that he had not qualified. *Maraist v. Caillier*, 30 La. An. pt. 1, 1087.

1. Wms. Exrs. (7th Eng. ed.) 305, 1889, 1893.

Although an executor delivers his title from the will, yet the only legitimate evidence of his title is the probate. See *Smith v. Maybry*, 7 Yerg. (Tenn.) 26; *Seymour v. Beach*, 4 Vt. 493.

The original will cannot be read in evidence for that purpose, unless it bears the seal of the court, or some other mark of authentication. *Pinney v. Pinney*, 8 B. & C. (Eng.) 335.

Under the English practice, the probate may be proved by an examined copy, or by the production of the "act book" containing the entry of the act of the court. The latter is primary evidence, and admissible, without accounting for the non-production of the probate. *Cox v. Allingham*, Jacob, 514.

Probate granted to one of several executors enures to the benefit of all, and hence is well evidenced by probate, granted to one only, of a will appointing them all. Wms. Exrs. (7th Eng. ed.) 1891; *Walters v. Pfeil*, 1 Mood. & Malk. (Eng.) 369; *Scott v. Briant*, 6 Nev. & M. (Eng.) 381.

"The title of the plaintiff as administrator may be proved by the production of the letters of administration, or of a certificate or exemplification thereof granted by the court of probate, or without producing the letters of administration, by the original book of acts directing the grant, or a copy of it, since the stat. 14 & 15 Vict. c. 99." Wms. Exrs. (7th Eng. ed.) 1893. See *Kemp-ton v. Cross*, Cas. temp. Hardw. (Eng.) 108; Bull. N. P. (Eng.) 246.

Letters testamentary and of administration are conclusive evidence of the authority of the persons to whom they are granted, and sufficient to establish the representative character of the plaintiff. *Carroll v. Carroll*, 60 N. Y. 123; *Farley v. McConnell*, 52 N. Y. 630; *Belden v. Meeker*, 47 N. Y. 630; *Westcott v. Cady*, 5 John. Ch. (N. Y.) 334.

The regularity of the appointment can only be questioned in a direct proceeding. *Denver, etc., R. Co. v. Woodward*, 4 Col. 1.

As to whether the letters are conclusive, or *prima facie* evidence only, see *Leonard v. Cameron*, 39 Miss. 419; *Clark v. Pishon*, 31 Me. 504; *Record v. Howard*, 58 Me. 225; *Seymour v. Beach*, 4 Vt. 493; *Davis v. Shuler*, 14 Fla. 438; *Collins v. Ayers*, 13 Ill. 358; *Owings v. Beall*, 1 Litt. (Ky.) 257; *Raborg v. Hammond*, 2 H. & Gill (Md.), 42; *Fishwick v. Sewell*, 4 Harr. & J. (Md.) 393; *Wilson v. Ireland*, 4 Md. 444; *Pendleton v. Dalton*, 92 N. C. 185. See also "Probate and Letters of Administration."

In New York an exemplification of letters of administration from the surrogate's office is good evidence, without accounting for the non-production of the original letters. *Jackson v. Robinson*, 4 Wend. (N. Y.) 436.

In New Hampshire a copy of the record where it is kept is the proper evidence, and a certificate of a register of probate incompetent. *Morse v. Bellows*, 7 N. H. 549; *Dickinson v. McCraw*, 4 Rand. (Va.) 158.

The title of an administrator *de bonis non* is sufficiently proved by the letters of administration *de bonis non*, without producing the letters granted to the first executor or administrator. *Catherwood v. Chabaud*, 1 B. & C. (Eng.) 150. See *Gradell v. Tyson*, 2 Stra. (Eng.) 716; *Owings v. Beall*, 1 Litt. (Ky.) 257.

In Minnesota the letters are at least *prima facie* evidence of every fact upon which the representative's title depends. *Pick v. Strong*, 26 Minn. 303.

So in Wisconsin are certified copies of letters and bond, without producing will and probate. *Wiltman v. Watty*, 45 Wis. 491.

2. The plea *ne unques executor or administrator* puts in issue the fact of appointment, but not its regularity. *Denver, etc., R. Co. v. Woodward*, 4 Col. 1.

3. Wms. Exrs. (7th Eng. ed.) 1887, 1888. See *Greenl. Ev.* §§ 339, 340, 341; 2 Saund. (Eng.) 47, 2, note to *Wilbraham v. Snow*; *Kelly v. Thompson*, 2 Brev. (S. C.) 58; *Gibb v. Gaboon*, 3 Dev. L. 80; *Brown v. Nourse*, 55 Me. 230; *Kavanachi v. Askew*, 17 Ark. 595; *Worshaw v. Goar*, 4 Porter (Ala.), 441; *Hughes v. Clayton*, 3 Call, 554; *Balance v. Frisby*, 2 Scam. (Ill.) 165; *Pol-lard v. Buttery*, 3 Blackf. (Ind.) 239; s. c., 4 Blackf. (Ind.) 48; *Scanlan v. Ruble*, 4 Blackf. (Ind.) 481; *Codding v. Whitaker*,

the representative sues upon his own contracts, or in trespass, trover, or replevin, relying upon his *actual* possession, — as the action can be maintained by him in his own right, — he cannot be compelled to prove his representative character.¹

(6) *Plea of Statute of Limitations.* See § XVI. 1, *b*, (12); also LIMITATIONS. — In *assumpsit* by an executor or administrator, where all the promises are laid to the deceased, and the right of action accrued in his lifetime, the time of limitation must be computed from the time when the action first accrued to the deceased, and not from the time of proving the will, or taking out letters of administration.² But where the cause of action accrued

5 Blackf. (Ind.) 473; Nolte v. Libbert, 34 Ind. 163; Axers v. Musselman, 2 Browne (Pa.), 117; Thames v. Richardson, 3 Strobb. 484; Cheek v. Wheatley, 11 Humph. (Tenn.) 556; Collins v. Ayres, 13 Ill. 358; Chapman v. Davis, 4 Gill (Md.), 166; Prettyman v. Waples, 4 Harr. (Del.) 299; Cheatham v. Riddle, 12 Tex. 112; Clark v. Pishon, 31 Me. 503; Thomas v. Tanner, 67 B. Mon. (Ky.) 52; Hyman v. Gray, 4 Jones, L. (N. C.) 155; Sullivan v. Homacker, 6 Fla. 372; Clapp v. Beardsley, 1 Vt. 151; Aldis v. Bardick, 8 Vt. 21; Miller v. Henderson, 24 Ark. 344. *Contra*, Chew v. Travers, 2 Brev. (S. C.) 146; Blair v. Cisneros, 10 Tex. 34.

Thus, in an action of *assumpsit* by an administrator, on promises to the intestate, the plea of *non-assumpsit* admits the title of the plaintiff as administrator, and the defendant will not be allowed to insist on the production of the letters of administration, nor object that the supposed intestate has made a will and appointed an executor, nor that the letters were not properly stamped. *Marsfield v. Marsh*, 2 Ld. Raym. (Eng.) 824; s. c., *nom.* *Blainfield v. Marsh*, 7 Mod. (Eng.) 141; 1 Salk. (Eng.) 285; *Holt* (Eng.), 44; *Axers v. Musselman*, 2 Browne (Pa.), 115. See *M'Kimm v. Riddle*, 2 Dall. (Pa.) 100; *Wise v. Getty*, 3 Cranch (C. C.), 292; *Quidort v. Pergeaux*, 18 N. J. Eq. 472; *Hutchinson v. Bobo*, 1 Bailey (S. C.), 546; *Kenan v. Du Bignon*, 46 Ga. 258; *Rawlings v. Paty*, 23 Ark. 204. So with the action of trover. 2 Saund. (Eng.) 47, z, note to *Wilbraham v. Snow*.

Where the plaintiff sues as executor, and there is no plea of *ne unques executor*, he cannot be called upon to prove that the testator is dead. *Loyd v. Finlayson*, 2 Esp. (Eng.) 564. *Compare* *Jeffers v. Radcliffe*, 10 N. H. 242; *Munroe v. Merchant*, 26 Barb. (N. Y.) 383; *Siebert v. True*, 8 Kansas, 52; *Brickhouse v. Brickhouse*, 11 Ired. L. (N. C.) 404; *Peterkin v. Incoes*, 4 Md. 175; *Sims v. Boynton*, 32 Ala. 353; *Tisdale v. Conn. L. Ins. Co.*, 26 Iowa, 177; s. c., 28 Iowa, 12; *Mutual Ben. L. Ins. Co. v. Tisdale*, 3 Cent. L. J. 130. But by pleading the general issue, the defendant only admits

the title stated in the declaration; and therefore, if that be insufficient, the plaintiff cannot recover. *Adams v. Savage*, 6 Mod. (Eng.) 134.

At common law, where the plaintiff declared on a cause of action arising in his own time, and made *profert* of the probate or letters of administration, the general issue did not admit the plaintiff's title as executor or administrator. *Hunt v. Stevens*, 3 Taunt. (Eng.) 115, by Lawrence, J.; 2 Saund. (Eng.) 47, z, note to *Wilbraham v. Snow*. *Compare* *Watson v. King*, 4 Campb. (Eng.) 272; *Loyd v. Finlayson*, 2 Esp. (Eng.) 564. See also *Clapp v. Beardsley*, 1 Vt. 151; *Aldis v. Burdick*, 8 Vt. 21; *Robinson v. McDonald*, 2 Ga. 116; *Macon, etc., R. Co. v. Davis*, 18 Ga. 679; *Kesler v. Roseman*, Busbee (N. C.), 389; *Browning v. Huff*, 2 Bailey (S. C.), 174.

Where an administratrix had, at the beginning of an action, authority to sue, *held*, that a subsequent revocation of that authority must be specially pleaded, and was not put in issue by denial of her authority "to sue or recover in and maintain this action." *Burlington & Missouri River R. R. Co. v. Crockett*, 17 Neb. 570.

A general demurrer to an action by administrator for a debt due the estate does not raise the question of his title. *Gibson v. Ponder*, 40 Ark. 195.

1. *Wms. Exrs.* (7th Eng. ed.) 305, 1889; *Elliott v. Kemp*, 7 M. & W. (Eng.) 306, 312, 314. See *Oughton v. Seppings*, 1 B. & Ad. (Eng.) 241; *White v. Mullett*, 6 Exch. (Eng.) 713, 715; *Wallor v. Drakeford*, 1 El. & Bl. (Eng.) 749; *Cheatham v. Riddle*, 12 Tex. 112, 115, 116; *Cheek v. Wheatley*, 11 Humph. (Tenn.) 556.

If the action can be maintained by the representative in his own right, the naming himself executor or administrator in the declaration may be regarded as mere surplusage. *Com. Dig. Pleader*, 2 D, 1; *Spurgeon v. Robinett*, 4 Bibb (Ky.), 75; *Bailey v. Gratton*, 14 Ark. 180. See § XVI. 1, *a*, (2), n.

2. *Hickman v. Walters*, Willes (Eng.), 27, 9; 2 Saund. 63, *k*, note to *Hodsdon v.*

after the death of the deceased, the statute begins to run only from the time of proving the will, or taking out letters.¹ Where the plaintiff relies on an acknowledgment made since the death of the deceased, to bar the statute, he must insert counts in

Harridge. See *Warren v. Paff*, 4 Bradf. Sur. (N. Y.) 260; *Conant v. Hitt*, 12 Vt. 285; *Hapgood v. Southgate*, 21 Vt. 584.

Actions abated by Death.—Where a party brings an action before the expiration of six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator may, within the equity of the fourth section of the statute of limitations (21 Jac. 1, c. 16), bring a new action, provided he does so within a reasonable time. The new action should be brought within the year, although it has been expressly held that the executor is not bound to that period, if, under the circumstances, he can fairly be said to have used due diligence. *Wms. Exrs.* (7th Eng. ed.) 1883, 1884; *Mathews v. Phillips*, 2 Salk. (Eng.) 425; *Kinsey v. Heyward*, 1 L. & W. (Eng.) 260; 2 Saund. (Eng.) 64, a, note to *Hodsdon v. Harridge*; *Kinsey v. Heyward*, 1 Ld. Raym. (Eng.) 434; *Wilcox v. Huggins*, 2 Str. (Eng.) 207; *Curlewis v. Lord Mornington*, 7 El. & Bl. (Eng.) 283; s. c., 27 L. J. Q. B. 439. See *Martin v. Anker*, 3 Hill, Ch. (N. Y.) 211; *Butts v. Genung*, 5 Paige (N. Y.), 254; *Huntingdon v. Brinkerhoff*, 10 Wend. (N. Y.) 278; *Story, J.*, in *Trecothick v. Austin*, 4 Mason (C. C.), 26, 27; *Allen v. Rantree*, 1 Speers, 80; *Parker v. Fassit*, 1 Harr. & J. 337; *Hunter v. Glenn*, 1 Bailey, Eq. 541; *Downing v. Lindsay*, 2 Pa. St. 382, 385; *McNeill v. McNeill*, 35 Ala. 30; *Manly v. Turnipseed*, 37 Ala. 522.

If an executor bring *assumpsit*, and the six years run, his executors may, notwithstanding, bring a fresh action, provided they bring it within a reasonable time, which is to be determined by the court upon the circumstances of the case. *Bull. N. P.* (Eng.) 150, a.

Where the action accrued to the testator while abroad, and he died without having returned after the accrual, the statute is no bar to an action by the executors, although the right accrued more than six years before action brought, where the action is brought within six years after the death. For the case is served by the 7th section, which provides, that, if the person entitled shall be abroad at the time the cause of action accrued, such person may bring his action within six years of his return from beyond seas. *Townsend v. Deacon*, 3 Ex. (Eng.) 706; *Forbes v. Smith*, 11 Ex. (Eng.) 161.

Statutory Provisions.—By N. Y. Code of Pro. § 102, on the death of a party en-

titled to bring an action, where the cause of action survives, the time within which the action may be brought by his representatives is extended for the term of one year from the date of the death of the party in addition to the time limited by the statute of limitations.

In Massachusetts, if a person entitled to bring an action dies before the time limited for the commencement of such action, or within thirty days after the expiration of said time, and the cause of action by law survives, the action may be commenced by or against the executor or administrator at any time within two years after the grant of letters testamentary or of administration, and not afterwards if otherwise barred. *Mass. Gen. Sts. c. 155, § 10.* See *Gallup v. Gallup*, 11 Met. (Mass.) 445; *Bates v. Kempton*, 7 Gray (Mass.), 382; *Ostrom v. Curtis*, 1 Cush. (Mass.) 467. Compare *McKinder v. Littlejohn*, 1 Ired. L. (N. C.) 66; *Brewster v. Brewster*, 52 N. H. 52; § XVI. 1, b, (14), n.; § XVI. 4.

1. *Wms. Exrs.* (7th Eng. ed.) 1880; *Cary v. Stephenson*, 2 Salk. (Eng.) 421; *C. Carth.* (Eng.) 335; *Skinm.* (Eng.) 4 Mod. (Eng.) 372. See *Stanford's Case*, Cro. Jac. (Eng.) 61; *Ferguson v. Fyffe*, 8 Cl. & Fin. (Eng.) 121; *Dunning v. Ocean Nat. Bank*, 6 Lans. (N. Y.) 296; *Bucklin v. Ford*, 5 Barb. (N. Y.) 393; *Johnson v. Humphries*, 14 S. & R. (Pa.) 395; *Fishwick v. Sewall*, 4 Harr. & J. (Md.) 393, 428; *Grubb v. Clayton*, 2 Hayw. (N. C.) 378; *Lee v. Ganse*, 2 Ired. (N. C.) 448; *Gieger v. Brown*, 4 McCord (S. C.), 423; *Webb v. Elmore*, 2 Bailey (S. C.), 595; *Hansford v. Elliott*, 9 Leigh (Va.), 79.

Thus, an administrator may maintain an action for money had and received to his use by the defendant, who had received the intestate's money *after his death*, six years and upwards before the commencement of the action, but within six years after letters of administration granted to the plaintiff. *Cary v. Stephenson*, 2 Salk. (Eng.) 421; s. c., 4 Mod. (Eng.) 372.

So where the action was brought by an administrator against the acceptors of bills of exchange payable to the intestate, and accepted after his death, but before the grant of letters of administration, it was held that the statute ran only from the grant of letters. *Murray v. E. I. Co.*, 5 B. & Ald. (Eng.) 204; *Pratt v. Swaine*, 8 B. & C. (Eng.) 285; s. c., 1 Mann. & Ryl. (Eng.) 351; *Perry v. Jenkins*, 1 My. & Cr. (Eng.) 118.

the declaration, laying promises to himself as executor or administrator.¹

(7) *Plea of Set-off.* See § XVI. 1, *b*, (16); also SET-OFF and COUNTER-CLAIM. — By stat. 2 Geo. II. c. 22, § 13, where either party sues, or is sued, as executor or administrator where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other.² To entitle the defendant to a set-off under the statute, the debts must be mutual, and the action necessarily brought by the executor or administrator in his representative character.³ Where, therefore, the plaintiff declares *as executor* for a debt due after the death of the testator,⁴ or sues for a cause of action arising after the testa-

1. *Wms. Exrs.* (7th Eng. ed.) 1880, 1881.

Evidence of an acknowledgment by the defendant within six years of a debt of above six years' standing, due to the plaintiff's intestate, made after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate. *Sarrell v. Wine*, 3 East (Eng.), 409. See *Ward v. Hunter*, 6 Taun. (Eng.) 210; *Short v. McCarthy*, 3 B. & Ald. (Eng.) 631; *Jones v. Moore*, 5 Binney (Pa.), 573. *Contra*, *Buswell v. Roby*, 3 N. H. 467, 468; *Baxter v. Penniman*, 8 Mass. 134.

If all the promises in the declaration are laid to be made to the testator, and the defendant pleads the statute of limitations, the plaintiff cannot in his replication set forth a promise made to himself within six years, without being guilty of a departure. *Hickman v. Walker*, Willes (Eng.), 29; *Deane v. Crane*, 1 Salk. (Eng.) 28; 6 Mod. 309, 310; *Marlborough v. Widmore*, 2 Stra. (Eng.) 890; 2 Saund. (Eng.) 63, *l*; 1 Chitty, Pl. (16th Am. ed.) 675.

If an executor sues on a bill or note, and intends to rely on an acknowledgment to himself to bar the statute, he must state the making of the bill or note in his declaration, and then aver that after the death of the decedent the defendant promised him (the plaintiff) as executor or administrator to pay him. *Timmis v. Platt*, 2 M. & W. (Eng.) 720; *Gilbert v. Platt*, 5 Dowl. (Eng.) 748; *Rolleston v. Dixon*, 2 Dowl. & L. (Eng.) 892.

As to what will be sufficient acknowledgment to the executor or administrator to take a case out of the statute, see *Clark v. Hooper*, 10 Bing. (Eng.) 840; s. c., 4 M. & Scott (Eng.), 353; *Baxter v. Penniman*, 8 Mass. 133; *Johnson v. Beardslee*, 15 John. 3; *Martin v. Williams*, 17 John. 330. See LIMITATIONS.

When once an action has been commenced within due time, the party is out of the purview of the act. *Downing v. Lindsay*, 2 Pa. St. 382, 385.

As to effect of death before final judgment upon the running of the statute, see § XVI. 4, n.

2. *Wms. Exrs.* (7th Eng. ed.) 1876. See *Jarvis v. Rogers*, 15 Mass. 389, 407; *Knapp v. Lee*, 3 Pick. (Mass.) 452, 460; *Boardman v. Smith*, 4 Pick. (Mass.) 212, 215; *Bigelow v. Folger*, 2 Met. (Mass.) 255; *Smalley v. Trammel*, 11 Tex. 10; *Mitchell v. Rucker*, 22 Tex. 66; *Peacock v. Haven*, 22 Ill. 23; *Ray v. Dennis*, 5 Ga. 357; *Granger v. Granger*, 6 Ohio, 25; *Richardson v. Parker*, 2 Swan (Tenn.), 529; *Patterson v. Patterson*, 59 N. Y. 574.

The New Hampshire statute is the same as the English except that it uses the words "debts and demands" instead of the single word "debts." Hence held to be broader in its scope. *Mathewson v. Strafford Bank*, 45 N. H. 104.

Where the administrator has sued before defendant has presented a claim against the estate, his only remedy is to plead his claim in offset. *Martin v. White*, 58 Vt. 398.

An administrator has no power to agree that a debt contracted by his intestate, and probated against the estate, may be set off against notes given to the administrator for the purchase-price of land sold at administrator's sale. *Bishop v. Dillard* (Ark.), 5 S. W. Rep. 341.

3. *Coleridge, J.*, in *Rees v. Watts*, 11 Ex. (Eng.) 410, 414; *Colby v. Colby*, 2 N. H. 419; *Mercien v. Smith*, 2 Hill (N. Y.), 210, 214; *Wolfersberger v. Bucher*, 10 S. & R. (Pa.) 10. *Contra*, *Crabtree v. Cliatt*, 22 Ala. 181, 189.

4. *Schofield v. Corbett*, 11 Q. B. (Eng.) 779; s. c., 6 Nev. & M. (Eng.) 627; *Rees v. Watts*, 11 Ex. (Eng.) 410; *Watts v. Rees*, 9 Ex. (Eng.) 696, overruling *Mardell v. Thellusen*, 18 Q. B. 857; *Patterson v. Patterson*, 59 N. Y. 574; *Colby v. Colby*, 2 N. H. 419.

The words of the statute upon which the question depends are, "Where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued

tor's death, the defendant cannot set off a debt due to him from the testator.¹

as executor or administrator where there are mutual debts between the testator or intestate and either party, one debt may be set against the other." "In the first branch of the sentence, the simplest case is mentioned, — that of mutual debts between two living persons; that is, of debts existing between them, contracted respectively in their individual character. In the second, the case supposed is that of one of these mutual debtors dying and being represented by an executor or administrator, in which case such representative will stand in relation to the survivor, if suing or being sued, exactly in the same situation as his testator or intestate would have stood in, and the same right of set-off is given. In this latter case it is quite as necessary as in the former that the debts should originally have existed between the two living parties. The executor or administrator, to come within the statute, must sue or be sued necessarily in his representative character; if not, although he may be called executor, he is really a third party introduced (whereas it is essential that there should be only two concerned), and the mutuality of the debts, without which there can be no set-off, does not exist." Coleridge, J., in *Rees v. Watts*, 11 Ex. (Eng.) 410, 413.

Demands which accrued after the death of the deceased cannot be set off by the defendant against debts due in his lifetime. *Armstrong v. Pratt*, 2 Wis. 299; *Minor v. Minor*, 8 Gratt. (Va.) 1; *Mercien v. Smith*, 2 Hill (N. Y.), 210. *Contra*, *Bosler v. Exchange Bank*, 4 Pa. St. 32; *Dorsheimer v. Bucher*, 7 S. & R. (Pa.) 9.

Otherwise where the estate is represented insolvent, and the debt falls due before action commenced, or pending suit. In such case unliquidated demands may also be set off. *Bigelow v. Folger*, 2 Met. (Mass.) 255; *Boardman v. Smith*, 4 Pick. (Mass.) 212, 215. See *Aldrich v. Campbell*, 4 Gray (Mass.), 284; *Medobank v. Curtis*, 24 Me. 36; *Mathewson v. Strafford Bank*, 45 N. H. 104, 110; *Morrison v. Jewell*, 34 Me. 146, 147, 148. *Contra*, *Bosler v. Exchange Bank*, 4 Pa. St. 32. See also *Dorsheimer v. Bucher*, 7 S. & R. (Pa.) 9.

Funeral expenses have been allowed as a set-off to an action by the administrator for a debt due the intestate. *Adams v. Butts*, 16 Pick. (Mass.) 343.

Also to an action by the administrator for a debt due the intestate which became due in his own time. *Patterson v. Patterson*, 59 N. Y. 574.

But debts due by the deceased in his lifetime cannot be set off against demands

which originated in the receipt or purchase of the assets of the estate after his death, because this would interfere with the regular course of distribution. Moreover, on such demands the representative could have sued in his own right. *Tallman's Administrator*, 21 Wend. (N. Y.) 674; *Shaw v. Gookin*, 7 N. H. 420; *Mills v. Lumkin*, 1 Kelly (Ga.), 507; *Crawford v. Beal*, Dudley (Ga.), 204; *Bissell v. Stone*, 7 Eng. (Ark.) 378; *Wolfersberger v. Bucher*, 10 S. & R. (Pa.) 10; *Cook v. Lovel*, 11 Iowa, 81; *Brown v. Garland*, 1 Wash. (Va.) 221; *Root v. Taylor*, 20 John. (N. Y.) 137; *Wolfersberger v. Bucher*, 10 S. & R. (Pa.) 9; *Steel v. Steel*, 12 Pa. St. 64; *Whitehead v. Cade*, 2 Miss. 95; *Mellen v. Boarman*, 13 Sm. & M. (Miss.) 100; *Cotton v. Parker*, 1 Sm. & M. Ch. 191; *Hall v. Hall*, 11 Tex. 526; *Dwight v. Carson*, 2 La. An. 459; *Irons v. Irons*, Harper, 109; *Schmidt v. Crafts*, 2 Brev. (S. C.) 266. See *Aldrich v. Campbell*, 4 Gray (Mass.), 284; *Smith v. Boyer*, 2 Watts (Pa.), 173; *McGinnis v. Allen*, 2 Swan (Tenn.), 645; 2 *Smith's L. Cas.* (8th Am. ed.) 341, note to *Rose v. Hart*.

1. *Shipman v. Thompson*, Willes (Eng.), 103; *Tegetmeyer v. Lumley*, Willes (Eng.), 264, n.; *Henderson v. Henderson*, 6 Q. B. 288; *Lambarde v. Older*, 17 Beav. (Eng.) 542; *Wront v. Dawes*, 25 Beav. (Eng.) 369; *Newhall v. Furney*, 14 Ill. 338; *Woodward v. McGaugh*, 8 Mo. 161; *Aiken v. Bridgman*, 35 Vt. 249; *Hall v. Hall*, 11 Tex. 326; *Buzzell v. Stone*, 7 Eng. (Ark.) 378; *Dayhuff v. Dayhuff*, 27 Ind. 158; *Stuart v. Commonwealth*, 8 Watts (Pa.), 74; *Mellen v. Boarman*, 13 Sm. & M. (Miss.) 100; *Cotton v. Parker*, 1 Sm. & M. Ch. (Miss.) 191; *Whitehead v. Cade*, 2 Miss. 95; *Root v. Taylor*, 20 John. (N. Y.) 137; *Dwight v. Carson*, 2 La. An. 459; *Irons v. Irons*, 5 R. I. 264; *Happoldt v. Jones*, Harper, 109; *Schmidt v. Crafts*, 2 Brev. 266. See *Aldrich v. Campbell*, 4 Gray (Mass.), 84; *McGinnis v. Allen*, 2 Swan (Tenn.), 645; *Burton v. Chimis*, Hardin (Ky.), 252; *Woodman v. Barker*, 2 N. H. 474; *Shaw v. Gookin*, 7 N. H. 19; *Hills v. Tallman*, 21 Wend. (N. Y.) 674; *Mead v. Merritt*, 2 Paige (N. Y.), 402; *Irving v. Dekay*, 10 Paige (N. Y.), 319; *Pitkin v. Pitkin*, 8 Conn. 325; *Wolfersberger v. Bucher*, 10 S. & R. (Pa.) 10.

The principle applies in every instance where the executor or administrator could have sued in his own right, although the suit may have actually been brought in his representative capacity. *Mercien v. Smith*, 2 Hill (N. Y.), 210; *Fry v. Evans*, 8 Wend. (N. Y.) 230; *Shipman v. Thompson*, Willes

(8) *Admissions.* — See DECLARATIONS.

Admissions made by an executor or administrator before he became clothed with the powers of his office are not evidence against him in an action brought by or against him in his representative capacity;¹ otherwise if made afterwards.²

(9) *Costs.* — See COSTS, § IV. 3.³

(Eng.), 103. *Compare* Wolfersberger v. Bucher, 10 Ser. & R. (Pa.) 10.

As to set-off brought by husband and wife in right of the wife as executrix, see *Field v. Allen*, 9 M. & W. (Eng.) 694.

Legacies and distributive shares cannot, as a general rule, be set off against debts due the estate from the legatee or distributee. *Guthrie v. Guthrie*, 17 Tex. 541; *Robinson v. Robinson*, 4 Harr. 418. But see *Smith v. Boyer*, 2 Watts (Pa.), 173.

If a stranger received rent due to the testator in his lifetime, and afterwards, at the request of the tenant in possession, pays the demand of ground-rent due at the same time for the same premises, he may deduct such payment in an action by the executor for the rents received, but he cannot deduct a payment of ground-rent arising after the testator's death. *Wilkinson v. Cawood*, 3 Anstr. (Eng.) 905. *Compare* *Dorsheimer v. Bucher*, 7 S. & R. (Pa.) 9; *Wolfersberger v. Bucher*, 10 S. & R. (Pa.) 10.

A loss on a policy underwritten by a testator with a broker cannot be deducted from the amount due to the executors for premiums from the same broker, either at law or in equity. *Beckwith v. Bullen*, 8 El. & Bl. (Eng.) 683.

Equitable Set-off. — "Although the rule is as fully established in equity as at law, that demands due in different rights cannot be set off, — the principle being that one's money shall not be applied to another man's debts, — yet a court of equity will have regard to the beneficial ownership of the debts, and will give effect to the right of set-off accordingly, notwithstanding any technical difficulties as to forms of action or the like." *Wms. Exrs.* (7th Eng. ed.) 1879. See *Jones v. Mossop*, 3 Hare (Eng.), 568; *Baillie v. Edwards*, 2 H. L. Cas. (Eng.) 74; *Bridges v. Smyth*, 8 Bing. (Eng.) 29; *Crabtree v. Crabtree*, 22 Ala. 181.

To entitle a party to an equitable set-off, he must show some equitable grounds for being protected from his adversary's demand. *Rawson v. Samuel*, 1 Cr. & Ph. (Eng.) 161, 178; 2 *Smith, L. Cas.* (8th Am. ed.) 355, note to *Rose v. Hart*; *Dorsheimer v. Bucher*, 7 S. & R. (Pa.) 9.

An equitable demand cannot be set off at law unless pleaded by way of an equitable defence under statutory authority. In the absence of such legislation, the proper course is to apply to a court of

equity for an injunction. *Wms. Exrs.* (7th Eng. ed.) 1878.

Replication. — In answer to a set-off, the executor or administrator may give in evidence the advance of money by him as executor or administrator to the defendant. *Gallant v. Bonteflower*, 3 Dougl. (Eng.) 34.

1. *Thomasson v. Driskell*, 13 Ga. 253; *Gilkey v. Hamilton*, 22 Mich. 283; *Gaines v. Alexander*, 7 Gratt. (Va.) 257; *Fenwick v. Thornton*, M. & M. (Eng.) 51. But see *Smith v. Morgan*, 2 M. & Rob. (Eng.) 257.

2. *Atkins v. Sanger*, Pick. (Mass.) 192; *Hill v. Buckminster*, 5 Pick. (Mass.) 391; *Faunce v. Gray*, 21 Pick. (Mass.) 243; *Heywood v. Heywood*, 10 Allen (Mass.), 105; *Emerson v. Thompson*, 16 Mass. 429; *Allen v. Allen*, 26 Mo. 327; *Lawson v. Powell*, 31 Ga. 681; *Floyd v. Wallace*, 31 Ga. 688; *Matson v. Clapp*, 8 Ohio, 248; *Haleyburton v. Kershaw*, 3 Desaus. (S. C.) 105. See § XIII. 3. But see *Hueston v. Hueston*, 2 Ohio St. 488; *Wright v. Wright*, 2 Brev. (S. C.) 125; *Ciples v. Alexander*, 3 Brev. (S. C.) 558; *Rhodes v. Seymour*, 36 Conn. 1; *Wheelock v. Wheelock*, 5 Vt. 433.

Such admissions are competent to charge the estate in the hands of an administrator *de bonis non*. *Emerson v. Thompson*, 16 Mass. 429; *Lashlee v. Jacobs*, 9 Humph. (Tenn.) 718. But see *Pease v. Phelps*, 10 Conn. 62; *McArthur v. Corrie*, 32 Ala. 75.

In an action upon a judgment recovered in another State, by an administrator appointed in that State, his admissions that the judgment was fraudulent are not admissible against the administrator appointed in Texas, and bringing the action there. *Norwood v. Cobb*, 20 Tex. 588.

Admissions with reference to plea of *plene administravit*, see § XVI. 1, b, (10), n.

Co-Executors and Co-Administrators. — See *Fox v. Waters*, 12 Ad. & El. (Eng.) 43; *Scholey v. Walton*, 12 M. & W. (Eng.) 510; *Hammon v. Huntley*, 4 Cow. (N. Y.) 493; *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558; *McIntire v. Morris*, 14 Wend. (N. Y.) 90; *James v. Hacklay*, 16 John. (N. Y.) 273; *Walkup v. Pratt*, 5 Harr. & J. (Md.) 53. See JOINT EXECUTORS AND ADMINISTRATORS.

3. **Additional Authorities.** — To the effect that an executor or administrator is not liable for costs, when plaintiffs, upon a non-suit or verdict, where the action was brought necessarily in his representative

(10) *Writs of Error.* — See ERROR; also APPEALS.

character, as upon a contract entered into by the testator or intestate, or for a wrong done in his lifetime. *Pickup v. Wharton*, 2 Cr. & M. (Eng.) 401; 4 Tyrwh. (Eng.) 224; *Woolly v. Sloper*, 9 Bing. (Eng.) 754; *Barnard v. Higdon*, 3 B. & Ald. (Eng.) 213; s. c., 1 Chitt. Rep. (Eng.) 628; *Jones v. Williams*, 6 M. & Sel. (Eng.) 178; *Woodbridge v. Draper*, 15 Mo. 460; *Holley v. Christopher*, 3 T. B. Mon. (Ky.) 14; *Burhams v. Blanchard*, 1 Denio (N. Y.), 626; *Gibbons v. Johnson*, 4 Ill. (3 Scam.) 61; *Frink v. Leyton*, 2 Bay (S. C.), 166; *Jamison v. Lindsay*, 1 Bailey (S. C.), 79; *Bordeaux v. Cave*, 2 Bailey (S. C.), 6; *Mealer v. Meyers*, 2 Bailey (S. C.), 53; *Swift v. Roolwine*, 1 Brev. (S. C.) 175; *Jameson v. Young*, 2 Litt. (Ky.) 387; *Hatcraft v. Gentry*, 2 J. J. Marsh. (Ky.) 499; *Frog v. Long*, 3 Dana (Ky.), 157; *Prouty v. McDougall*, 6 Cow. (N. Y.) 612; *Moses v. Murgatroyd*, 1 John. Ch. (N. Y.) 473; *Van Orden v. Reynolds*, 18 Wend. (N. Y.) 635; *Folsom v. Blaisdell*, 38 N. H. 100. But see *Westley v. Williamson*, 2 Moll. (Ir.) 458; *Capehutt v. Haly*, 1 Hill, Ch. (N. Y.) 405; *Harrison v. McMennorny*, 2 Edw. Ch. (N. Y.) 251; *Goodrich v. Pendleton*, 3 John. Ch. (N. Y.) 520; *Roosevelt v. Ellithorp*, 10 Paige (N. Y.), 415; *Shepherd v. McClain*, 3 C. E. Greene (N. J.), 128; 2 Dan. Ch. Pr. (4th Am. ed.) 1382.

The reason for this position is, that stat. 23 Hen. VIII. c. 15, § 1, by which costs were given to defendants, was confined to wrongs done to, and contracts with, *the plaintiff*. *Wms. Exrs.* (7th Eng. ed.) 1895, n.

When executors pursue an action commenced by their testator, they are liable for costs out of their own estate. *Clarke v. Higgins*, 2 Root (Conn.), 398.

Where pursued in an action defended by their testator, see *Farrier v. Cairns*, 5 Ham. (Ohio) 45.

Where one of two residuary legatees of an indefinite sum to be determined by the process of administration, is also executor of the will, and sues, as executor, to recover property which had belonged to his testator, claimed under a transaction with the testator in his lifetime, and with which such plaintiff had no connection, except in so far as it was an asset of the estate, and is unsuccessful in the suit, he is not chargeable personally with costs, on the ground that he brought the action unnecessarily in his name as executor; nor is he chargeable with one-half the costs, on the ground that he was beneficially interested to that extent in the recovery sought, since the cause of action was not divisible, and his duty as executor required him to endeavor to collect it as an asset of the estate. *Hone*

v. De Peyster, 9 Cent. Rep. 475; 3 N. Y. 331.

Where the cause of action is such that the executor or administrator could have brought the action in his own right, as for a wrong done in his own time, or upon a contract made with himself, though he sues in his representative character, he shall pay costs to the defendant if he fails. *Cockeril v. Kynaston*, 4 T. R. (Eng.) 227, cited by *Le Blanc, J.*, in *Ord v. Fenwick*, 3 East (Eng.), 110; *Hollis v. Smith*, 10 East (Eng.), 293; *Grimstead v. Shirley*, 2 Taun. (Eng.) 116; 2 Saund. (Eng.) 47, *y*, note to *Williamson v. Snow*; *Slater v. Lawson*, 1 B. & Ad. (Eng.) 893; *Dowbiggen v. Harrison*, 9 B. & C. (Eng.) 666. See *Farley v. Farley*, 2 Bailey (S. C.), 319; *Pillsbury v. Hubbard*, 10 N. H. 224; *Keniston v. Little*, 30 N. H. 322, 323; *Moulton v. Wendell*, 37 N. H. 406; *Frink v. Luyton*, 2 Bay (S. C.), 166; *Chamberlin v. Spencer*, 4 Cow. (N. Y.) 550; *Baker v. Baker*, 5 Cowen (N. Y.), 267; *Buckland v. Gallup*, 2 N. Y. 811; 7 Cent. Rep. 703; 11 N. E. Rep. 843; *Freig v. Wray*, 64 How. (N. Y.) Pr. 391.

Where, therefore, an executor sues on a count upon promises made to himself as executor, and is non-suited, he is liable for costs. *Spence v. Albert*, 2 Ad. & El. (Eng.) 785.

It is too late to strike out such a count after the cause has been taken down to trial. *Tomlinson v. Nanny*, 2 Dowl. (Eng.) 17.

By stat. 3 & 4 W. IV. c. 42, § 31, executors and administrators, when plaintiffs, are placed on the same footing as other plaintiffs as to liability for costs, unless where the court sees that they have been misled by some misconduct on the part of the defendant. *Wms. Exrs.* (7th Eng. ed.) 1895.

As to construction of *Mass. Gen. Sts. c. 98, § 13*; c. 128, §§ 6-9, see *Thacher v. Dunham*, 5 Gray (Mass.), 26.

As to law before this statute, see *Hardy v. Call*, 16 Mass. 530; *Brooks v. Stevens*, 2 Pick. (Mass.) 68; *Healy v. Root*, 11 Pick. (Mass.) 389; *Pierce v. Saxton*, 14 Pick. (Mass.) 274.

Ind. R. S. 1881, § 2291, provides that an executor or administrator shall not be liable in his individual capacity for costs incurred in any suit for any demand due the decedent in his lifetime, or for the recovery of possession of any property of the estate, or for trespass or waste committed on the estate of the decedent in his lifetime. As to construction of Ind. R. S. 1881, § 591, see *Hillenburg v. Bennett*, 88 Ind. 540.

Costs when Suit is Vexatious. — Where an executor or administrator knowingly brings a wrong action, or has otherwise

b. Actions against Executors and Administrators. — (1) *What Actions survive against Executors and Administrators.*¹ — See § XV. 1.

(2) *Actions for Legacies.* — See LEGACIES.

(3) *Presentation, Determination, and Allowance of Claims.* — *How far such Statutory Proceedings supersede the Common-Law Actions.* — See DEBTS OF DECEDENTS,² § I.

(4) *When Suit may be brought.* — See § XVI. 1, *b* (12). — In the absence of express legislation, the death of the debtor does not suspend the creditor's right of action.³

been guilty of a wilful default, he has been held liable to costs upon a discontinuance, or for not proceeding to trial according to notice. *Harris v. Jones*, 1 W. Bl. (Eng.) 451; *Taylor v. How*, 1 Wend. (N. Y.) 34; *Woolly v. Sloper*, 9 Bing. (Eng.) 754; *Pickup v. Wharton*, 2 Cr. & M. (Eng.) 401; s. c., 4 Tyrwh. (Eng.) 224; *Taylor v. How*, 1 Wend. (N. Y.) 34; *Morse v. M'Coy*, 4 Cowen (N. Y.) 551.

Otherwise where he brings a wrong action by mistake. *Phenix v. Hill*, 3 John. (N. Y.) 249.

Judgment of Non Pros. — **Interlocutory Motions.** — The personal representative is liable for costs upon judgment of *non pros* unless he has applied to the court for leave to discontinue without payment of costs. *Pickup v. Wharton*, 2 Cr. & M. (Eng.) 403; 4 Tyrwh. (Eng.) 226; *Rudd v. Cabbe*, 4 John. (N. Y.) 190; *Barnard v. Higlen*, 1 Chitt. Rep. (Eng.) 629.

Executors or administrators have always been held liable for costs upon interlocutory motions. *Tidd* (9th ed.), 979.

The court will not suspend the payment of such costs until the plaintiff has received sufficient assets to be paid *quando acciderint*. *Andrews v. Sealy*, 8 Price (Eng.), 212; *Tidd* (9th ed.), 979.

Security for Costs. — Executors and administrators who live out of the jurisdiction of the court may be compelled to give security for costs. *Chamberlain v. Chamberlain*, 1 Dowl. (Eng.) 366; *Chevalier v. Finnis*, 1 Brod. & Bing. (Eng.) 277; s. c., 3 Moore (Eng.), 602.

Costs in Error. — Executors and administrators are liable for costs in error where they are liable to costs in the original action. *Williams v. Riley*, 1 H. Bl. (Eng.) 566.

1. **Debt.** — **Assumpsit.** — **Account.** — At common law, debt could not be maintained against an executor or administrator in those cases in which, had the action been brought against the deceased in his lifetime, he could have waged his law. Wager of law is now abolished in England and the United States, and the action can be maintained. 3 & 4 W. IV. c. 42, sects. 13, 14; *Wms. Exrs.* (7th Eng. ed.) 1931.

No action of account lay against an executor or administrator at common law, because the account rested in the priority and knowledge of the deceased only; but his action is given by stat. 4 & 5 Ann. c. 16, § 27; *Co. Litt.* 89, *b*, 2 Inst. 404.

Assumpsit lay at common law against an executor or administrator upon the simple contract of his decedent. 1 Saund. (Eng.) 216, a, note (1) to *Wheatley v. Lane*. But see *Powell, J.*, in *Berwick v. Andrews*, 2 Ld. Raym. (Eng.) 976.

2. See *Pepper v. Sidwell*, 36 Ohio St. 454; *Morris v. Cude*, 57 Tex. 337.

In Vermont. — No action, according to the course of the common law, is allowed against executors or administrators except to recover some real estate, or replevin to recover some specific property. All estates are settled as in many of the States insolvent estates are settled upon a presentation of insolvency; and no other action can be prosecuted otherwise than by being presented to the commissioners who are appointed to receive, examine, and adjust claims against the deceased. *Gen. Sts. Vt.* c. 53, § 1; *Wheeler, J.*, in *University, etc.*, *v. Baxter*, 43 Vt. 645, 650.

3. *Rhodes v. Smethurst*, 4 M. & W. (Eng.) 42; s. c., 6 M. & W. (Eng.) 351; *S. P. in Equity, Freake v. Cranefeldt*, 3 My. & Cr. (Eng.) 499. See *Mann v. Warner*, 4 Whart. (Pa.) 455; *Hapgood v. Southgate*, 21 Vt. 584; *Warren v. Paff*, 4 Bradf. Sur. (N. Y.) 260.

But in many States the creditor's right of action against the executor or administrator is suspended by statute for a specified period after qualification. These statutes apply, both to actions at law and suits in equity brought against the executor or administrator in his representative capacity, where it is sought to fasten liability upon the estate of the decedent. *Ala. Code*, 1876, § 2614; *State Bank v. Glass* (Ala.), 2 So. Rep. 641; *Boynton v. Sandford*, 28 N. J. Eq. 184; *Or. Gen. Laws* 1874, p. 188, § 373.

The defence that the suit was prematurely brought, may be waived; and where the executor permits the suit to proceed to

(5) *Parties.* — See JOINT EXECUTORS AND ADMINISTRATORS.

All actions against the estate must be brought against the executor or administrator. In suits against several executors or administrators, it is only necessary to join so many as have administered.¹

(6) *When Suit to be brought against the Executor or Administrator in his Representative Character.* — See § XV. 2, *a* and *b*; § XV. 3, *a*; § XVI. *a*, 2; § XVI. 1, *b*, (7), *n*.

(7) *Declaration.* — *Process.* — *Venue.* — Correct practice requires that, in an action against an executor or administrator in his representative character, he should be named executor or administrator;² but if, upon the whole matter, the plaintiff has declared

final decree, in the absence of proof of accident or inadvertence, the presumption is that it was waived. *Boynton v. Sandford*, 28 N. J. Eq. 184. But see *Wells v. Applegate*, 10 Or. 519.

Suits to preserve the estate when there is danger of embezzlement, or to enforce the payment of a legacy when due, are not within the statute. *Walker v. Johnson* (Ala.), 2 So. Rep. 744.

As to suits after settlement, see § XVII.

6.

As to construction of special statutes of limitation or statutes of non-claim, see DEBTS OF DECEDENTS, § 1.

1. *Wms. Exrs.* (7th Eng. ed.) 1936; *Alexander v. Mawman*, Willes (Eng.), 42; 1 *Saund.* (Eng.) 291, *m*, note. See *Barnes v. Jarnogin*, 12 Sm. & M. (Miss.) 108; *Jones v. Wilkinson*, 3 *Stewart* (Ala.), 44; *Owen v. Brown*, 2 Ala. 126.

A plea in abatement must aver not only that the co-executor not joined is alive, but that he has administered. *Hilbert v. Lewis*, 1 *Freem.* (Eng.) 268. See *Royalls v. Bramall*, 1 *Ex.* (Eng.) 734; *Wheeler v. Bolton*, 54 Cal. 302.

If one of two executors dies, the action must be against the survivor alone, and not against the survivor and the executor of the deceased executor. 1 *Roll. Abr.* 928, tit. "Executors," Z.

To authorize a joint judgment against two who are sued as executors, the evidence must show a joint liability in their representative character: if only one is proved to be liable, and he personally, the action must fail. *Moody v. Ewing*, 8 B. Mon. (Ky.) 521.

See, as to entering a *nol. pros.* against one executor, and taking judgment against the others, *Dale v. Eyre*, 1 *Wils.* (Eng.) 306; 1 *Saund.* (Eng.) 207, *a*, note to *Salmon v. Smith*.

In an action against a *feme covert* executrix at common law, the husband must be joined as defendant, and they must both plead, otherwise it will be a discontinu-

ance. If a *feme covert* and a stranger are executors, the action must be against the stranger executor and the husband and wife executrix. *Wms. Exrs.* (7th Eng. ed.) 1936.

As to effect of State statutes on this principle, see HUSBAND AND WIFE.

The trustee of the residuary legatee is not a necessary party to an action brought by the next of kin against the executor to recover a sum bequeathed to one deceased, though the same may have been paid to the trustee by the executor. *Mabry v. Stafford*, 88 N. C. 602.

To a proceeding to compel an administrator to pay the maintenance of an infant, the infant and his guardian are properly made parties. *Bulkley v. Staats*, 66 *How. Pr.* (N. Y.) 257; 31 *Hun* (N. Y.), 137.

2. *Wms. Exrs.* (7th Eng. ed.) 1937; *Com. Dig. Pleader*, 2 D, 2; *Dean of Bristol v. Guyse*, 1 *Saund.* (Eng.) 112, *a*. But see *Brown v. Hicks*, 1 *Ark.* 232; *McNeil v. Cook*, 33 Ala. 278; *Holliday v. Fletcher*, 2 *Ld. Raym.* (Eng.) 1510; *s. c.*, 2 *Stra.* (Eng.) 781; *Ackland v. Pring*, 2 *M. & Gr.* (Eng.) 937.

In a suit against an administrator, it is sufficient to allege that he is sued as administrator, and it is not necessary to allege matters showing his appointment as such. *Wise v. Williams* (Cal.), 14 *Pac. Rep.* 204.

At all events, the allegation that letters testamentary were granted and issued by the proper court, is sufficient without averring an acceptance of the trust and qualification therefor. *Mattison v. Childs*, 5 *Col.* 78.

Where the complaint in an action against an executor contains several causes of actions separately stated, an allegation showing the defendant's representative character need not be contained in each count. One such allegation at the conclusion of the complaint is sufficient. *Moseley v. Henry*, 66 Cal. 478. But see 6, *n*.

In Oregon, to sustain an action against an administrator, the complaint must show

against the defendant in his representative character, the judgment may well be *de bonis decedentis*, although the defendant is not named executor or administrator at the beginning of the declaration. So, where the nature of the whole claim set out in the declaration is such as necessarily to make the defendant liable personally, and, nevertheless, he is charged *as executor*, these words may be struck out as surplusage.¹

that letters were granted six months before suit brought. *Wells v. Applegate*, 10 Or. 519.

If the plaintiff declares in the *debet* and *detinet* against an executor or administrator in cases where he ought to sue in the *detinet* only, the declaration is bad on demurrer, though it is aided by verdict. *Fruen v. Porter*, 1 Sid. (Eng.) 379. But no objection can be taken to a declaration in the *detinet*, which strictly ought to have been laid in the *debet* and *detinet*; for a party may abridge his demand, though he cannot extend it. *Wilson v. Hobday*, 4 M. & Sel. (Eng.) 120.

In an action on a note executed by a partnership in the firm-name, where one of the partners has died, and the other qualified as administrator, it is proper to sue the survivor in both his individual and representative capacity. *W. J. Little Grocer Co. v. Johnson* (Ark.), 6 S. W. Rep. 231.

Suits.—The defendant as executor had been factorized for a legacy, and judgment obtained; and the defendant not paying as garnishee on demand, the plaintiff brought a writ of *scil. fa.* against him in his individual capacity, and making demand on him only in that capacity, but setting out the factorizing proceedings in the declaratory part of the writ. The defendant pleaded the general issue, with notice that he should offer evidence of certain facts with regard to the condition of the estate. *Held*, (1), that judgment could not be rendered against the defendant in his individual capacity, because the facts alleged did not show a liability in that capacity; (2), that judgment could not be rendered against him as an executor, because he was sued only in his individual capacity; (3), that the notice, under the general issue, of matters pertaining only to his liability as executor, was not sufficient to warrant a judgment against him as executor. *Middlebrook v. Pendleton*, 47 Conn. 9.

Suits against Residuary Legatee.—An executor, who is also residuary legatee, and who has given a bond to pay debts and legacies, cannot be sued personally, on a judgment recovered against him as executor, in an action by a creditor of the testator. *Jenkins v. Wood*, 140 Mass. 66.

Executor de son Tort.—A declaration against an executor *de son tort* should be

in the same form as if he were the lawful executor. *Sawyer v. Thayer*, 70 Me. 340.

1. *Wms. Exrs.* (7th Eng. ed.) 1941; *Wigley v. Ashton*, 3 B. & Ald. (Eng.) 101. See *Merritt v. Seaman*, 6 N. Y. 168; *Hood v. Link*, 2 B. Mon. (Ky.) 37; *Davies v. Mead*, 2 Bibb (Ky.), 397; *King v. Beeler*, 4 Bibb (Ky.), 83; *Braden v. Hollingsworth*, 8 Humph. (Tenn.) 19; *Peters v. Heydenfeldt*, 3 Ala. 205; *Johnson v. Gaines*, 8 Ala. 791; *Baughner v. Wilkins*, 16 Md. 35. But see *Harrell v. Scudder*, 27 Ind. 499; *Harrell v. Mattingley*, 27 Ind. 500.

If executors are sued, as such, an amendment of plaintiff's pleadings cannot be allowed after trial to enable a judgment to be entered against defendants individually. *Van Cott v. Prentice*, 10 N. E. Rep. 257. See *Yarrington v. Robinson*, 141 Mass. 450.

Nor can the words be rejected where the defendant could on any supposition be liable in his representative character upon the contract declared on. *Corner v. Shew*, 3 M. & W. (Eng.) 350, 356.

Process.—The defendant may be declared against in his representative character, although the process only describes him generally. *Watson v. Pulling*, 3 Brod. & Bing. (Eng.) 4; s. c., 6 Moore (Eng.), 66. See *Brockman v. McDonald*, 16 Ill. 112; *Duncan v. Duncan*, 4 Bennett (Miss.), 434.

As to whether service of a summons, in which an executor is not described in his representative character, is such notice to him of the commencement of the suit as will render him liable for a *devastavit*, if he pays debts of equal degree with that sued for between the service of the writ and filing the declaration, see *Rees v. Morgan*, 5 B. & Ad. (Eng.) 1035; s. c., 3 Nev. & M. (Eng.) 205; *Tidd's New Pr.* 68. Compare Lord Nottingham's judgment in *Parker v. Dee*, 2 Swanst. (Eng.) 531, note; *Allison v. Davidson*, Dev. & Bat. Eq. (N. C.) 46.

Where the action is brought against several executors or administrators in their representative capacity, they must all be served with process. If only one was served, it is error to discontinue as to the other, and take judgment by default as to the one served. *Barnes v. Jarnagin*, 12 Sm. & M. (Miss.) 108. See *Owen v. Brown*, 2 Ala. 126.

(8) *Foinder of Counts*. See § XVI. 1, a (3). — A count which charges the executor or administrator personally cannot be joined with a count which charges him in his representative character;¹ for the judgment in the one case is *de bonis propriis*, and in the other, *de bonis decedentis*.² Such misjoinder is a defect in substance, and bad on general demurrer, or in arrest of judgment, or in error.³

But service upon one of two co-executors, who were in possession of the premises, is sufficient service in ejectment. *Doe dem. Strickland v. Roe*, 4 D. & L. (Eng.) 431.

An executor cannot be compelled to appear and answer a suit against him in a State where he has not taken out letters, nor done any official act. Process served upon him in another State, while within the jurisdiction of the court from which it issued, does not make him amenable in his representative character. *Security Ins. Co. v. Taylor*, 2 Biss. (C. C.) 446.

Venue. — Where the executor of a lessee is sued by the lessor, in his representative character, for rent incurred in his own, or in the testator's, time, the venue is transitory. But where he is sued in debt in the *debit et detinet*, or in covenant, as assignee, for rent incurred in his own time, the venue is local. *Hellier v. Casbard*, 1 Sid. (Eng.) 266; *Cormel v. Lisset*, 2 Lev. (Eng.) 80; 1 Saund. (Eng.) 241, note to *Thursby v. Plant*.

Under N. C. St. 1863, 1869, ch. 258, suits against executors and administrators, in their representative character, must be brought in the county where they took out letters. *Stanley v. Mason*, 69 N. C. 1.

In Massachusetts, transitory actions, by or against executors or administrators, may be brought in any county in which such action might have been brought by or against the deceased at the time of his death. Mass. St. 1865, c. 13.

1. Wms. Exrs. (7th Eng. ed.) 1939. See § XVI. 1, a, n. See also *Parker v. Baylis*, 2 Bos. & Pull. (Eng.) 73; *Moody v. Ewing*, 8 B. Mon. (Ky.) 521; *Bignell v. Harpur*, 4 Ex. (Eng.) 773; 2 Saund. (Eng.) 117, h, note; *Churchill v. Bertrand*, 3 Q. B. (Eng.) 568.

A count for *goods sold to, or work done for*, the defendant as executor, cannot be joined with a count for a debt due from the defendant in his representative capacity. *Corner v. Shew*, 3 M. & W. (Eng.) 350.

If, in fact, the goods or work had been contracted for by the testator, and the contract completed by the plaintiff in the time of the executor, the declaration, instead of containing the common counts for goods sold to, and work done for, the executor, should state the contract to have been made with the testator, and that, at the time of his death, the work was incomplete,

but was finished afterwards, and the defendant, as executor, then promised to pay. Wms. Exrs. (7th Eng. ed.) 1940. See *Werner v. Humphreys*, 2 M. & Gr. 857, note (a); *Smith v. Procter*, 1 Sandf. (N. Y. Super. Ct.) 72.

A count on a promise by the testator may be joined with a count for funeral expenses, alleging that they were incurred at the request of the executor, and that he, as executor, promised to pay. *Hapgood v. Houghton*, 10 Pick. (Mass.) 154. But see § XV. 2, c; XVI. 1, a, (7), n.

In assumpsit against an executor to recover taxes due on the testatrix's estate, a count for taxes due by testatrix in her lifetime was held properly joined with one for taxes due from the executor pending settlement. *Bonaparte v. State*, 63 Md. 465.

A count on an account stated with the defendant as executor, whether the account be averred to have been stated of money due from the testator to the plaintiff, or of money due from the defendant, as executor, to the plaintiff, may be joined to counts on promises made by the testator, as may a count for money paid by the plaintiff to the use of the defendant as executor. For these counts do not charge the defendant personally; but he may plead *plene administravit*, and the judgment is *de bonis testatoris*. Wms. Exrs. (7th Eng. ed.) 1940. See *Malin v. Bull*, 13 S. & R. (Pa.) 441; *Strohecker v. Grant*, 16 S. & R. (Pa.) 237; *Bank of Penn. v. Jacobs*, 1 P. & W. (Pa.) 161; *Carter v. Phelps*, 8 John. (N. Y.) 440; *Benjamin v. Taylor*, 12 Barb. (N. Y.) 328; *McKinley v. Call*, 1 T. B. Mon. (Ky.) 54; *Vaughn v. Gardner*, 7 B. Mon. (Ky.) 329; *Reeve v. Cawley*, 17 N. J. L. 415.

Whenever an executor or administrator is sued upon promises by him in his representative character, the words "*as executor*" must be inserted in each count in stating the promise, and also in stating the debt, or cause of action, if it be laid to have accrued after the death of the decedent. Wms. Exrs. (7th Eng. ed.) 1945; 1 Chitt. Pl. (5th ed.) 236; *Bridgden v. Parkes*, 2 Bos. & Pull. (Eng.) 424. See § XVI. 1, a, n. But see *Moseley v. Henry*, 66 Cal. 478.

2. *Herranden v. Palmer*, Hob. (Eng.) 88; *Hall v. Huffam*, 2 Lev. (Eng.) 288; *Seip v. Droch*, 14 Pa. St. 352; *Benjamin v. Taylor*, 12 Barb. (N. Y.) 328; *Moody v. Ewing*, 8 B. Mon. (Ky.) 521.

3. *Jennings v. Newman*, 4 T. R. (Eng.)

(9) *Pleas.*—*When sued for Conversion of Property of Third Persons.*—*Plea of Tender.*—*Representative's Bankruptcy.*—*Joint Executors.*—In an action against an executor or administrator, the defendant may plead any matter which the decedent might have pleaded;¹ and in addition thereto may deny the character in which he is sued, by pleading *ne unques executor* or *administrator*, or plead a deficiency of assets to satisfy the plaintiff, or a retainer of his own debt.²

(10) *Pleas.*—*Ne unques Executor or Administrator.*—*Plea of*

347; *Bridgden v. Parkes*, 2 Bos. & Pull. (Eng.) 424; *Rose v. Bowler*, 1 H. Bl. (Eng.) 108; 2 Saund. (Eng.) 117, *b*, note; 2 Saund. (Eng.) 210, *b*, note to *Foxtwist v. Tremaine*. See *Howard v. Powers*, 6 Ham. (Ohio) 92; *Carter v. Phelps*, 8 John. (N. Y.) 440; *Godbold v. Roberts*, 20 Ala. 354; *Fry v. Evans*, 8 Wend. (N. Y.) 530.

The court cannot award a *venire de novo*. *Corner v. Shew*, 4 M. & W. (Eng.) 163.

If separate damages have been assessed on each count, the objection may be cured by entering a *nolle prosequi* as to the count which constitutes the misjoinder. *Hayter v. Moat*, 5 Dowl. (Eng.) 298.

If there is a misjoinder of causes of action against an administrator and against A., the administrator may demur, although if he were sole defendant the causes of action might be joined. *Hoffman v. Wheelock*, 62 Wis. 434.

1. Wms. Exrs. (7th Eng. ed.) 1941; Com. Dig. Pleader, 2 D, 8.

At common law, in debt on simple contract, against executors or administrators, *non delinet* is a good plea in all cases where nothing was due to the plaintiff at the time of commencing the action. *Tidd* (9th ed.), 648; Com. Dig. Pleader, 2 W, 17.

In debt on bond, if the executor pleads *non est factum suum*, it is good after verdict; for *suum* refers to the testator. Wms. Exrs. (7th Eng. ed.) 1942; *Baker's Case*, Latch (Eng.), 128; Com. Dig. Pleader, 2 D, 8.

So, in an action of *assumpsit*, *non assumpsit* generally is a good plea, at least after verdict; for it shall be referred to the testator. Wms. Exrs. (7th Eng. ed.) 1942; *Browning v. Litton*, 1 Lev. (Eng.) 184.

In an action for a debt due from the testator, the plea of *non est factum* or *non assumpsit* is an admission of a will of which the defendant is executor: *secus* where the action is for a demand on which the testator was not liable, as for a legacy. *Hantz v. Sealy*, 6 Bin. (Pa.) 405.

It must be borne in mind, however, that an executor or administrator, in his capa-

city as such, is as much bound by the laws of estoppel as if he acted in his individual capacity. *Butler v. Gazzam* (Ala.), 1 So. Rep. 16.

Suits for Conversion of Property of Third Persons.—An executor who is sued personally for the conversion of property treated by him as belonging to the estate, may raise any question by way of defence that could have been raised had the suit been against him as executor. *Patterson v. Dushane* (Pa.), 8 Atl. Rep. 440.

Plea of Tender.—Whenever a tender with *tout temp prist*, is pleaded by an executor or administrator, he must allege that his testator or intestate was at all times, from the time of making the promise to the time of his death, ready to pay, and that he, the defendant, has, at all times since the death of his testator or intestate, been ready to pay. *Clements v. Reynolds*, Sayer (Eng.), 18; Wms. Exrs. (7th Eng. ed.), 1952.

Plea of Representative's Bankruptcy.—Unless a *devastavit* is suggested, the executor or administrator cannot plead his own bankruptcy, as the proceedings in bankruptcy would not bind any effects, upon which, if the plaintiff obtained judgment and execution, the sheriff would have a right to levy under a *fi. fa.* Wms. Exrs. (7th Eng. ed.) 1942; *Serie v. Bradshaw*, 2 Cr. & M. (Eng.) 148; s. c., 4 Tyrwh. (Eng.) 69; 2 Dowl. (Eng.) 289.

Joint Executors may plead different pleas, and that which is most to the testator's advantage shall be received. *Chaffe v. Killand*, 1 Roll. Abr. 929, tit. "Executors," A, pl. 1; Went. Off. Ex. (14th ed.) 212, 213; *Elwell v. Quash*, 1 Stra. (Eng.) 20; *Foster v. Jackson*, Hob. (Eng.) 61; *Hustin, J.*, in *Lyon v. Allison*, 1 Watts (Pa.), 172; *App. v. Dreisbach*, 2 Rawle (Pa.), 301; *Geddis v. Irvine*, 5 Pa. St. 508.

Where one executor pleaded a good plea, and the other a bad one, on demurrer, judgment was given by C. B. for both defendants; but it was reversed on error, and a new judgment given for the plaintiff against one executor only. *Baldwin v. Church*, cited 1 Stra. (Eng.) 20.

2. *Tidd*, Pr. (9th Eng. ed.) 644.

Administrator whose Letters have been revoked. — Plea of Executor of Revoked Will. — The plea *ne unques executor or administrator*, although a plea in bar,¹ does not deny the cause of action, but only that the defendant is one of the executors or administrators of the deceased,² and must be specially pleaded whenever he intends to deny his representative character. By pleading the general issue, he admits the character in which he is sued.³ On issue joined on a plea of *ne unques executor or administrator*, the burden of proof rests on the plaintiff, who has to prove the affirmative of the issue.⁴

1. Com. Dig. Pleader, 2 D, 7. See *Coding v. Whitaker*, 5 Blackf. (Ind.) 470; *Finn v. Chase*, 4 Denio (N. Y.), 85; *Cain v. Haas*, 18 Tex. 616; *Sheron v. Barr*, 11 Ired. (S. C.) 296; *The Governor v. Evans*, 1 Ark. 349; *Langford v. Frey*, 8 Humph. (Tenn.) 443.

But a plea that the defendant is administrator and not executor, or that he is executor and not administrator, is in abatement only. Com. Dig. Pleader, 2 D, 3; 2 D, 7; Com. Dig. Abatement, F, 20; Pleader, 2 D, 12; *Harding v. Salkill*, 1 Salk. (Eng.) 296; *Cranwell v. Sibley*, 2 Lev. (Eng.) 190; *Pyne v. Walland*, 2 Vent. (Eng.) 178.

In the former plea the defendant must show that the administration is well granted to him. But he need not traverse *absque hoc* that he administered as executor, — for this is more proper from the other side, — nor that he was made executor. In the latter he must traverse *absque hoc* that the deceased died intestate. Com. Dig. Pleader, 2 D, 4.

If the defendant be sued as administrator generally, he must plead in abatement that he is administrator only *durante minore etate*. *Little v. Plant*, 1 Lutw. (Eng.) 20; Com. Dig. Pleader, 2 D, 12.

2. 1 Saund. (Eng.) 207, a, note to Salmon v. Smith.

Joint Executors. — In an action against several executors, if one of them plead severally *ne unques executor*, the plaintiff may enter a *nol. pros.* as to him, and proceed against the others. 1 Saund. (Eng.) 207, a, note. See *Griffith v. Franklin*, Mood. & M. (Eng.) 146; *Atkins v. Tredgold*, 2 B. & C. (Eng.) 30, per Holroyd, J.

Hence a plea by one of two persons charged as executors, that the other is not executor, is bad. *Atkins v. Humphrey*, 2 C. B. (Eng.) 654; s. c., 2 D. & L. (Eng.) 312.

3. Wms. Exrs. (7th Eng. ed.) 1943; *Lo-max v. Spierin*, Dudley (S. C.), 365; *R. Co. v. Joyce*, 8 Rich. (S. C.) 117.

Under an act allowing a defendant in any action to plead as many several matters as may be necessary for his defence, a de-

fendant sued as executor may plead *ne unques executor* and *non est factum*. *Langford v. Frey*, 8 Humph. (Tenn.) 443.

4. Wms. Exrs. (7th Eng. ed.) 1944; *Witcher v. Wilson*, 47 Miss. 663. See *Travers v. Boykin*, 6 Ala. 355.

The plaintiff must prove, not only the appointment of the defendant, but that he has taken upon himself the trust; and this may be by his proving the will, or taking the oath and giving bond, or, if he is charged as executor *de son tort*, by proving acts of intermeddling with the estate. *Peyton, C. J.*, in *Witcher v. Wilson*, 47 Miss. 663, 666. See *Atkins v. Tudgold*, 2 B. & C. (Eng.) 30; *Cottle v. Aldrich*, 4 M. & Sel. (Eng.) 175; *Day v. Floyd*, 130 Mass. 488. As to evidence of title, see § XVI. 1, a, (5). n.

Proof that the defendant so intermeddled with the effects as to make himself executor *de son tort*, is said to be sufficient proof of his being executor. Wms. Exrs. (7th Eng. ed.) 1944. But see *Tindal, C. J.*, in *Scott v. Wedlake*, 7 Q. B. (Eng.) 780, 781.

To the plea *ne unques executor*, the plaintiff may reply that the defendant has administered, or that goods of a certain value came to his hands, before administration granted. *Keble v. Keble*, Hob. (Eng.) 209; Com. Dig. (Eng.) 2 Pleader, 2 D, 7; *Kellow v. Westcombe*, 1 Freem. (Eng.) 122; *Hinde v. Skelton*, 34 L. J. N. S. Ch. (Eng.) 378; *Went. Off. Ex.* (14th ed.) c. 15, p. 339.

It has been said that an executor who proves the will, though he does not otherwise administer, cannot plead *ne unques executor*, and that if there are two executors, and one proves in the name of both, even against the will of the other, yet he cannot plead *ne unques executor*, nor administer as executor. Com. Dig. Pleader, 2 D, 7. See *Went. Off. Ex.* c. 15, p. 339 (14th ed.); *Holroyd, J.*, in *Atkins v. Tredgold*, 2 B. & C. (Eng.) 30.

For the purpose of introducing secondary evidence of the defendant's title, it is sometimes necessary, and always advisable, to serve notice upon him to produce his letters, they being presumed to be in his

(11) *Pleas.* — *Admitting Assets.* — *Effect of Judgments as Admissions.* — *Pleading a Debt of a Higher Nature.* — *Plene Administravit, Replication, and Evidence thereunder.* — To avoid individual liability, an executor or administrator who has no assets, or not sufficient assets to satisfy a debt upon which an action is brought against him, must plead a general or special *plene administravit*, or, admitting assets to the sum in hand, plead *riens ultra*; ¹ for

possession. Phil. Ed. (6th ed.) 346, 347; *Witcher v. Wilson*, 47 Miss. 664, 667.

Plea of an Administrator whose Letters have been Revoked. — If the defendant, being sued as administrator, pleads that before the date of the writ his letters were revoked, and administration granted to another, he should allege that he has fully administered all the goods in his hands, or else delivered them over to the new administrators. Wms. Exrs. (7th Eng. ed.) 1945; *Garner v. Dee*, 1 Freem. (Eng.) 13; *Packman's Case*, 6 Co. (Eng.) 18 b.

Plea of Executor of Revoked Will. — One who has administered under a will which has been revoked by a later will, may plead the special matter *sans ceo* that he administered in any other manner. *Dyer* (Eng.), 166 b.

1. Wms. Exrs. (7th Eng. ed.) 1953, 1954, 1956. See *Ramsden v. Jackson*, 1 Atk. (Eng.) 292; *Erving v. Peters*, 3 T. R. (Eng.) 685. See *Ray v. Patton*, 86 N. Y. 386; *Little v. Duncan*, 89 N. C. 416.

The essential part of the plea of *plene administravit* is, that "the said defendant has no goods, which were of the said A. B. (the testator), at the time of his death in the hands of the said defendant, as executor, to be administered, or had at the time of the commencement of the suit or ever since." The omission of any of the above averments, either in a general or special *plene administravit*, will be fatal on demurrer. Wms. Exrs. (17th Eng. ed.) 1955; 2 Chitt. Pl. (16th Am. ed.) 384, 385; *Hewlett v. Framingham*, 3 Lev. (Eng.) 28; *Covel v. Deval*, 2 Lutw. (Eng.) 1637, 1638; *Rees v. Morgan*, 5 B. & Ad. (Eng.) 1034; 2 Saund. (Eng.) 216, note (1).

As to the omission of the words "or ever since," see *Gewen v. Roll*, Cro. Jac. (Eng.) 132; 2 Saund. (Eng.) 216, note (1); *Smith v. Tateham*, 2 Ex. (Eng.) 205; *Mara v. Quin*, 6 T. R. (Eng.) 10; *Southard v. Potts*, 2 Zab. (N. J.) 278; *Orcutt v. Orms*, 3 Paige (N. Y.), 459.

The usual averment that the defendant "has fully administered all the goods and chattels," etc., is superfluous. The simple averment that the defendant has no goods, etc., is more correct. 2 Saund. (Eng.) 220 a, note (3) to *Noell v. Nelson*. See *Reeves v. Ward*, 2 Bing. N. C. (Eng.) 235; s. c., 2 Scott (Eng.), 396.

An executor sued in Tennessee on a judgment rendered against him in another State, if he did not plead *plene administravit* in that suit, cannot have the benefit of such plea in Tennessee, but is liable to judgment *de bonis propriis*. *White v. Archbill*, 2 Sneed (Tenn.), 588.

The form of a plea of *plene administravit præter* is, "The defendant, except as to the sum of £ — (the amount of costs in hand), says that he hath fully administered the goods and chattels which were of the said E. deceased at the time of his death, and which have ever come to the hands of him, the defendant, to be administered, except goods and chattels to the value of £ —; and that he, the defendant, had not at the commencement of this suit, or at any time since, nor has he, any goods or chattels which were of the said E. deceased, at the time of his death, in his, the defendant's, hands to be administered, except the said goods and chattels of the value aforesaid [and the defendant brings into court the said sum of £ — ready to be paid to the plaintiff]."

While proper, it is not necessary to bring the assets into court. 2 Chitty, Pl. (16th Am. ed.) 386, n.

In stating the value of the assets in hand, it is proper to state some certain sum, or at least to say to "the value of the debts aforesaid." 1 Saund. (Eng.) 333, note (7) to *Hancocke v. Prowd*; *Tresham's Case*, 9 Co. (Eng.) 109, 110; *Edgcomb v. Dee*, Vaugh. (Eng.) 104; *Davage v. Davage*, 1 Sid. (Eng.) 210; *Page v. Danton*, 1 Vent. (Eng.) 354.

But the omission is mere form, neither material nor traversable. *Parker v. Atfield*, 1 Salk. (Eng.) 312.

Nor can it be taken advantage of on general demurrer. *Moon v. Andrewes*, Hob. (Eng.) 133.

Plea of Executor of Executor. — In an action against an executor of an executor, it is not sufficient to plead that the defendant has not any goods or chattels of the original testator in his hands to be administered; but he must also plead either that the first executor fully administered, or that he, the said defendant, has no assets of the first executor out of which he can satisfy any *devastavit* committed by the first executor. *Wells v. Fydeil*, 10 East (Eng.), 315.

judgment against him by default,¹ or confession,² on demurrer,³ or upon verdict upon any other plea pleaded,⁴ is conclusive upon him that he has sufficient assets for its satisfaction.⁵ But judgment against him on a verdict upon a general or special plea of *plene administravit*, only admits assets to the extent proved to be in his hands.⁶ The failure of an executor to plead a judgment or other debt of higher rank, of which he has notice, in bar of an action for a debt of lower rank, and *riens ultra*, is an admission of assets to satisfy both debts.⁷ When an executor pleads that he has no

1. *Mason v. Peter*, 1 Munf. (Va.) 437; *Mosier v. Zimmerman*, 5 Humph. (Tenn.) 62; *Baracliff v. Griscom*, 1 Cox (N. J.), 165; *Dickson v. Wilkinson*, 3 How. (U. S.) 57.

2. *People v. Judges of Erie*, 4 Cowen (N. Y.), 445; *Worsham v. McKenzie*, 1 Hen. & Munf. (Va.) 342; *Freelands v. Royal*, 2 Hen. & Munf. (Va.) 575; *Powell v. Myers*, 1 Dev. & Bat. Eq. (N. C.) 502.

3. *Rock v. Leighton*, 1 Salk. (Eng.) 310; S. P. admitted in *Ewing v. Peters*, 3 T. R. (Eng.) 686; *Leonard v. Simpson*, 2 Bing. N. C. (Eng.) 176; s. c., 2 Scott (Eng.), 355.

4. *Ramsden v. Jackson*, 1 Atk. (Eng.) 292; *Ewing v. Peters*, 3 T. R. (Eng.) 685.

A plea of *non est factum testatoris*, or of a release to the testator, or of payment by him, or *non assumpsit*, admits assets. 1 Saund. (Eng.) 335, note 10.

5. 1 Saund. (Eng.) 219, *b*, note to *Wheatley v. Lane*. See *Dorsey v. Hammond*, 1 Bland (Md.), 463; *Ellicott v. Welch*, 2 Bland, 242; *Post v. Mackall*, 3 Bland, 486; *Lenoir v. Winn*, 4 Desaus. (S. C.) 65; *Huger v. Dawson*, 3 Rich. (S. C.) 328; *Newcomb v. Goss*, 1 Met. (Mass.) 333; *Judge of Probate v. Lane*, 50 N. H. 556; *Platt v. Robins*, 1 John. Cas. (N. Y.) 278.

A judgment against an administrator requiring a dormant judgment against the intestate, is evidence of assets. *Ansley v. Glendenning*, 56 Ga. 286.

In *Illinois* the plea of *plene administravit* is no defence, nor is a judgment an admission of assets: it only establishes a debt against the estate, and no execution will issue thereon; but it will be paid when there are sufficient assets. *Judy v. Kelley*, 11 Ill. 211. So in *Mississippi*. *Lee v. Gardner*, 26 Miss. 521; *Dobbins v. Holfaere*, 52 Miss. 561.

Effect of giving Security on Appeal Bond.

—An executor's giving security, on appeal in ordinary form, is an admission that he has assets in hand to pay the judgment if affirmed. *Yates v. Burch*, 20 N. Y. Sup. Ct. 622.

6. 1 Saund. (Eng.) 219, *b*, note to *Wheatley v. Lane*; *Re Huggin's Trusts*, 2 Giff. (Eng.) 562; *Parke, B.*, in *Cousins v. Padon*. See *Coleman v. Hall*, 12 Mass. 570.

7. *Wms. Exrs.* (7th Eng. ed.) 1956; *Rock v. Leighton*, 1 Salk. (Eng.) 310; *Earle v. Hinton*, 2 Stra. (Eng.) 732; *Abbis v. Winter*, 3 Swanst. (Eng.) 578, note; *Shaw v. Cameron*, 11 S. & R. (Pa.) 252. See § XIV. 5.

A debt not payable till after the death of the decedent is within the principle. *Britton v. Bathurst*, 3 Lev. (Eng.) 114; *Lemun v. Fooks*, 3 Lev. (Eng.) 57; *Buckland v. Brook*, Cro. Eliz. (Eng.) 315. See *Atkinson v. Grey*, 6 Sm. & G. (Eng.) 577, 581. See § XIV. 5 & 6; DEBTS OF DECEDENTS, § II.

As to the form of pleading a judgment or specialty debt, see 2 Chitty, Pl. (16th Am. ed.) 386, 387. See 1 Saund. (Eng.) 329, note 4, 330 *a*, note 5.

In pleading a judgment obtained against the executor, where the action is on a specialty, it is necessary to show either that the judgment pleaded was recovered against the executor on a specialty, or that it was obtained before the executor had notice of the specialty debt on which the action was brought. *Wms. Exrs.* (7th Eng. ed.) 1958. Compare DEBTS OF DECEDENTS, n.; Order Payment Notes, note 1, Payment of Debts.

A recovery against one of several executors or administrators, and no assets *ultra*, may be pleaded in an action against all the executors or administrators for another debt of the decedent. Further *v. Further*, Cro. Eliz. (Eng.) 471; cited, *Wyndham, J.*, in *Palmer v. Lawson*, 1 Sid. (Eng.) 334. See JOINT EXECUTORS AND ADMINISTRATORS.

The plea of a judgment recovered against the executor himself, and no assets *ultra*, is a plea in bar of the action generally, and not to its further maintenance merely, even where the judgment has been confessed after action brought and pleaded *puis darrein continuance*. But the plaintiff may avoid the effect of the plea as an absolute bar, and protect himself from costs at the same time, on the ground of his original right of action, by praying judgment of such assets as should come to the executor's hands, after satisfying the judgment so confessed. So that the plea

assets *ultra* a judgment, the plaintiff may reply that the judgment was obtained by fraud and covin between the executor and the creditor,¹ or that it is kept on foot to defraud creditors,² but cannot traverse the averment that the debt upon which the judgment was obtained was just and true.³ In his rejoinder to such replications, the executor is bound to traverse the fraud;⁴ and the plaintiff may, upon this issue, give in evidence, either that the debt is not just, or that less is due than the sum for which the judgment was entered.⁵ If, to the plea of *plene administravit*, the

of judgment recovered against the defendant as executor, pending the writ, enures in effect, if the judgment itself be not questioned by the replication, as only a plea in bar of the further maintenance of the suit against the executor in respect of his present assets. Wms. Exrs. (7th Eng. ed.) 1958, 1959; *Le Bret v. Papillon*, 4 East, 502, 508.

Bonds. — Where a bond due from the deceased is forfeited, the penalty is the debt; and the representative may either plead the penalty as a debt, or the sum really due. But where the day of payment has not yet come, the conditions are the debts, and the assets can only be covered for them. *Bank of England v. Morice*, 2 Stra. (Eng.) 1028; s. c., *Cas. temp. Hardw.* (Eng.) 219; *Cox v. Joseph*, 5 T. R. (Eng.) 307; 1 Saund. (Eng.) 333, a, note (7).

The court always recommends the executor to show honestly how much is really due, and set out the conditions; for if the penalties only are pleaded, the creditor cannot learn the nature of the bond without filing a bill for discovery. *Cox v. Joseph*, 5 T. R. (Eng.) 307; 1 Saund. (Eng.) 333, a, note (7).

1. *Williams v. Fowler*, 1 Stra. (Eng.) 410; 2 Saund. 50, note (3) to *Trethewy v. Ackland*.

2. 1 Saund. (Eng.) 334, note (9) to *Hancocke v. Prowd*. But if the judgment be for a true debt, though confessed by covin to defeat the plaintiff, he cannot avoid it; for the executor may confess a judgment to a creditor in equal degree with the plaintiff, and plead it in bar, although done expressly to deprive the plaintiff of his debt. *Veale v. Gatesdon*, W. Jones (Eng.), 91, 92; *Waring v. Danvers*, 1 P. Wms. (Eng.) 295; *Morice v. Bank*, *temp. Talb.* (Eng.) 225; § XIV. 5, b. But the plaintiff may well reply that the judgment has been kept on foot to defraud creditors after the debt has been discharged for less than its face, in accordance with the terms of a composition with creditors. 1 Saund. (Eng.) 334, note (9) to *Hancocke v. Prowd*.

3. 2 Saund. (Eng.) 50, note (3) to *Trethewy v. Ackland*; *Powell, J.*, in *Robinson v. Corbett*, 1 Lutw. (Eng.) 662.

Such averment is unnecessary. Wms. Exrs. (7th Eng. ed.) 1957; 1 Saund. (Eng.) 330, a, note (5). But see *Trethewy v. Ackland*, 2 Saund. (Eng.) 48, a; *Com. Dig. Pl. 2 D* (Eng.), 9.

4. *Veale v. Gatesdon*, W. Jones (Eng.), 92; *Trethewy v. Ackland*, 2 Saund. (Eng.) 50, note (3) to *Trethewy v. Ackland*; *Parker v. Atfield*, 1 Ld. Raym. (Eng.) 678.

The other averments in the replication, such as the allegation of the payment of the money in satisfaction of the judgment, are only inducement, and not traversable. *Veale v. Gatesdon*, W. Jones (Eng.), 92. *Beaumont's Case*, Latch (Eng.), 111; 1 Saund. (Eng.) 334, note (9); *Jones v. Roberts*, 2 Cr. & M. (Eng.) 219; s. c., 4 Tyrwh. (Eng.) 48.

5. 2 Saund. (Eng.) 50, note (3) to *Trethewy v. Ackland*.

"If a judgment being pleaded, and *per fraudem* replied, issue is taken thereupon, and, by evidence, it appears the debtor was willing to take less than is recovered, it is evidence of fraud; but if it be shown that the administrator had not assets to pay that sum, it is no fraud." *Parker v. Atfield*, 1 Salk. (Eng.) 312.

To rebut evidence that less is due than the sum for which the judgment was entered (which is *prima facie* proof of fraud), the defendant may show that the judgment was entered for more than was due by mistake. *Pease v. Naylor*, 5 T. R. (Eng.) 80.

When the judgments or debts pleaded by the executor are upon penalties, the plaintiff should reply that the creditor would have accepted the less sums, but the defendant either would not pay, or had not paid them, but kept the judgments or bonds on foot by fraud or covin; and for issue, give in evidence such matters as will serve to avoid the penalties. For if he replies generally that the judgments were for less sums, and the defendant has assets above what will satisfy them, on issue that he has not, the defendant may insist on the penalties as debts. 1 Saund. (Eng.) 334, note (9) to *Hancocke v. Prowd*; *Thompson v. Hunt*, 3 Lev. (Eng.) 368; *Bell v. Bolton*, 1 Lutw. (Eng.) 450.

plaintiff replies that the defendant had assets at the commencement of the suit, on issue joined, the plaintiff must prove that assets were, or ought to have been, in the hands of the defendant at the time of the writ sued out.¹ If assets have come to hand

Avoiding One of Several Judgments pleaded.—If an executor pleads several judgments recovered against *himself*, and one of them is avoided, there ought to be a general judgment for the plaintiff, because every judgment recovered against an executor himself, whether by default or by verdict, finding it on *plene administravit*, is an admission of assets for its satisfaction, and, therefore, as the judgments pleaded admit assets so far, if any one of them be falsified, the executor admits, by his plea, that he has more assets than will satisfy the other judgments by as much as the judgment so falsified amounts to. And in such case it is *held* that the plaintiff will be equally entitled, though the plea alleges *riens ultra* a small sum, not sufficient to satisfy all the judgments, for the allegation is not material. *Wms. Exrs.* (7th Eng. ed.) 1963. See *Rock v. Leighton*, 1 Salk. (Eng.) 310; 1 Saund. (Eng.) 336, 337, n. (1); *Hancocke v. Prowd*; *Harrison v. Beccles*, cited in *Irving v. Peters*, 3 T. R. (Eng.) 688; *Parker v. Atfield*, 1 Salk. 312.

This reasoning obviously has no application where the executor pleads several outstanding judgments *against his testator*, for a judgment against the testator is no admission of assets by the executor. Nevertheless, it has been *held*, on the ground that a plea bad in part is bad altogether, and to be set aside, that if an executor plead several judgments *against the testator*, and one of them be ill pleaded, *although he aver that he had assets to a small sum*, judgment should be given against the defendant *de bonis testatoris* generally, and all the judgments well pleaded set aside. *Norton v. Harvey*, cited 2 Saund. (Eng.) 50; *Trethewy v. Ackland*, 2 Saund. (Eng.) 48; *Parker v. Atfield*, 1 Salk. (Eng.) 312; s. c., 1 Ld. Raym. (Eng.) 673; *R. v. Dickinson*, *Parker's Rep.* (Eng.) 263.

This position was sharply criticised by Lord Vaughn in *Edgcombe v. Dee*, Vaughn (Eng.), 104, 105. See also 1 Saund. (Eng.) 337, n. (1).

Sergeant Williams thinks that in view of these criticisms, the rule to-day may be understood to be, that if the executor pleads judgments obtained *against his testator*, and that he has not sufficient assets to satisfy them, or any of them, if any one or more of the judgments be avoided, still there ought not to be a general judgment against the executor, or, at least, not until so many are avoided as to leave assets in the executor's hands. *Wms. Exrs.* (7th Eng.

ed.) 1965; *Parke, B.*, in *Cousins v. Paddon*, 2 Cr. M. & R. (Eng.) 557, 558.

Duplicity.—The plaintiff is allowed to reply to every judgment, or other debt, or payment pleaded, or some or one of them, omitting the rest, without being guilty of duplicity; but the better way seems to be to answer only such judgment as the plaintiff knows to be obtained by fraud. 1 Saund. (Eng.) 337, a, note (2) to *Hancocke v. Prowd*. See *Ashton v. Sherman*, 1 Ld. Raym. (Eng.) 263; 1 Salk. (Eng.) 298; *Turner's Case*, 8 Co. (Eng.) 132; *Trethewy v. Ackland*, 2 Saund. (Eng.) 49, 50; *Jefferies v. Dee*, 1 Lev. (Eng.) 281.

1. *Wms. Exrs.* (7th Eng. ed.) 1965; *Mara v. Quin*, 6 T. R. (Eng.) 10; *Webster v. Blackman*, 2 Fost. & F. (Eng.) 490. See *Bentley v. Bentley*, 7 Cow. (N. Y.) 701; *Ely v. Horine*, 5 Dana (Ky.), 398; *Wallace v. Barlow*, 3 Bibb (Ky.), 169; *Marquis v. Rogers*, 8 Blackf. (Ind.) 118; *Shannon v. Dinkins*, 2 Strobb. (S. C.) 196.

The burden of proof is on the plaintiff. *Gilpin v. Noe*, 9 Heisk. (Tenn.) 192; *Ray v. Patton*, 86 N. Y. 386.

Where an administrator denies an alleged debt of his intestate, pleads *plene administravit*, and no assets applicable to the same, the issue as to the contested indebtedness must be determined by the jury; and, this being settled, an inquiry as to the assets and the disposition thereof must be had by reference or upon issue to a jury. *Ray v. Patton*, 86 N. C. 386. See *Little v. Duncan*, 89 N. C. 416.

A failure to avail himself of the privilege of reference as to the state of the assets, after due notice, may be construed by the court a waiver of reference, and an admission that the assets are sufficient to satisfy the plaintiff's ascertained claims. *Terry v. Cape Fear Bank*, 20 Fed. Rep. 773.

If a verdict is rendered for plaintiff, and the executors are then sued individually on the judgment, they will not be permitted to show that no evidence was taken under the plea, and that the only question controverted at the trial was as to the validity of plaintiff's claim against the testator; and the verdict, being responsive to the issues shown by the pleadings, cannot be amended. *Trimmier v. Thomson*, 19 S. C. 247.

Assets in Hand, or Assets come to Hand.—Also see § XII. 3, a, n.; *Britton v. Jones*, 3 Bing. N. C. (Eng.) 676; *Stroud v. Dandridge*, 1 Car. & K. (Eng.) 445.

since the suing-out of the writ, such matter must be specially replied, and cannot be given in evidence under this replication.¹ If, upon the issue of *plene administravit*, it appears that the executor or administrator has been guilty of a *devastavit*, which has caused a failure of assets, the jury must find that the defendant has assets to that amount, and not find a *devastavit*.² Under a plea of *plene administravit*, in answer to the proof of assets, the executor or administrator may show that he has exhausted the assets in discharging debts of higher rank before suit commenced,³ but cannot give evidence of the existence of superior debts outstanding,⁴ nor

1. *Mara v. Quinn*, 6 T. R. (Eng.) 11; 2 Phill. Ev. (6th Eng. ed.) 347; *Roscoe, Ev.* (4th Eng. ed.) 59. But later English cases hold such replication bad, and that the proper cause is to take judgment *quando*. See *Smith v. Tateham*, 2 Ex. (Eng.) 305; *Barker v. Dee*, 3 Swanst. (Eng.) 532, note (a); *Orcutt v. Orms*, 3 Paige (N. Y.), 459; *Brown v. Whitmore*, 71 Me. 65. See 14, n. *post*.

2. *Went. Off. Ex.* (14th ed.) c. 13, p. 312; *Wms. Exrs.* (7th Eng. ed.) 1966. See *Reeves v. Ward*, 2 Bing. N. C. (Eng.) 235; s. c., 2 Scott (Eng.), 296.

To prove assets, the plaintiff may give the inventory in evidence. *Giles v. Dyson*, 1 Stark. N. P. C. (Eng.) 32.

As to its effect as evidence, and effect of failing to distinguish between sperate and desperate debts, see § XIV. 3.

The plaintiff may prove assets not included in the inventory. *Maer v. Rucker*, 1 Humph. (Tenn.) 348.

An admission by the defendant that a debt is just, or a promise to pay as soon as possible, is not evidence to charge him with assets; for the executor could not mean to pledge himself to commit a *devastavit* by paying the debt before others of higher rank. *Hindsley v. Russell*, 12 East (Eng.), 232; 2 Phill. Ev. (6th Eng. ed.) 348.

Otherwise if the admission be by a third person, to whom the party has been referred by the administrator for information. *Williams v. Innes*, 1 Camp. (Eng.) 364.

Proof that the executor had made a composition with creditors, and entered the plea at the suit of one of them, estops him from giving evidence of no assets. *Bull. N. P.* (Eng.) 145.

Payment of interest on a bond does not conclude him from disputing assets for the principal. *Cleverly v. Brett*, cited by *Buller, J.*, 5 T. R. (Eng.) 8; 2 Phill. Ev. (6th Eng. ed.) 348.

The plea of *plene administravit* admits the debt, but not the amount; therefore in an action of *assumpsit* the plaintiff must prove the amount of the debt, in addition to proving assets, otherwise he will recover only nominal damages. But in an action

of debt, if the defendant plead *plene administravit*, without pleading also *nunquam indebitatus*, the debt is admitted by the plea, and need not be proved. *Shelly's Case*, 1 Salk. Eng.) 296; *Saunderson v. Nicholle*, 1 Show. (Eng.) 81; *Bull. N. P.* 140; 2 Phill. Ev. (6th ed.) 348.

3. § XIV. 5, or not inferior in their nature to that of the plaintiff, where such preference is allowed. § XIV. 5, b.

Or even that he has paid a debt of inferior rank before suit commenced without notice of the plaintiff's claim. *Chelsea Water Works Co. v. Cowper, Cowp.* 1 Esp. (Eng.) N. P. C. 277. But see *Lawrence, J.*, in *Hickey v. Hayter*, 6 T. R. (Eng.) 388; § XIV. 5, b, n.; DEBTS OF DECEDENTS, § II. p. 236, n.

Or that he has exhausted the assets in funeral, probate, or administration expenses, or in the reasonable charges of collecting the debts of the deceased. *Giles v. Dyson*, 1 Stark. N. P. C. (Eng.) 32; DEBTS OF DECEDENTS, § II. pp. 249-251.

In Massachusetts the administrator of an insolvent estate can defend a suit against him for a debt due from his intestate only by showing an account of administration, settled in the probate court, or by regular proceedings in insolvency. *Cushing v. Field*, 9 Met. (Mass.) 180. See *Mass. Gen. Sts. c. 97, § 20*; *Hildreth v. Marshall*, 7 Gray (Mass.), 167. Compare *Stuckey v. Bellah*, 41 Ala. 700.

Where the executor shows payments made by him to the extent of assets proved by the plaintiff to have come to his hands, the plaintiff may show in reply, that the funds so applied did not come to the defendant as executor, but were handed to him in trust to pay the testator's debts, and were not part of the assets proved to have come to his hands. *Marston v. Downes*, 1 Ad. & El (Eng.) 31; 6 C. & P. (Eng.) 381; *Wms. Exrs.* (7th Eng. ed.) 1973.

4. *Bull. N. P.* (Eng.) 141; 1 Saund. (Eng.) 333, a, note 8. But see 2 Phill. Ev. (6th ed.) 350; *Bond v. Green*, 1 Brownl. (Eng.) 75.

A retainer for the funeral expenses and probate charges may be shown. *Gillies v. Smither*, 2 Stark. N. P. C. (Eng.) 528.

that he has applied the assets in payment of debts after the commencement of the suit.¹

(12) *Plea of Retainer*.—The executor or administrator may plead a retainer for the expenses of the funeral, or probate, charges, or to reimburse himself for payments made out of his own pocket, in discharge of debts superior to the plaintiff's, before commencement of suit;² but not for debts outstanding of higher degree than that on which the action is brought.³

(13) *Plea of Statute of Limitations*. See § XVI. 1, *a*, (6); § XIII.; also LIMITATIONS.—Where the action is brought on a debt contracted by the deceased more than six years before the commencement of the suit, and the plaintiff means to rely upon a promise, by the executor or administrator, to take the case out of the statute of limitations, the declaration should contain a count or counts upon promises by the executor or administrator in his representative character.⁴ At common law, death did not stop the running of the statute; and hence it was no answer to the plea, that the debtor died within six years after the cause of action accrued, and that an executor had not been appointed until after the expiration of the six years, and that the plaintiff had

1. Dyer, 32 *a*, in margin; Com. Dig. Admon. C. (Eng.) 2; Nightingale *v.* Lee, 1 Freem. (Eng.) 110.

If, therefore, there are outstanding debts of higher rank than the plaintiff's, or if the executor has paid other creditors of superior degree after action commenced, he must plead such matters specially; and if he has paid other creditors of equal degree, since the writ issued, without having had notice of the suit, he ought to plead specially *plene administravit* before notice. Wms. Exrs. (7th Eng. ed.) 1973, 1974; Bull. N. P. (Eng.) 141; 1 Saund. (Eng.) 333 *a*, note 8; Went. Off. Ex. (14th ed.) c. 12, p. 282; Com. Dig. Admon. c. 2; Nightingale *v.* Lee, 1 Freem. (Eng.) 54; Parker *v.* Dee, 3 Swanst. (Eng.) 531, note to Drewry *v.* Thacker. See § XIV. 5, *b*.

As to the effect of misleading the executor, see Tindal, C. J., in Richards *v.* Browne, 3 Bing. N. C. (Eng.) 499; § XIV. 6, *a*, *n*.

Where a party entitled to a legacy under a will has a claim against the testator, which he conceals from the executor till after he has received his legacy, he cannot afterwards, in an action against the executor, object that the amount of the legacy was not paid in due course of administration. Wms. Exrs. (7th Eng. ed.) 1974; Stroud *v.* Stroud, 7 M. & Gr. (Eng.) 417.

2. Wms. Exrs. (7th Eng. ed.) 1959, 1960; Co. Litt. 283, *a*; Bull. N. P. (Eng.) 140; Gillies *v.* Smither, 2 Stark. N. P. C. (Eng.) 528.

3. As to form of such plea, see R. *v.* Wade, 5 Price (Eng.), 621.

Such matters may also be given in evidence under a plea of *plene administravit*. § XVI. 1, *b*, (12).

He may also plead a retainer for his own debt, or to reimburse himself for the payment, before suit commenced, of a debt not inferior to the plaintiff's, where such retainer or preference is allowed. 1 Saund. (Eng.) 333, note 6; Co. Litt. 283, *a*; Bull. N. P. (Eng.) 140. See § XIV. 5, *b* and *c*.

3. Such matter must be specially pleaded. Bull. N. P. (Eng.) 141.

An executor who pleads a retainer, should state in the plea the making of the will, and his appointment as executor therein. Price *v.* Rowson, 1 Mod. (Eng.) 208; 2 Mod. (Eng.) 51. He must also produce the letters testamentary, and show that he is rightful executor. Partee *v.* Caughran, 9 Verg. (Tenn.) 460.

So where an administrator is sued as executor, and claims to retain as administrator, he must show his letters in the plea. Caverley *v.* Ellison, 7 Jones (Eng.), 23; 2 Chit. Pl. (16th Am. ed.) 389.

Otherwise where he is sued as administrator, for the declaration admits his title. Picard *v.* Brown, 6 T. R. (Eng.) 550.

4. Wms. Exrs. (7th Eng. ed.) 1947; Parke, B., in Browning *v.* Paris, 5 M. & W. (Eng.) 120. But see Rolleston *v.* Dixon, 2 Dowl. & L. (Eng.) 892; Poile *v.* Executor, 2 Phill. Ev. (6th Eng. ed.) 351; Buswell *v.* Roby, 3 N. H. 467; Benjamin *v.* De Groot, 1 Denio (N. Y.), 151.

As to the availability and characteristics of such promise or acknowledgment, see § XIII.; also LIMITATIONS.

sued such executor within a reasonable time after probate granted.¹

(14) *Plea of Set-off.* See § XVI. 1, a, (7); also SET-OFF AND COUNTER-CLAIM. — An executor or administrator sued in his representative character cannot set off a debt due to himself personally; nor, if sued for his own debt, can he set off a debt due to him in his representative character; because the debts, to be set off, must be mutual, and due in the same right.²

(15) *Admissions.* See § XVI. 1, a, (8).

(16) *Judgment.* — Whenever the action can only be supported against the executor or administrator in his representative character, and he pleads any plea which admits that character³ (except a release to himself), the judgment must be that the plaintiff do recover the debt and costs to be levied out of the assets of the decedent, if the defendant have so much; and, if not, then *the costs* out of the defendant's *own goods*.⁴ But where the defendant

1. Rhodes v. Smethurst, 4 M. & W. (Eng.) 42; s. c., 6 M. & W. (Eng.) 351; Freake v. Cranefeldt, 4 My. & Cr. (Eng.) 499. See Hopgood v. Southgate, 21 Vt. 584; Warren v. Paff, 4 Bradf. Sur. (N. Y.) 260. But compare Conant v. Hilt, 12 Vt. 285; Boyce v. Foote, 19 Wis. 199.

In equity the statute cannot be pleaded when the executor has not taken out letters of administration, because no *laches* can be attributed to the plaintiff. Story's Eq. Pl. § 753.

Hence, held in *Pennsylvania*, on the ground that the orphans' courts have chancery powers that an administrator may plead the statute in an action at law, if six years have elapsed from the time the debt occurred, although less than that period may have elapsed at the death of the debtor, but not in bar of the claim when the creditor proceeds in the orphans' court. The statute destroys the remedy, but does not extinguish the debt, nor affect a trust created for its payment. In the absence of gross *laches*, lapse of time is no bar, so long as the estate is unadministered, and the trust subsists. McCandless's Estate, 61 Pa. St. 9, 11, 12. See Foster, J., in Brewster v. Brewster, 52 N. H. 52, 59.

It is provided by New York Code Pro. § 102, that if a person against whom an action may be brought, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executor and administrator, after the expiration of that time, within one year after the issuing of letters testamentary, or of administration. See Scovil v. Scovil, 45 Barb. (N. Y.) 517.

Similar provisions exist in Massachusetts, New Hampshire, and some other States. Mass. Gen. Sts. c. 155, § 10; N. H.

Gen. Sts. c. 179, § 7. See Corliss v. Steam Engine Co., Schumacher, 109 Mass. 416, 418; Brewster v. Brewster, 52 N. H. 52, 59. Compare § XVI. 1, a, (6), n.; § XVI. 4.

2. Wms. Exrs. (7th Eng. ed.) 1952; Bishop v. Church, 3 Atk. (Eng.) 691; Gale v. Luttrell, 1 Y. & Jerv. (Eng.) 180; Call v. Houdlette, 70 Me. 308.

On the ground that an account stated by an executor in his representative character, must be taken to show a debt due from his testator to the plaintiff, it has been held, to a declaration in debt or *assumpsit* against an executor, or to an account stated by him *as executor*, a set-off for debts due from the plaintiff to the executor may be pleaded. Blakesley v. Smallwood, 8 Q. B. (Eng.) 538; s. c., 11 Ex. (Eng.) 416. But see Rees v. Watt, 11 Ex. (Eng.) 410. See § XVI. 1, a, (8).

Set-off Debts, Assets. — While the administrator cannot discharge a debt due the estate by cancelling his individual liability to the debtor, the latter is entitled to credit by way of equitable set-off, where it can be done by affecting only the administrator's rights as distributee. State v. Donegan, 3 Mo. (L. ed.) 919; 13 West. Rep. 101. Compare § XVI. 1, a, (7).

3. § XVI. 1, b, (11).

4. Wms. Exrs. (7th Eng. ed.) 1975; 1 Saund. (Eng.) note 10 to Hancock v. Prowd; Gordon v. Gregory, 3 B. & S. (Eng.) 90. See Hapgood v. Houghton, 10 Pick. (Mass.) 154; Gray, E. J., in Nat. Bank of Troy v. Stanton, 116 Mass. 438; Campbell v. Ely, 13 N. J. L. 150; Montgomery v. Reynolds, 14 N. J. L. 283; Quicksall v. Quicksall, 2 Penning. (N. J.) 457; Murray v. Davis, 2 Penning. (N. J.) 843; Sindle v. Kiersted, 2 Penning. (N. J.) 926; Justices v. Sloan, 7 Ga. 37; Scott v. Mitchell, 1

pleads *ne unques executor* or *administrator*, or a *release to himself*, the judgment is, that the plaintiff do recover both the *debt* and *the costs* in the first place, *de bonis decedentis si*, etc., and *si non*, etc., *de bonis propriis*.¹ Judgment upon a plea of *plene administravit*, found against the executor or administrator, should be entered only for so much of the debt as was proved to be in his hands.² Judgment *quando* covers all assets which were, are, or

Mo. 764; Laughlin v. McDonald, 1 Mo. 684; Ranney v. Thomas, 45 Mo. 111; Barrow v. Wade, 7 Sm. & M. (Miss.) 49; Hill v. Robeson, 2 Sm. & M. (Miss.) 541; Flagg v. Winans, 2 Ind. 123; Priest v. Martin, 4 Blackf. (Ind.) 311; Phipps v. Addison, 9 Blackf. (Ind.) 357; Crane v. Hopkins, 6 Ind. 44; Voorhies v. Enbank, 6 Iowa, 274; Lawton v. Buckingham, 15 Iowa, 22; Oliver v. Hearne, 4 Ala. 271; Armstrong v. Johnson, Minor (Ala.), 169; Pope v. Robinson, 1 Stewart (Ala.), 415; Greenwood v. Spiller, 2 Scam. (Ill.) 502; Burnap v. Dennis, 3 Scam. (Ill.) 478; M'Dowell v. Wright, 4 Scam. (Ill.) 403; Massingale v. Jones, 3 Hayw. (Tenn.) 36; Wilcox v. State, 24 Tex. 544; Stone v. Kaufman, 25 Ark. 186; Lightfoot v. Cole, 1 Wis. 27; Rece v. May, 2 A. K. Marsh. (Ky.) 23; Lake v. Marshall, 6 J. J. Marsh. (Ky.) 458. See also Rock v. Leighton, 1 Salk. (Eng.) 310; Ramsden v. Jackson, 1 Atk. (Eng.) 292, 294; Ewing v. Peters, 3 T. R. (Eng.) 685; Frink v. Layton, 2 Bay (S. C.), 166; Swearingen v. Pendleton, 4 S. & R. (Pa.) 389, 396.

But if the judgment be entered *de bonis propriis*, instead of *de bonis testatoris si*, etc., it may be amended on motion in the court below, even after the record has been removed by error. Short v. Coffin, 5 Burr. (Eng.) 2730. See Ware v. St. Louis Bagging & Rope Co., 47 Ala. 667; Estate of Schroeder, 46 Cal. 304; Piper v. Goodwin, 23 Me. 251; Atkins v. Sawyer, 1 Pick. (Mass.) 351; Boykin v. Cook, 61 Ala. 472. But see Ward v. Thomas, 1 Cr. & M. (Eng.) 532; s. c., 2 Dowl. (Eng.) 87.

After a lapse of six years the court will not allow a judgment *de bonis testatoris*, and for costs *de bonis propriis*, to be altered to a judgment *de bonis testatoris et si non de bonis propriis*, although the latter be clearly the judgment to which the plaintiff was entitled, the distinction being between an alteration to *discharge* and one to *fix* the personal liability of the executor. Burroughs v. Stevens, 5 Taunt. (Eng.) 556.

1. Went. Off. Ex. (14th ed.) 338, 340; 1 Saund. 336, *b*, note (10); Kellogg v. Wilcox, 2 John. (N. Y.) 377; Harrison v. Taylor, 1 Brev. 233; Justices v. Sloan, 7 Ga. 31; Smith v. Coggans, Harper (S. C.), 52.

The reason for the distinction is said to be that the executor cannot but know these

pleas to be false. Wms. Exrs. (7th Eng. ed.) 1976. See Evans v. Pierson, 1 Wend. (N. Y.) 30; Robert v. Ditmas, 7 Wend. (N. Y.) 522; Moore v. Hunt, 1 Bailey (S. C.), 370. Compare 1 Saund. (Eng.) 336, *b*, note 10.

The difference in effect between the two modes of entering the judgment is really slight; for since the judgment in either case is an admission of sufficient assets for its satisfaction, the executor must ultimately pay both the debt and costs recovered out of his own pocket. See § XVI. 1, *b*, (12). Therefore to a *scire facias* on the judgment, or action of debt suggesting a *devastavit*, the executor cannot plead *plene administravit*, but only controvert the *devastavit*, of which fact the judgment and the sheriff's return of *nulla bona testatoris* are almost conclusive evidence, and judgment will be against the defendant *de bonis testatoris*. 1 Saund. (Eng.) 337, note 1 to Hancocke v. Prowd. See Micheau v. Caldwell, 1 Spear's (S. C.) Ch. 22; Cogan v. Duncan, 23 Miss. 274; Young v. Kennedy, 2 McMullan (S. C.), 80.

In some States it has been held that a judgment against an executor should direct the debt to be paid in due course of administration. Racoulat v. Sausevain, 32 Cal. 376; Estate of Schroeder, 46 Cal. 304; Welch v. Wallace, 8 Ill. 490; Turney v. Gates, 12 Ill. 141; Bull v. Harris, 31 Ill. 487; Thorn v. State, 10 Tex. 295; Fortson v. Caldwell, 17 Tex. 627; Peck v. Stevens, 5 Gilman (Ill.), 127; Mattison v. Childs, 5 Col. 78. See Masters v. Masters, 13 Ill. App. 611.

Under Md. St. 1798, ch. 101, sub. ch. 8, §§ 7, 8, a judgment against an executor can only be had when there are assets in his hands. Keefe v. Malone, 3 McArthur (D. C.), 236.

In California, costs must, by the judgment, be made chargeable only upon the estate, unless the court directs them to be paid by the executor or administrator for mismanagement or bad faith in the conduct of the suit. Cal. Code, C. P. pl. 11,031.

As to judgment in attachment execution against executor, see Maner v. Keeper, 102 Pa. St. 444.

2. Hagthorpe v. Millforth, Cro. Eliz. (Eng.) 319; Harrison v. Beccles, cited 3 T. R. (Eng.) 688; Bayley, J., in Hancocke

ought to be, in the hands of the representative after the issuing of the writ, whether such assets come to hand between the issuing of the writ and the judgment, or after the judgment is signed.¹

(17) *Costs*. See COSTS, § IV. 3.—If the verdict be for the defendant, he is entitled to costs, as in ordinary cases;² if for the plaintiff, the executor or administrator must pay them *de bonis propriis*, if there are no assets.³

v. Podmore, 1 B. & Ad. (Eng.) 265. See *Jackson v. Lyon*, C. & M. (Eng.) 97; *Jameson v. Martin*, 3 J. J. Marsh. (Ky.) 330; *Siglar v. Haywood*, 8 Wheat. (U. S.) 675; *Botts v. Fitzpatrick*, 5 B. Mon. (Ky.) 397.

As to the earlier method of procedure, see 1 Saund. (Eng.) 336, note to *Hancock v. Prowd*.

When several executors plead *plene administravit severally* by several attorneys, and the jury find that one of them only has assets, judgment should be given against him only, and the rest shall go quit. *Bellew v. Juckleden*, 1 Roll. Abr. 929, B, pl. 5.

This appears to be the modern practice, although they join in the plea. *Parsons v. Hancock*, 1 Mood. & Malk. (Eng.) 330; *Parke, J.*, in *Cousins v. Paddon*, 2 Cr. M. & R. (Eng.) 558; 1 Saund. (Eng.) 336, note to *Hancock v. Prowd*.

But in *Dickerson v. Robinson*, 6 N. J. L. 195, it was held, that, as administrators cannot plead severally as executors may, judgment against them must be joint. See also *Kavanaugh v. Thompson*, 16 Ala. 817.

1. *Smith v. Tateham*, 2 Ex. (Eng.) 205.

Before this case, it seems to have been understood that praying judgment of assets *quando* was an admission that there are no assets in the defendant's hands at that time; i.e., the time of taking such judgment. Therefore, in the *scire facias* upon such judgment, it seems to have been thought necessary to state that the assets came to the executor's hands after the judgment. 2 Saund. (Eng.) 219, note (1) to *Noell v. Nelson*; *Parker v. Dee*, 3 Swanst. (Eng.) 522, note to *Drewry v. Thacker*; *Mara v. Quinn*, 6 T. R. (Eng.) 10. See *Sanford v. Wicks*, 3 Ala. 369; *McDowall v. Branham*, 2 Nott & McCord (S. C.), 572; *Allen v. Mathews*, 7 Ga. 149; *Southard v. Potts*, 2 Zab. (N. J.) 278; *Brown v. Whitmore*, 71 Me. 65.

But in *Smith v. Tateham*, 2 Ex. (Eng.) 205, in referring to the above passage from *Saunders, Rolfe, B.*, p. 209, said, "I think that that is not altogether correct. It is immaterial whether the assets have come into the executor's hands at a period antecedent to or posterior to the judgment, provided they have come since the commencement of the suit. All assets in the

executor's hands at that time unadministered are liable, and are reached by this judgment." Under this decision judgment *quando* is only an admission that there were no assets at the commencement of the suit. But the earlier position has been followed in several American cases, *ante*.

In *Orcutt v. Orms*, 3 Paige (N. Y.), 459, it was held that judgment *quando* protected the administrator from accounting for any assets which came to his hands before the time of the plea, but not from accounting for any which came to his hands after that time, as well before judgment as afterwards.

If the plaintiff take issue on the general or special plea of *plene administravit*, and it be found against him, the better opinion appears to be, that he cannot have judgment of assets *quando*. Wms. Exrs. (7th Eng. ed.) 1980; 2 Saund. 217, note (1) to *Noell v. Nelson*; *Bayley, B.*, in *Lucas v. Jenner*, 2 Dowl. (Eng.) 64. But see *Burnes v. Burton*, 1 A. K. Marsh. (Ky.) 349; *Osterhout v. Hardenburgh*, 19 John. (N. Y.) 266.

Judgment *quando* is interlocutory or final according to the nature of the action; if interlocutory, there must be a writ of inquiry or other proceedings to complete it. Tidd, Pr. (9th ed.) 683. See further upon the nature of judgment *quando*, *Mary Shipley's Case*, 8 Co. (Eng.) 134 a; *Wilt v. Bird*, 7 Blackf. (Ind.) 258; *Miller v. Towles*, 4 J. J. Marsh. (Ky.) 255; *Skinner v. Frierson*, 8 Ala. 915; *Brown v. Whitmore*, 71 Me. 65. See the form of such judgment, *Noell v. Nelson*, 2 Saund. (Eng.) 216, 217.

2. The statutes 7 Hen. VIII. c. 4, s. 3, and 21 Hen. VIII. c. 19, s. 3, by which costs are recoverable by the defendant in an action of replevin, extend to avowries made by an executor. Tidd, Pr. (9th ed.) 887, 956.

3. *Marshall v. Wilder*, 9 B. & C. (Eng.) 658; *Giles v. Pratt*, 1 Hill, Ch. (N. Y.) 239; *Howard v. Jemmett*, 3 Burr. (Eng.) 1368; s. c., 1 W. Bl. (Eng.) 400; *Gibbs v. Taylor* (Mass.), 9 N. E. Rep. 576. And otherwise in California, unless judgment be so entered for misconduct. Cal. C. C. P. pl. 10,031. The executor is liable *de bonis propriis*, in verdict found against him on the general issue, although the plea was not false to his own knowledge. *Deame v. Grim*, 2

(18) *Proceedings upon Judgments de Bonis Propriis*. See JUDGMENT; also EXECUTION. — Execution may issue immediately upon a judgment *de bonis propriis* against an executor or administrator, as in the case of judgments against other individuals.

(19) *Proceedings upon Judgment against the Executor or Administrator de Bonis Decedentis*. — At common law, if the sheriff returned *nulla bona* and a *devastavit* to a *feri facias de bonis decedentis*, sued out on a judgment obtained against an executor or administrator, the plaintiff immediately sued out a *feri facias de bonis propriis*.¹ But if he returned *nulla bona* generally, with-

W. Bl. (Eng.) 1275; 1 Saund. (Eng.) 336, *b*, note to *Dennis v. Dennis*.

Under Pub. St. Mass. c. 166, s. 8, which provides, that when a judgment recovered against an executor is for debts, damages, and costs, an execution for the debt and damages shall issue against the goods and estate of the deceased, and an execution for costs against the goods, estate, and body of the executor, as though for his own debt. An execution for costs issued against an administrator warrants his arrest without affidavit or special instruction to the officer. *Gibbs v. Taylor* (Mass.), 9 N. E. Rep. 576. Under this statute, an execution for debt, damages, and costs on the estate of the deceased is void, notwithstanding Mass. Pub. St. ch. 172, § 55, providing "the real estate of a deceased person may be taken on execution on a judgment . . . against his . . . administrator, for the proper debt of the deceased, with costs of suit." Look *v. Luce*, 136 Mass. 249. Compare *Perkins v. Fellows*, *id.* 294.

If the executor or administrator pleads *non assumpsit* and *plene administravit*, and the plaintiff takes judgment *quando* upon the latter plea, and goes to trial upon the former, and obtains a verdict, he will be entitled to costs to be levied *de bonis propriis* of the executor or administrator if there are not sufficient assets of the decedent to satisfy them, because, to avail himself of the judgment *quando*, he was obliged to go down to trial on the other issue. *Marshall v. Wilder*, 9 B. & C. (Eng.) 655, 657; *Tidd*, Pr. (9th Eng. ed.) 980. The court will permit the administrator to withdraw the plea of *non assumpsit* on motion upon paying costs. *Deame v. Grim*, 2 W. Bl. (Eng.) 1275. See *Tidd*, Pr. (9th Eng. ed.) 980; *Hindley v. Russell*, 12 East (Eng.), 232; *Kellogg v. Wilcox*, 2 John. (N. Y.) 377; *Fort v. Goody*, 7 Barb. (N. Y.) 388; *Nicholson v. Showerman*, 6 Wend. (N. Y.) 554; *Gordon v. Frederick*, 1 Munf. (Va.) 14; *Craddock v. Turner*, 6 Leigh (Va.) 124; *Smith v. Coggans*, Harper (S. C.), 52.

But where the personal representative has pleaded any one plea which goes to the whole cause of action, and succeeded

in it, in ordinary cases he will be entitled to costs, although he may also have pleaded the general issue, and failed on it. Thus, if the defendant pleads *ne unques executor* and *plene administravit*, or *non assumpsit* and *plene administravit*, and the plaintiff goes to trial on both pleas, and the last issue only is found for the defendant, he will be entitled to a general judgment and costs, although the other issues are found against him. *Hogg v. Graham*, 4 Taunt. (Eng.) 135; *Iggulden v. Gerson*, 2 Dowl. (Eng.) 277; *Cockson v. Drinkwater*, 3 Dougl. (Eng.) 239; *Ragg v. Wells*, 8 Taunt. (Eng.) 129; *Edwards v. Bethel*, 1 B. & Ad. (Eng.) 254; *Terry v. Vest*, 11 Ired. (N. C.) 65.

Costs on Judgments Quando. — When an executor or administrator pleads *plene administravit*, or judgments, etc., outstanding, and *plene administravit prater*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *quando*, etc., the plaintiff is not liable to pay costs *de bonis propriis*; nor does he seem liable to them when he pleads *plene administravit prater*, and the plaintiff takes judgment of the assets admitted in part, and for the residue of assets *quando*, etc. Judgment in such case should be entered for the costs, to be recovered *de bonis testatoris quando acciderint*. Wms. Exrs. (7th Eng. ed.) 1983; *Tidd*, Pr. (9th Eng. ed.) 980; 1 Saund. (Eng.) 336, *b*, note to *Hancocke v. Prowd*; *De Tastet v. Andrade*, 1 Chitt. Rep. 629, 630, note; *Cox v. Peacock*, 4 Dowl. (Eng.) 134. See *Lewis v. Johnston*, 69 N. C. 392.

1. 1 Saund. (Eng.) 219, note (8) to *Wheatley v. Lane*; *Tidd*, Pr. (9th Eng. ed.) *1025; *The People v. Judges of Erie*, 4 Cow. (N. Y.) 445. The creditor might also have had a *capias ad satisfaciendum*. *Tidd*, Pr. (9th Eng. ed.) *1025.

As to proceeding in Louisiana, see *Payne v. Dejean*, 32 La. An. 888.

Under the English practice the judgment an no assets to be found will be sufficient evidence of a *devastavit* in an action against the sheriff for false return. *Rock v. Leighton*, cited 3 T. R. (Eng.) 692; s. c., 1 Salk. (Eng.) 310; *Bell, J.*, in *Peaslee v. Kelly*, 38 N. H. 380.

out suggesting a *devastavit*, the ancient practice was to proceed by *scire fieri* inquiry.¹ But this proceeding has been superseded by an action of debt in the *debet* and *detinet*, founded upon the judgment, and suggesting a *devastavit*, upon which the judgment is *de bonis propriis*.² In this action the defendant may traverse the *devastavit*, and give in evidence that there were goods of the deceased which might have been taken in execution, and that he showed them to the sheriff;³ but cannot plead *plene administravit*, or any other plea which puts his defence upon want of assets, for such plea would be contrary to what is admitted by the judgment.⁴

In Pennsylvania, confession of judgment *de bonis* means *de bonis testatoris*, and is not conclusive proof of the existence of assets in a suit suggesting a *devastavit*, but their existence must be proved by evidence *aliunde*. Hence it would seem that the sheriff cannot, on such a judgment, return a *devastavit* with safety on such evidence, and the judgment creditor must resort to his action of debt. *Hussey v. White*, 10 S. R. (Pa.) 346; *Moore v. Kerr*, 10 S. & R. (Pa.) 348; *Mead v. Kilday*, 2 Watts (Pa.), 110. See also *Judy v. Kelly*, 11 Ill. 211; *Lee v. Gardner*, 26 Miss. 521.

In New York, execution will not be permitted to issue on a judgment against an executor until it is first ascertained that he has assets for its satisfaction. *Hanselt v. Gano*, 1 Dem. (N. Y.) 36; *Peters v. Carr*, 2 Dem. (N. Y.) 22.

Where the possession of assets by the executor to satisfy a claim, although put directly in issue by the pleadings, was never considered by the referees, nor passed on by the judge, judgment cannot be entered and execution issued against the executors *de bonis propriis*. *Dickerson v. Wilcoxon* (N. C.), 1 S. E. Rep. 636.

1. Wms. Exrs. (7th Eng. ed.) 1984; Tidd (9th ed.), 1113, 1114. See, as to establishment and nature of this practice, 1 Saund. (Eng.) 219, *a*, note to *Wheatley v. Lane*.

"The course of proceeding in England, by *scire fieri* inquiry, is unlike any course of proceeding known in our practice." Bell, J., in *Peaselee v. Kelly*, 38 N. H. 380. See *Bank of Alabama v. Hooks*, 2 Porter (Ala.), 271.

2. Wms. Exrs. (7th Eng. ed.) 1987; Warren v. Cousett, 2 Lord Raym. (Eng.) 1502. See 1 Saund. (Eng.) 219, *b*, note (8) to *Wheatley v. Lane*. *Blackmor v. Mercer*, 2 Saund. (Eng.) 403; *Erving v. Peters*, 3 T. R. (Eng.) 686; *Farr v. Newman*, 4 T. R. (Eng.) 637. See *Newcomb v. Goss*, 1 Met. (Mass.) 333; *Mead v. Kilday*, 2 Watts (Pa.), 110; *Goodwin v. Wilson*, 1 Blackf. (Ind.) 344; *Peaselee v. Kelly*, 38 N. H. 380.

The judgment and execution upon which

the action is founded must be against the executor or administrator in his representative character. *Van Horn v. Teasdale*, 4 Halst. (N. J.) 379; *State v. Seabright*, 15 W. Va. 590.

A declaration in the *detinet* is cured by verdict. *Hope v. Bague*, 3 East (Eng.), 2.

The action may be brought upon the judgment against the executor, upon a bare suggestion of waste, without first taking out a writ of *fi. fa.* upon the judgment. But the usual course is first to sue out a *fi. fa.* upon the judgment, and, upon the sheriff's return of *nulla bona*, to bring the action, and state the judgment, the writ, and return in the declaration; and, on the trial, the record of the judgment, the *ferri facias*, and the return, will be sufficient evidence to prove the case. Wms. Exrs. (7th Eng. ed.) 1987; *Peaselee v. Kelly*, 38 N. H. 372. See *Leonard v. Simpson*, 2 Bing. N. C. (Eng.) 176; *Cope v. McFarland*, 2 Head (Tenn.), 543.

In Massachusetts and New Hampshire the proceeding is by *scire facias* against the executor and administrator. In the latter State it was held that the waste was necessarily implied by the execution and return of *nulla bona*, and need not be specifically alleged in the *scire facias*. *Mass. Gen. Sts. c. 128, § 10*; *Peaselee v. Kelly*, 38 N. H. 372. See also *Cal. Code, C. P. § 6107*.

The action of debt may be brought on the administration bond. *Newcomb v. Goss*, 1 Met. (Mass.) 333. Compare *Goodwin v. Wilson*, 1 Blackf. (Ind.) 344. See § XI.

A bill in equity may also be sustained against the executor or administrator, to charge him *de bonis propriis* if he admits having received personal assets, and used them otherwise than in paying the judgment. *Glenn v. Maguire*, 3 Tenn. Ch. 695.

3. 1 Saund. (Eng.) 219, *c*, note (8) to *Wheatley v. Lane*; *Newcomb v. Goss*, 1 Met. (Mass.) 333.

At common law, the same defence could have been given under the plea of *nil debet*. *Coppin v. Carter*, 1 T. R. (Eng.) 462.

4. 1 Saund. (Eng.) 219, *c*, note (8) to

2. *Other Remedies.* — See § XIII. 3, 4, 5, 6.

a. *Attachment.* — Effects or money in the hands of the personal representative, due or belonging to the deceased at the time of his death, may be attached.¹

b. *Distress.* — Where the lessee of lands dies before the expiration of the term, and his executor or administrator continues in possession during the remainder, a distress may be taken for rent due for the whole term.²

c. *Proceedings against Executors upon Promissory Notes and Bills of Exchange.* — See **BILLS AND NOTES**, pp. 373, 374, 407, 411.

Wheatley v. Lane; Ewing v. Peters, 3 T. R. (Eng.) 685; Rock v. Leighton, 1 Salk. (Eng.) 310; Cooper v. Taylor, 6 M. & Gr. (Eng.) 989; s. c., 7 Scott, N. R. (Eng.) 951; Dawson v. Gregory, 7 Q. B. (Eng.) 756; Blount v. Hopson, 1 Yerg. (Tenn.) 399; White v. Archbill, 2 Sneed (Tenn.), 588. See § XVI. 1, b, (12). But see Hussey v. White, 10 S. & R. (Pa.) 346; Goodwin v. Wilson, 1 Blackf. (Ind.) 344; Lee v. Gardner, 26 Miss. 521; Judy v. Kelley, 11 Ill. 212; Braxton v. Wood, 4 Gratt. (Va.) 25. For the same reason, he cannot give in evidence the want of assets on the trial of the *devastavit*. Rock v. Leighton, 1 Salk. (Eng.) 310.

Under the Massachusetts statute, the real estate of the decedent may be taken in execution on a judgment recovered against the executor or administrator for the proper debt of the deceased, with costs of suit, and the fees and charges of levying the execution, as it might have been if the judgment had been rendered, and the execution issued and served against the decedent in his lifetime. Mass. Gen. Sts. §§ 53, 54, 55; Steel v. Steel, 4 Allen (Mass.), 417. See *ante*, (19), n.

The law is similar in some other States. See Wyman v. Fox, 55 Me. 523; Bells v. Robinson, 1 Stewart, 193; Graff v. Smith, 1 Dall. (Pa.) 481; Rowland v. Harbaugh, 5 Watts (Pa.), 367; McPherson v. Cunliff, 11 S. & R. (Pa.) 432; Murphy's Appeal, 8 W. & S. (Pa.) 165. *Contra*, Stillman v. Young, 16 Ill. 318; O'Brien v. Moody, 4 McLean (Ind.), 77.

Judgments Quando. — The plaintiff cannot have execution upon judgment *quando* entered against an executor or administrator until some assets come to his hands, when he may bring an action of debt upon the judgment, or proceed by *scire facias*. As to the form of the *scire facias*, see Noell v. Nelson, 2 Saund. (Eng.) 219.

As to whether the *scire facias* should state that the assets came to the defendant's hands since the judgment, see § XVI. 1, b, (18), n.

1. Horsam v. Target, 1 Ventr. (Eng.) 113; s. c., 1 Lev. (Eng.) 306; Com. Dig.

Attachment, D; Wms. Exrs. (7th Eng. ed.) 2000. Executors and administrators were within the custom of London. Master v. Lewis, 1 Ld. Raym. (Eng.) 57; Fisher v. Lane, 3 Wils. (Eng.) 297; s. c., 2 W. Bl. (Eng.) 834. See also Lord Kenyon in Barrymore v. Taylor, 1 Esp. (Eng.) 326. But money recovered by an executor as damages in trespass, or on a covenant made with him, or awarded to him on a submission by him of controversies between his testator and another person, cannot be attached. Horsam v. Target, 1 Ventr. (Eng.) 113; s. c., 1 Lev. (Eng.) 306; Com. Dig. Attachment, D.

"A legacy is not attachable by foreign attachment, being it may work a wrong to creditors, who are third persons, and can have no day in court in that suit to interplead." Lord Keeper Finch in Chamberlain v. Chamberlain, 1 Prec. Chanc. 257. See Wood v. Smith, Noy (Eng.), 115; Scurra v. Merciall, 1 Roll. Abr. 551, tit. "Customs de London," E, pl. 2; Com. Dig. Attachment, D. So of a distributive share. McElwee v. Storr, 1 Rich. (S. C.) 9.

In Pennsylvania, a legacy or distributive share in the representative's hands may be reached by attachment execution. Maurer v. Kerper, 102 Pa. St. 444.

A creditor who, after his debtor's death, obtains an attachment against a part of the assets, gains no priority over other creditors of the decedent. Redhead v. Wether, 29 Beav. (Eng.) 521; Matthey v. Wiseman, 34 L. J. C. P. (Eng.) 216.

Attachment on an Award. — The court will not grant an attachment against an executor for the non-performance of an award which was made under a reference by rule of court entered into by the testator. Newton v. Walker, Willes (Eng.), 315.

Attachment for Contempt. — As a trustee for the heirs and creditors, and as an officer of the court, an executor is subject to attachment for "contempt," within Cal. Code, § 1209; *Ex parte* Smith, 53 Cal. 204.

Attachment as a Remedy for an Executor. — See § XVI. 4, note.

2. Went. Off. Ex. (14th ed.) 291; Braithwaite v. Cooksey, 1 H. Bl. (Eng.) 465.

3. *Remedies in Equity.*—*a. For Executors and Administrators.*—(1) *What Bills may be maintained by an Executor or Administrator.*—(a) *Bills to restrain the Publication of Letters.*—The executors of the writer of letters may maintain a bill in equity to restrain the defendant from publishing them.¹

(b) *Bills for Discovery of Assets.* See § XVI. 4.—An executor or administrator may exhibit a bill for the discovery of assets.²

(c) *Bills to recover Property fraudulently obtained.*—The executor or administrator is the proper party to maintain a bill to recover property obtained from the decedent by fraud.³

(d) *Bills to recover Property aliened by the Deceased in Fraud of Creditors.*—See § XII. 3, a, e.

(e) *Bills to compel Creditors, Legatees, and Distributees to refund.*—See § XIV. 5, a; § XIV. 6, a.

(f) *Injunctions.*—*Relief in Equity on Judgments at Law.* See § XVI. 3, b, (1), (c).—After a decree for an account and payment of debts or legacies, under which all the creditors or legatees

But see *Wilson v. Shearer*, 9 Met. (Mass.) 504, 506.

The executor or administrator cannot plead *plene administravit* in bar to the avowry. Went. Off. Ex. (14th ed.) 291.

The distress may be taken by virtue of the statute 8 Ann. c. 14, §§ 6 & 7, within six months after the termination of the tenancy, if the executor or administrator continues in possession, *Braithwaite v. Cooksey*, 1 H. Bl. (Eng.) 465.

1. *Thompson v. Stanhope*, Amb. (Eng.) 737; *Queensbury v. Shebbeare*, 2 Eden (Eng.), 329. See also *Granard v. Dunkin*, 1 Ball & B. (Ir.) 207; 2 Dan. Ch. Pr. (4th Am. ed.) 1647; *Story*, Eq. Jur. § 946, *et seq.*; *Folsom v. Marsh*, 2 Story, 100; 2 Story, Eq. Jur. § 946, *et seq.*

The receiver of letters has but a qualified property in them: they pass to the administrator, but are not assets in his hands. *Eyre v. Higbee*, 35 Barb. (N. Y.) 502.

2. Com. Dig. Chanc. 2 B, 1; *Wright v. Bluck*, 1 Vern. (Eng.) 106; *Thorn v. Tyler*, 13 Blackf. (Ind.) 504.

A bill in equity will lie by an administrator against the general agent of his intestate for a discovery, and an account of the transactions of the latter with his principal. *Simmons v. Simmons*, 33 Gratt. (Va.) 451.

To such a bill the heirs are not necessary parties. *Sturgeon v. Burrall*, 1 Ill. App. 537.

In most States the remedy for discovery of assets is in the probate court. See § XVI. 4.

Lapse of time will not of itself bar an executor of an executor of his right to have an account of his executor's testator's estate taken, with a view to ascertain such executor's liabilities as an accounting party.

Smith v. O'Grady, L. R. 3 P. C. C. (Eng.) 311.

3. *Sears v. Currier*, 4 Allen (Mass.), 339; *Cheney v. Gleason*, 125 Mass. 166.

The administrator, and not the heir, is the proper party to impeach a sale made under a deed of trust to the intestate as being tainted by the fraud of the purchaser. *Craig v. Jenkins*, 31 Ohio St. 84.

So, in an action to annul a sale made by an administrator, he must be made a party. *Herrmann v. Fontelieu*, 29 La. Ann. 302.

But he cannot maintain a bill to rescind his intestate's executory contract for the purchase of land. *Cotham v. Britt*, 10 Heisk. (Tenn.) 469.

An administrator sought by bill to reach land for the intestate's debts. Defendant claimed the land under an unrecorded deed from the intestate. *Held*, that plaintiff might attack the deed for fraud, although no fraud was charged in the bill. *Werts v. Spearman*, 22 S. C. 200.

Where notes or other negotiable instruments formerly held by the decedent have come into the hands of a third party under an indorsement and delivery fraudulently obtained, the personal representative may sue for their value at law as for a tort, or file a bill in equity to compel the specific delivery of the instruments to himself, and restrain the holder from suing upon the instrument, or parting with the possession.

In such bill the makers of the notes may properly be joined as parties. *Sears v. Currier*, 4 Allen (Mass.), 339. See *Morton v. Preston*, 18 Mich. 60.

But where there is an adequate remedy at common law, or by statute, a bill in equity cannot be maintained. *Aberathy v. Bankhead*, 71 Ala. 190; *Graveley v. Graveley's Admr.* (Va.), 4 S. E. Rep. 218.

may claim, the executor or administrator, upon due exposition of the state of the assets, may obtain an injunction on motion in the existing suit to restrain proceedings by a separate creditor or legatee, either at law or in equity, and compel him to come in under the decree.¹ If the injunction is granted, the plaintiff at law is entitled to have both the costs of the action up to the time when he had notice of the decree,² and the costs of the motion, paid by the executor.³ Any delay in making the application before judgment will, in most cases, resolve itself into a mere question of costs.⁴ But if the creditor has obtained judgment on

1. Mitf. Pl. (4th ed.) 168; *Paxton v. Douglass*, 8 Ves. (Eng.) 52; *Perry v. Philips*, 10 Ves. (Eng.) 39, 40; *Drewry v. Thacker*, 3 Swanst. (Eng.) 541, 544; *Clarke v. Ormonde*, Jacob. (Eng.) 123, 124; *Hayward v. Constable*, 3 Y. & Coll. (Eng.) 43; *Whitaker v. Wright*, 2 Hare (Eng.), 310; *Pennell v. Roy*, 3 De G. M. & G. 126, 137, 138. See *Ratcliffe v. Winch*, 16 Beav. (Eng.) 576; *Largan v. Bowen*, 1 Sch. & Lef. (Eng.) 299; *Hazen v. Durning*, 1 Green, Ch. (N. J.) 138; *Updike v. Doyle*, 7 R. I. 460; *Thompson v. Brown*, 4 John. Ch. (N. Y.) 642; *McKay v. Green*, 3 John. Ch. (N. Y.) 58; 1 Story, Eq. Jur. § 549.

The rule extends to proceedings in a foreign country,—*Graham v. Maxwell*, 1 Mac. & G. (Eng.) 71; *McClaren v. Stainton*, 16 Beav. (Eng.) 279; 5 H. L. Cas. 416. See *Pennell v. Roy*, 3 De G. M. & G. (Eng.) 126; 2 Dan. Ch. Pr. (4th Am. ed.) 1614, 1615; *Baillie v. Baillie*, L. R. 5 Eq. Cas. (Eng.) 175,—and to proceedings for the administration of the real as well as the personal estate in the foreign country, unless the party instituting such suit can carry on the proceedings as to the realty without proceeding as to the personal estate. *Hope v. Carnegie*, L. R. 1 Ch. App. (Eng.) 320.

Formerly the course was for the executor to file a bill against the creditor suing at law to obtain the injunction, but in modern practice the injunction is granted on motion by either party. *Thompson v. Brown*, 4 John. Ch. (N. Y.) 619, 643; *Paxton v. Douglass*, 8 Ves. (Eng.) 520; *Perry v. Philips*, 10 Ves. (Eng.) 39, 40.

A legatee may make the application. *Clarke v. Ormonde*, Jacob. (Eng.) 122.

The court will not restrain proceedings at law merely on bill filed: there must be in existence a decree under which the creditor has a present right to go in and prove his debt. *Rush v. Higgs*, 4 Ves. (Eng.) 638; *Teague v. Richards*, 11 Sim. (Eng.) 46; *Rankin v. Harwood*, 2 Phill. C. C. (Eng.) 22; 5 Hare (Eng.), 215.

The injunction is granted only upon the principle that the creditor is enabled to bring into equity all his legal rights. *Whit-*

aker v. Wright, 2 Hare (Eng.), 310. See also *Fowler v. Roberts*, 2 Giff. (Eng.) 226; *Marriage v. Skiggs*, 4 De G. & J. (Eng.) 4. See § XVI. 3, b, (1), (c), n.

To prevent the executor from converting the proceeding into a means of keeping the assets in his own hands, Lord Eldon introduced the rule, that, where the answer does not state what the assets are, the executor shall be called upon to state them by affidavit, so as to enable the court, in its discretion, to order him to pay the balance into court. *Gilpin v. Lady Southampton*, 18 Ves. (Eng.) 469; *Paxton v. Douglas*, 8 Ves. (Eng.) 520; *Clarke v. Ormonde*, Jacob. (Eng.) 125; *Vernon v. Theilussou*, 1 Phill. C. C. (Eng.) 466, 472; *Macrae v. Smith*, 2 K. & Johns. (Eng.) 411; *Drewry v. Thacker*, 3 Swanst. (Eng.) 546; *Thompson v. Brown*, 4 John. Ch. (N. Y.) 619, 642. But see *Ratcliffe v. Winch*, 16 Beav. (Eng.) 576, 577.

2. *Dyer v. Kearsley*, 2 Meriv. (Eng.) 483, note to *Terrevest v. Featherby*; *Paxton v. Douglas*, 8 Ves. (Eng.) 520; *Ratcliffe v. Winch*, 16 Beav. (Eng.) 576. See *Drewry v. Thacker*, 3 Swanst. (Eng.) 541; *Turner v. Connor*, 15 Sim. (Eng.) 630.

3. *Turner v. Connor*, 15 Sim. (Eng.) 630; *Jones v. Jones*, 5 Sim. (Eng.) 678. But see *Anon.* 2 Sim. & Stu. (Eng.) 424.

If the creditor commences his action at law before bill filed, and then discontinues and comes in under the decree, he will be entitled to prove his costs, both in the action and in the motion, in addition to his debt. *Goate v. Fryer*, 3 Bro. C. C. (Eng.) 23; s. c., 2 Cox, Eq. Cas. (Eng.) 201; *Jones v. Jones*, 5 Sim. (Eng.) 678. But see *Anon.* 2 Sim. & Stu. (Eng.) 424.

4. *Lord Lyndhurst* in *Rouse v. Jones*, 1 Phill. C. C. (Eng.) 464.

An executor who, after notice of the decree, permits the creditors to proceed at law, and take the property of the deceased in execution, will be liable to the estate; and if the creditors obtain judgment after notice, and levy on the decedent's property, a court of equity will compel them to restore it. *Clarke v. Ormonde*, Jacob. (Eng.) 122. See *Irby v. Irby*, 24 Beav. (Eng.) 525, 530.

motion to restrain the execution, the court will interfere so far as is necessary to give effect to its own decree, but will not interpose to protect the executor from any liability to which he may have subjected himself personally.¹

(g) *Bills of Conformity*. — See § XVI. 3, b, (1), (c), note.

A creditor will not be allowed the costs of further proceedings at law after actual notice of the decree, nor, in such case, the costs of the motion. *Paxton v. Douglas*, 8 Ves. (Eng.) 521; *Curre v. Bowyer*, 3 Madd. (Eng.) 456; *Jones v. Brain*, 2 Y. & Coll. C. C. (Eng.) 170. See *Hayward v. Constable*, 2 Y. & Coll. (Eng.) 43; *Moore v. Prior*, 2 Y. & Coll. (Eng.) 375.

He may be ordered to pay the costs of the motion, if, after bringing in his claim under the decree, he proceeds with his own suit. — *Beauchamp v. Lord Huntley*, Jacob. (Eng.) 546; *Gardner v. Garrett*, 20 Beav. (Eng.) 469, — although the suit be in a foreign court. *Graham v. Maxwell*, 1 Mac. & G. (Eng.) 71.

Such costs may be set off against his costs incurred before notice of the decree. *Gardner v. Garrett*, 20 Beav. (Eng.) 469.

Sir L. Shadwell, V. C., in *Kent v. Pickering*, 5 Sim. (Eng.) 55; *Burles v. Popplewell*, 10 Sim. (Eng.) 383. See *Vernon v. Thelluson*, 1 Phill. C. C. (Eng.) 466; *Kirby v. Barton*, 8 Beav. (Eng.) 45; *Lee v. Pack*, 1 Keen (Eng.), 714; *Vincent v. Godson*, 3 De G. & Sm. (Eng.) 717.

In *Brook v. Skinner*, 5 Meriv. (Eng.) 481, note, Lord Eldon laid down, that, if the plaintiff at law has recovered judgment *de bonis testatoris*, the court will restrain the creditor from taking execution on such judgment; but that, if he has recovered *de bonis propriis*, the court will not restrain the execution. See, as to this distinction, *Clarke v. Ormonde*, Jacob. (Eng.) 124; *Terravest v. Featherby*, 2 Meriv. (Eng.) 480; *Drewry v. Thacker*, 3 Swanst. (Eng.) 542, 543, 547, 548; *Lord v. Wormleighton*, Jacob. (Eng.) 148; *Fielden v. Fielden*, 1 Sim. & Stu. (Eng.) 255; *Dyer v. Kearsley*, 4 Meriv. (Eng.) 482.

Sergeant Williams criticises the distinctions taken in these cases as founded upon a misapprehension of the true nature and consequences of judgments at law against executors and administrators; for there are but two cases where a judgment against an executor is *de bonis testatoris*, *et si non, de bonis propriis*: viz., where he pleads a release to himself, or *ne unques executor*; and whether the judgment be *de bonis testatoris*, *et si non, de bonis propriis*, or *de bonis propriis* merely, the executor is equally compellable to pay the debt and costs out of his own pocket if the assets prove deficient. Wms. Exrs. (7th Eng. ed.) 1922. See § XVI. 1, b, (11).

"Hence it should seem to follow, that, if the principle were that a court of equity will not, by injunction, exclude creditors, proceeding at law, from the benefit of that due diligence by which they have established a right to be satisfied, either out of the assets of the deceased, or, *de bonis propriis*, of the representative (*Drewry v. Thacker*, 3 Swanst. (Eng.) 547), that principle would apply to every case where the creditor has obtained a judgment at law of any kind other than a judgment of assets *quando acciderint* (except cases such as *Dyer v. Kearsley*, 4 Meriv. (Eng.) 482, and *Fielden v. Fielden*, 1 Sim. & Stu. (Eng.) 255, where the executor has taken steps merely with a view to gain time to apply to a court of equity), because, by judgment in every case, the creditor has established a right to proceed against the goods of the representative in the event of a deficiency of the goods of the deceased." Wms. Exrs. (7th Eng. ed.) 1922. See *Lee v. Park*, 1 Keen (Eng.), 714.

Restraining Execution against the Heir.

— Execution against an heir by a bond credited of the intestate may be restrained on motion, pending the determination of an issue on a plea of *riens per descent prater*, etc., although, if the plea should be falsified, the judgment would be *de bonis propriis* against him. For the amount of the judgment being paid by him, the lands in respect of which the levy or payment was made would become the property of the heir, and thus withdrawn from the fund which ought to be applied for the benefit of the creditors under the decree. *Lord Lyndhurst, C.*, in *Rouse v. Jones*, 1 Phill. C. C. (Eng.) 462. See *Price v. Evans*, 4 Sim. (Eng.) 514; *Hope v. Carnegie*, L. R. 1 Ch. App. (Eng.) 328.

Injunction to restrain the Executor.

— After the estate of a testator has been fully administered in a court of equity, the executor (defendant in the creditor's suit) cannot be permitted, without leave of the court, to commence an action to recover from the plaintiff in the creditor's suit a portion of the testator's property, and such action will be restrained. *Oldfield v. Cobbett*, 5 Beav. (Eng.) 132; s. c., 6 Beav. (Eng.) 515.

Relief in Equity from Judgments at Law.

— An executor who, in an action at law by a creditor of the testator, has pleaded according to the truth of the case, when the assets have been taken from him and ad-

(h) *Bills for Instruction.* — A court of equity will only instruct an executor or trustee in regard to circumstances actually existing, or reasonably certain to arise in the management of the trust. It will not give an abstract opinion,¹ nor will it allow him to place it in the position of his general legal adviser.²

ministered in equity, is entitled to all the protection the court can give against any consequences resulting from the interference of the court, and the nature of the plea at law. In such case, the fund in court will be so applied as to give the judgment creditor the benefit of his legal right. *Taylor v. Gaunt*, 2 Hare (Eng.), 413, 420.

The relief has been granted by restraining the creditor from further proceedings on the judgment, upon the executor or administrator showing that assets sufficient to pay all the debts had come to his hands, but that a large portion of them had been recovered by title paramount, or where the deficiency was caused by unexpected depreciation in value. *Royall v. Johnson*, 1 Rand. (Va.) 421; *Miller v. Rice*, 1 Rand. (Va.) 438. See *Pendleton v. Stuart*, 6 Munf. (Va.) 377.

But an administrator, having allowed judgments at law to be rendered against him, cannot obtain equitable relief against them on an averment that they were rendered on an agreement that no effort was to be made to charge him personally, or to charge the sureties upon his bond, with the amount of such judgments. *Weakley v. Gurley*, 60 Ala. 399.

1. *Goddard v. Brown*, 12 R. I. 31; *Sohier v. Burr*, 127 Mass. 221; *Feuche v. Garrison* (Ga.), 3 S. E. Rep. 330; *Little v. Thorne*, 93 N. C. 69; *Weed v. Cantwell*, 36 Hun (N. Y.), 528; *Minot v. Taylor*, 129 Mass. 160; *Wilbur v. Maxam*, 133 Mass. 541; *Dill v. Wisner*, 88 N. Y. 153.

A suit in equity to obtain the instruction of the court as to the construction of a will cannot be maintained where there is no conflict of claims affecting the duties of the administrator; the only question being as to who eventually, after the death of a certain person, is to have the property. *Wilbur v. Maxam*, 133 Mass. 541. See *Goddard v. Brown*, 12 R. I. 31; *Sohier v. Burr*, 127 Mass. 227.

It has been held that such a suit can only be maintained where there is some continuing duty imposed or some trust requiring action for some time to come. *Powell v. Demming*, 22 Hun (N. Y.), 235.

An administrator cannot maintain a bill in equity to obtain the instructions of this court as to the distribution of the proceeds of real estate sold by him under a license from the probate court, until the surplus remaining on the final settlement of his

accounts in that court has been ascertained. *Muldoon v. Muldoon*, 133 Mass. 111.

A demurrer to a bill brought by an executor or administrator *cum. test. an.* for the construction of a clause in a will, will be sustained if the bill shows, that, in the actual condition of the estate, the clause does not, and probably never will, embarrass him in the performance of his duties. *Rexroad v. Wells*, 13 W. Va. 812.

Upon a bill to obtain the construction of a codicil, and enforce a charge created by it, the court has no jurisdiction to try the legality of the codicil, and consent cannot give it, especially when the contestant's ancestor probated the will and codicil, and took property under them. *Union Meth. Episc. Church v. Wilkinson*, 36 N. J. Eq. 139, 141.

Where a bequest of the residue is given to charitable corporations, one of which cannot take by reason of a charter provision that bequests made to it within two months from the execution of the will shall be void, in an action brought to procure a construction of the will, the existence of authority on the part of the other corporations to respect the testator's wishes concerning this one should be affirmed in the judgment. *Riker v. St. Luke's Hospital*, 35 Hun (N. Y.), 512.

2. *Clay v. Gurley*, 62 Ala. 14; *McNiel v. McNiel*, 36 Ala. 109; *Park v. Park*, 36 Ala. 132; *Pitkin v. Pitkin*, 7 Conn. 315; *Beers v. Strohecker*, 21 Ga. 442.

The court cannot be called upon to decide as to the validity of claims, or the bringing of suits against persons who, in separate transactions with the deceased, or with the administrators of his estate, may have come under liability to a subsequent administrator, nor as to the right between the administrator and those who, claiming title, refuse to give up property on his adverse demand, or to determine a liability to him of a third person in no way interested in the distribution of the estate, asserted on the one side, and denied on the other. *Clay v. Gurley*, 62 Ala. 14.

The Orphans' Court will not advise or direct executors with reference to the sale of securities. *Whitaker's Estate*, 14 Phila. (Pa.) 254.

An executor cannot seek the advice of the court in an application for the construction of a devise of land, unless it involves the administration of the personal estate. *Robinson v. McDiarmid*, 87 N. C. 455; *Cozart v. Lyon*, 91 N. C. 282.

(i) *Bills filed before Probate or Letters.* — Such bills must allege that the executor or administrator has obtained probate or letters,¹ and the subsequent probate or letters will make the bill a good one if obtained before a hearing.²

(j) *Bills against a Co-Executor.* — See JOINT EXECUTORS AND ADMINISTRATORS.

(2) *Parties.* See EQUITY PLEADING AND PRACTICE; also § XVI. 3, a, (1), (h), note; § XVI. 3, b, (3). — Where there are several executors, all who have proved the will must be made parties to the bill.³

The circuit court has jurisdiction in equity of a bill filed by executors, alleging that it was their duty to sell certain lands to pay debts, and that no sale could be effected without a ruinous sacrifice of the land, and that there were salable lands belonging to the estate, and asking the advice of the court as to the manner in which the trust should be executed; and jurisdiction once having been acquired, for the purpose of giving the advice, the necessary relief could be afforded, and a sale of land under a decree in the suit is valid. *Bridges v. Rice*, 99 Ill. 414.

The interposition of the court is largely discretionary, and will not be exercised except in matters of importance. *Dimmock v. Bixby*, 20 Pick. (Mass.) 368, 374; *Andrews v. Bishop*, 5 Allen (Mass.), 430; *Drury v. Natick*, 10 Allen (Mass.), 169, 175; *Hooper v. Hooper*, 9 Cush. (Mass.) 122, 127; *Treadwell v. Cordis*, 5 Gray (Mass.), 341; *Horah v. Horah*, 1 Wms. (N. C.) Eq. 107; *Kearney v. Macomb*, 1 C. E. Greene (N. J.), 189; *Annin v. Vandoren*, 14 N. J. Eq. 135; *Crosby v. Mason*, 32 Conn. 482; *Wheeler v. Perry*, 18 N. H. 307; *Goodhue v. Clark*, 37 N. H. 525.

For a case where a bill for instructions was successfully maintained, see *Sevens v. Warren*, 101 Mass. 564, 565.

Parties. — See § XVI. 3, b, (2). Bills for instruction may be maintained by a foreign executor, or by a beneficiary under the will. *Mechanics & Traders' Bank v. Harrison*, 68 Ga. 463; *First Baptist Church v. Robberson*, 71 Mo. 326; *Wager v. Wager*, 89 N. Y. 161.

Allegations in a petition for the construction of a will that a controversy has arisen between plaintiff (a legatee) and the executor regarding the latter's duties, and that doubts have arisen as to the proper construction of the will to the danger of plaintiff's interest, unless equity instruct the executor, are good grounds on demurrer for a suit for the construction of the will. *First Baptist Church v. Robberson*, 71 Mo. 326.

When the portion of the will, for the construction of which the bill is brought,

cannot be construed without construing other portions, all persons interested in the latter should be made parties. *Magers v. Edwards*, 13 W. Va. 822.

Bills by Debtors. — A debtor to the decedent cannot maintain a bill against the personal representative to obtain the directions of the court as to the money due by him, and to restrain an action brought by him to recover the debt, on the ground that he intends to appropriate it to purposes other than those specified by the testator. *Darthez v. Winter*, 2 Sim. & Stu. (Eng.) 536.

Costs of Bills for Instruction. — See § XVI. 3, (h), note.

1. *Humphreys v. Ingledon*, 1 P. Wms. (Eng.) 753; s. c., *Dick*, (Eng.) 38. See *Pelletreau v. Rathbone*, 1 N. J. Eq. 331; *Trapnall v. Burton*, 24 Ark. 371.

2. § VII. 1, 2. See *Simons v. Milman*, 2 Sim. (Eng.) 241.

The question as to whether or not an administrator has given a sufficient bond, is not one with which a court of equity in which such administrator has sued has anything to do. *Huntingdon v. Moore*, 1 New Mex. 489.

3. 16 Vin. Abr. (Eng.) 251, tit. "Parties," B, pl. 20; *Davies v. Williams*, 1 Sim. (Eng.) 5.

Although one of them be an infant. 16 Vin. Abr. 251, tit. "Parties," B, pl. 20.

Where one executor has alone proved, he may sue without making the others parties, although they have not renounced. *Davies v. Williams*, 1 Sim. (Eng.) 5. Compare § XVI. 1, a, (4).

Where one of several executors refuses to join in a suit, he is a necessary party defendant. *Evans v. Evans*, 23 N. J. Eq. 73.

Legatees are not necessary parties, but, if joined with the executor, the bill is not on that account demurrable. *Rhodes v. Warburton*, 6 Sim. (Eng.) 617.

Where a mortgage is made to several persons jointly, they are in equity, tenants in common of the mortgage money; and the representatives of such of them as may be dead are necessary parties, with the

(3) *Allegation of Character.* — When the suit is brought by the executor or administrator in his representative character, the bill must allege that he has proved the will, or taken out administration, although it is not necessary to mention in what court.¹

(4) *Pleas.* — The defendant may plead that the plaintiff who entitles himself as executor or administrator is not executor or administrator,² or may set up the Statute of Limitations in resistance to proceedings by way of revivor, provided there has been no decree, and the executor or administrator has not proceeded within six years after the abatement of the suit,³ or plead a set-off of debts due in the same right.⁴

b. Remedies against Executors and Administrators. — (1) *Nature of Equitable Jurisdiction.* — (a) *What Bills may be maintained.* — An executor or administrator is liable, in his representative character, to all equitable demands with regard to personal property which existed against the deceased at the time of his death.⁵ Moreover, under the English chancery practice, upon the ground

survivor, to a bill for foreclosure or redemption. *Vickers v. Cowell*, 1 Beav. (Eng.) 529.

1. *Humphreys v. Ingledon*, 1 P. Wms. (Eng.) 753; s. c., *Dick* (Eng.) 38; *Stone v. Baker*, 1 P. Wms. 753 (Eng.), note; *Wms. Exrs.* (7th Eng. ed.) 1912.

But an allegation that a will has been proved in the proper ecclesiastical court, has been held bad on demurrer. *Jossaume v. Abbott*, 15 Sim. (Eng.) 127.

In *Evans v. Evans*, 23 N. J. Eq. 72, 74, the proper allegations to enable the executor to maintain a bill in his representative character were said to be the appointment, proving the will, and probate by the proper officer. See also *Pelletreau v. Rathbone*, 1 N. J. Eq. 331; *Trapnall v. Burton*, 24 Ark. 371.

2. *Winn v. Fletcher*, 1 Vern. (Eng.) 473. But see *Fell v. Letwidge*, 2 Atk. (Eng.) 120; 3 *Barnard* (Eng.), 320.

Such plea, though negative, is good in abatement. *Mitf. Pl.* (4th Eng. ed.) 230; *Winn v. Fletcher*, 1 Vern. (Eng.) 473; *Fry v. Richardson*, 10 Sim. (Eng.) 475; *Cooke v. Gittings*, 21 Beav. (Eng.) 497; *Clarke v. Pishou*, 31 Me. 503.

A plea that the supposed intestate was living has been allowed. *Ord v. Huddleston*, *Dick* (Eng.) 510; s. c., cited 1 *Cox* (Eng.), 198.

Letters of administration are not even *prima facie* evidence of the intestate's death: such fact is collateral, and can only be inferred from the sentence by argument. *Blackham's Case*, 1 Salk. (Eng.) 290; *Thompson v. Donaldson*, 3 Esp. (Eng.) N. P. C. 63; *Morris v. De Bernales*, Russ. C. C. (Eng.) 301; *Tebbits v. Tilton*, 31 N. H. 273, 384. See *Mut. Ben. Ass. Ins.*

Co. v. Tisdale, 15 Am. L. Reg. N. S. 412; *Helm v. Smith*, 2 Sm. & M. (Miss.) 403; *Carroll v. Carroll*, 60 N. Y. 121; *Newman v. Jenkins*, 10 Pick. (Mass.) 515; *Tisdale v. Conn. L. Ins. Co.*, 26 Iowa, 177; s. c., 28 Iowa, 12; *Jeffers v. Radcliff*, 1 N. H. 242, 245; *Collins v. Ross*, 2 Paige (N. Y.), 396; *Vanderpool v. Van Valkenberg*, 6 N. Y. 190; *Wms. Exrs.* (7th Eng. ed.) 562.

3. *Mitf. Pl.* (4th Eng. ed.) 272, 273; *Hollingshead's Case*, 1 P. Wms. (Eng.) 742.

A decree being in the nature of a judgment, the statute does not apply. *Hollingshead's Case*, 1 P. Wms. (Eng.) 742. See LIMITATIONS.

As to effect of allowance of a claim by a commission of insolvency. *Bancroft v. Andrews*, 6 Cush. (Mass.) 493, 495.

If an executor, administrator, or trustee of an infant neglects to sue within six years, the statute binds the infant. *Wych v. East India Company*, 3 P. Wms. (Eng.) 309.

4. *Wms. Exrs.* (7th Eng. ed.) 1914. A court of equity in regulating the right of set-off will regard a debt or demand as due in the right of him who is beneficially entitled to it. See XVI. 1, a, (7), n.

But where the plaintiff was residuary legatee and surviving executrix of her husband, to whom A. and a bankrupt had given a joint bond, the other obligor being dead, and the plaintiff was indebted upon a private account, Lord Hardwicke refused an injunction to a suit upon the bond, saying that the debts were in different rights, and that there was no mutual credit. *Bishop v. Church*, 3 Atk. (Eng.) 691; *Money Penny v. Bristow*, 2 Russ. & My. (Eng.) 117.

5. *Toller, Exrs.* 479.

that executors and administrators are in equity regarded as trustees, courts of equity exercise jurisdiction over them, in the administration of assets, by compelling them, in the due execution of their trust, to apply the property to the payment of creditors, legatees, and distributees.¹

(b) *Bills for Account and Discovery.* See § XVI. 5. — A court of equity will compel an executor or administrator in the same manner as it does an express trustee, to discover and set forth an account of the assets, and of his application of them, on a bill exhibited for that purpose by a creditor, legatee, or distributee.²

1. Wms. Exrs. (7th Eng. ed.) 2005; *Adair v. Shaw*, 1 Sch. & Lef. (Eng.) 262. But see *Walker v. Cheever*, 35 N. H. 347; *McCoy v. Green*, 3 John. Ch. (N. Y.) 58.

Other auxiliary grounds of jurisdiction exist from the necessity for taking accounts, compelling discovery, and the fact that no adequate remedy exists at law. *Story, Eq. Jur. c. ix. § 534; Walker v. Cheever*, 35 N. H. 339; *Parsons v. Parsons*, 9 N. H. 309. Compare § XVI. 5.

Where the executors refused to enforce the liability of two persons, one of them being one of the executors, who continued the testator's business in accordance with the provisions of his will, and lost the capital invested, it was held that the legatees could claim the intervention of a court of equity. *Bennett v. Hoffman*, 58 Md. 78.

But a bill to compel the transfer of stock to an administrator who refuses to sue for it, cannot be sustained. The proper remedy is on his bond, or by proceedings in the probate court for his removal, or for a disallowance of his account. *Butler v. Sisson*, 49 Conn. 580.

Proceedings against Real Estate. — In some States a bill in equity may be maintained by a creditor against the executor to subject the decedent's real estate to the payment of his debts. *Creswell v. Kennedy*, 3 McArth. (D. C.) 78; *Keefe v. Malone*, 3 McArth. (D. C.) 236. See *American Bible Society v. Stover*, 38 N. J. Eq. 78. The more usual remedy is in probate. See DEBTS OF DECEDENTS, § IV. (a), p. 267.

In North Carolina, the Superior Court has exclusive jurisdiction of the subject-matter of an action brought by a creditor of an intestate's estate against the administrator, where it is alleged that the intestate, in his lifetime, bought certain land, and being insolvent, and intending to defraud creditors, procured the deed to be made to his son, who became his administrator, and judgment is demanded that he be declared a trustee, and the land be sold to pay the intestate's debts. The right of creditors to subject this land is independent of the statute defining what lands may be

sold for assets under a license from the probate court, and can only be enforced by a court of original equitable jurisdiction, such as does not attach to a court of probate. *Greer v. Eagle*, 84 N. Car. 385.

2. Com. Dig. Chancery, 2 B, 1, 3 D, 1; *Wright v. Bluck*, 1 Vern. (Eng.) 106; *Howard v. Howard*, 1 Vern. (Eng.) 134; *Brooks v. Oliver*, Ambl. (Eng.) 406.

Such a bill may be sustained, although the testator has directed that the executor should not be compelled to declare the amount of the residue bequeathed to him. *Gibbons v. Dawley*, 2 Chanc. Cas. (Eng.) 198.

Under the English practice, an account has been decreed, notwithstanding an account before taken and distribution decreed in the spiritual court; and a bill may be brought for the discovery of assets before the will is proved, or during the litigation thereof in the probate court. Wms. Exrs. (7th Eng. ed.) 2006. See *Carpenter v. Gray*, 37 N. J. Eq. 389.

An account has been decreed between executors, or between a surviving executor and the administrator of a deceased executor. *Stiver v. Stiver*, 8 Ham. (Ohio) 217.

Where personal property of a deceased debtor is taken possession of by a stranger, and, on his death, by his executor, a creditor of said debtor cannot maintain a bill for an account against said executor without showing some reason why the administrator of said debtor has not sued in trover. *Jones v. McCleod*, 61 Ga. 602.

To obtain a decree directing an inquiry as to wilful neglect or default, the plaintiff must aver and prove at least one act of wilful neglect or default; nor will the court direct a preliminary inquiry unless the fact of wilful neglect or default can be treated as in issue between the parties, or unless, if in issue, there is evidence upon it. *Sleight v. Lawson*, 3 Kay & J. (Eng.) 292; *Coope v. Carter*, 2 De G. M. & G. (Eng.) 292.

The mere fact that a general allegation that there are outstanding assets, without specifying particulars, is not met by a distinct denial, does not afford sufficient

(c) *Bills by Creditors, Legatees, and Distributees.* — *Administration Suits.* — A single creditor may maintain a bill in equity for his own demand, and obtain a preference by the decree over other creditors in the same degree who have not used equal diligence.¹ But in a suit by a single legatee for his own legacy, unless the personal representative, by admitting assets for its payment, warrants an immediate personal decree against himself, by which he alone will be bound, the court will direct a general account of all the legacies, and payment of the legacy claimed, ratably with the others.² The more usual course is for a creditor or legatee to file a bill on behalf of himself and all other creditors or legatees standing in the same position,³ who should come in under the decree, for an account and settlement of the estate.⁴ Bills of

ground for an inquiry. *Massey v. Massey*, 2 Johns. & H. (Eng.) 728. See *Ashburn v. Ashburn*, 16 Ga. 213.

On a bill against an administrator for the discovery of assets, he may show that he has fully administered, notwithstanding a judgment at law against him, admitting assets. *Bedell v. Keethley*, 5 T. B. Mon. (Ky.) 598.

Account against Infant Administrator. — If letters of administration be granted to an infant, under which he receives and disposes of the assets of the intestate, an account cannot be directed as to his receipts during his infancy. *Hindmarsh v. Southgate*, 3 Russ. (Eng.) 324.

1. *Att. v. Comthwaite*, 2 Cox, R. (Eng.) 44; *Mitf. Pl.* (4th Eng. ed.) 166. See *Haycock v. Haycock*, 2 Ch. Cas. (Eng.) 124; *Hall v. Binney*, 6 Ves. (Eng.) 738.

But in *McCay v. Green*, 3 John. Ch. (N. Y.) 58, doubt was expressed whether such a bill could be sustained in the absence of special circumstances; and in *Thompson v. Brown*, 4 John. Ch. (N. Y.) 619, 643, it was said that the decree must be for the benefit of all the creditors.

A single bond creditor, by bringing such bill against the executors and heirs of the obligor, may obtain satisfaction out of the real assets descended if the personality is insufficient. *Walter v. Goring*, Dickens, Ch. Rep. (Eng.) 299. But see *Bedford v. Leigh*, 2 Dickens, Ch. Rep. (Eng.) 707.

Where a single creditor brings a bill, there is no general account of debts directed; but the course is, to direct an account of the personal estate, and of that particular debt, which is ordered to be paid in course of administration; and all debts of a higher or equal nature may be paid by the executor, and must be allowed to him in his discharge. *Atty.-Gen. v. Comthwaite*, 2 Cox, 45.

But a person entitled to a share of a sum of money, which is due as a debt from the testator, cannot maintain a bill for his own

share, unless he sues on behalf of himself and all others interested in the debt, or makes those other persons parties to the suit. *Alexander v. Mullins*, 2 Russ. & My. (Eng.) 568.

2. *Mitf. Pl.* (4th Eng. ed.) 168.

Where a suit in equity is brought by legatees against an executor for an account, the court may assume general administration of the estate, and the same rules will be observed that govern in the probate court. Creditors will be preferred to legatees, and the rents of mortgaged property collected by a receiver appointed in the suit will be applied to pay a deficiency occurring upon foreclosure, in preference to being paid to the legatees. *Coddington v. Bispham*, 36 N. J. Eq. 574.

As to the admission of assets, see *Boys v. Ford*, 4 Madd. (Eng.) 40; *Calhoun v. Whittle*, 56 Ala. 138.

On a bill filed by the next of kin against an administrator, for a decree of distribution, the administrator may properly set up by cross-bill and by answer, that part of the funds have been lost without his negligence, and that a part of the estate is claimed by one of the defendants as individual property, and that another part is subject to a trust. *Westervelt v. Ackerson*, 35 N. J. Eq. 43.

Equity has jurisdiction of suits to enforce the rights of legatees and next of kin; and where the liability of the executor rests wholly on the ground of his negligence, the jurisdiction is exclusive. *Suydam v. Bastedo*, 40 N. J. Eq. 433.

3. A bill has been admitted by a legatee claiming under a general description, on behalf of himself, and others claiming under the same description. *Mitf. Pl.* (4th ed.) 169.

4. *Wms. Exrs.* (7th Eng. ed.) 2007; *Mitf. Pl.* (4th Eng. ed.) 166, 168; 1 Story, Eq. Jur. §§ 544, 547.

If assets are admitted, and the debt admitted or proved, an immediate decree

this nature, when brought by creditors, are called creditors' bills. The decree is in the nature of a judgment at law, and places all who come in under it upon an equality with judgment creditors, so as to exclude from the time of the decree all preferences in favor of the latter.¹ The decree absolves the executor or administrator from further liability; although parties who have neglected to come in, and have had no opportunity to present their claims, may assert them against those who have received payment.²

(d) *Bills by Debtors.* — See 3, a, (1), (h), note.

(2) *Time within which Suit to be brought.* — See XVI. 1, b, (4).

(3) *Parties.* See 2, a, (2); also § XVI. 3, a, (1), (h), note; § XVI. 3, a, (2). — It may be stated as a general rule, that wherever the personal assets of the deceased may be affected by the decree, or wherever the statements of the bill show that the relief prayed for cannot be granted without an administration of the estate, the personal representative is a necessary party.³ Where there are

for payment is made. *Woodgate v. Field*, 2 Hare (Eng.), 211. See § XVI. 3, b, (10).

Bills of Conformity. — A bill of conformity is a bill brought by the executor or administrator against the creditors generally, for the purpose of having all their claims adjusted, and a final decree settling the order of the payment of the assets. Such a bill is not much favored in equity, and the same result is generally attained by an amicable creditor's suit. 1 Story, Eq. Jur. §§ 545, 547; *Wms. Exrs.* (7th Eng. ed.) 1916.

Similar results are effected in Massachusetts by a representation of insolvency. *Mass. Gen. Sts. c. 99, § 220*; *Walker v. Hill*, 17 Mass. 386; *Aiken v. Morse*, 104 Mass. 277; *Niebert v. Withers*, 1 Sm. & M. Ch. (Miss.) 598.

1. *Thompson v. Brown*, 4 John. Ch. (N. Y.) 619, 643.

The object of creditor's bill is to abolish the executor's right of preference, and relieve the estate from a multiplicity of suits. *Mitf. Pl.* (4th ed.) 166.

After the decree the representative can do nothing which will affect the relative rights of the creditors. *Sir J. Leach, M. R., in Shewen v. Vandenhorst*, 2 Russ. & N. Y. (Eng.) 75; s. c., *Russ. & N. Y. (Eng.)* 347.

A creditor having a *debitum in presentis solvendum in futuro* may maintain such a bill. *Whitmore v. Oxborrow*, 2 Y. & Coll. C. C. (Eng.) 13, 17. See *Greenwood v. Firth*, 2 Hare (Eng.), 241; *Albridge v. Westbrook*, 5 Beav. (Eng.) 138; *Sky v. Bennett*, 2 Y. & C. N. R. (Eng.) 405.

As to costs of administration suits, see XVI. 3, b, (10).

2. *Wms. Exrs.* (7th Eng. ed.) 2008; *Story, Eq. Pl. c. 4, § 106*; *David v. Frowd*, 1 My. & K. (Eng.) 200; *Anon.* 9 Price

(Eng.), 210; *Sawyer v. Brichmore*, 1 Keen (Eng.), 390; 2 My. & Cr. (Eng.) 211. See *Cattel v. Simons*, 8 Beav. (Eng.) 143.

Staying Proceedings. — Any number of creditors may institute such proceedings at the same time; and, as the litigating creditor may stop his suit at any time before decree, the court permits them all to go on until a decree in any one of them is obtained. But after decree, if another suit is instituted praying no further relief than might be had in the former suit, the parties to such former suit ought to apply to have the proceedings in the latter suit stayed; otherwise the costs of it may be dealt with as costs of their suit. On such an application, the question is whether the suit which is sought to be stayed asks something more than could be obtained under the existing decree. *Wms. Exrs.* (7th Eng. ed.) 2012. See also *Rigby v. Strangways*, 2 Phill. C. C. (Eng.) 175; *Rump v. Greenhill*, 20 Beav. (Eng.) 512; *Plunket v. Lewis*, 11 Sim. (Eng.) 379; *Suisse v. Lord Lowther*, 2 Hare (Eng.), 214; *Gwyer v. Peterson*, 26 Beav. (Eng.) 83; *Hoskins v. Campbell*, 2 Hemm. & M. (Eng.) 42; *Belcher v. Belcher*, 2 Dr. & Sm. (Eng.) 444; *Dufford v. Arrowsmith*, 7 De G. M. & G. (Eng.) 434; *Harris v. Gaudy*, 1 De G. F. & J. (Eng.) 13; *Turner v. Dorgan*, 12 Sim. (Eng.) 504. Compare § XVI. 3, a, (1), (f).

3. *Wms. Exrs.* (7th Eng. ed.) 2016. See *Wilkinson v. Folkes*, 9 Hare (Eng.), 193; *Donato v. Bather*, 16 Beav. (Eng.) 26; *Penny v. Watts*, 2 Phill. C. C. (Eng.) 149, 153; *Lowry v. Fulton*, 9 Sim. (Eng.) 104.

As to the appointment of a temporary administrator to file a bill in equity, or conduct a chancery suit, see SPECIAL AND LIMITED ADMINISTRATION.

Under the English practice, the personal

several executors or administrators, all who have administered must be joined.¹ From the exclusive character of his title,² it is evident that overpaid creditors, debtors, pecuniary or residuary legatees or distributees, in the absence of special circumstances, cannot be joined with the executor or administrator as co-defendants.³

representative is generally a necessary party to a bill brought to recover a debt by specialty against real assets in the hands of the devisee, as equity will first apply the personal estate in exoneration of the realty. Mitf. Pl. (4th ed.) 176. See Lowry v. Jackson (S. C.), 2 S. E. Rep. 473.

The fact that an *executor de son tort* is already before the court, will not dispense with the presence of a regular representative. Penny v. Watts, 2 Phill. C. C. (Eng.) 149, 152; Creasor v. Robinson, 14 Beav. (Eng.) 589.

The attorney-general does not, as a party in the cause, sufficiently represent the estate of a bastard intestate to dispense with a legal representative, duly appointed in the ecclesiastical court, as a party. Bell v. Alexander, 6 Hare (Eng.), 543.

A special representative, limited to the subject of the suit, duly appointed by the probate court, sufficiently represents the estate. Faulkner v. Daniel, 3 Hare (Eng.), 199, 208; Ellice v. Goodson, 2 Coll. (Eng.) 4. But see Shipton v. Rawlins, 4 De G. & Sm. (Eng.) 477.

But in a suit for an account by a surviving partner against a debtor to the firm, the personal representative of the deceased partner is not generally a necessary party. Haigh v. Gray, 3 De G. & Sm. (Eng.) 741.

Where the property, for which the suit is brought, has ceased to be a part of the assets of the estate, and has assumed the character of a trust fund in a sense different from that in which the executor or administrator held it, the personal representative is not a necessary party. Bond v. Graham, 1 Hare. (Eng.), 482, 484. See also Arthur v. Hughes, 4 Beav. (Eng.) 506; Penny v. Watts, 2 Phill. C. C. (Eng.) 153, 154.

Joinder of Heirs.—In a suit in equity, brought against an administrator to obtain a conveyance of real estate alleged to have been held in trust for the complainant by the defendant's intestate, the heirs should be joined as parties defendant. Wiley v. Davis (Me.), 10 Atl. Rep. 493.

The heir-at-law is a proper, though not necessary, party to a suit against the legal representatives of his ancestor, for loss from breach of trust of ancestor as executor. McCartin v. Traphagen, 2 N. J. (L. ed.) 553; 10 Cent. Rep. 193.

Where land is directed by will to be sold and converted into money, the executor, and not the heirs, represents the estate, and the latter are not necessary parties to

a suit concerning the disposition of, and charges on, such estate. Harris v. Bryant, 83 N. Car. 568.

Feme Covert Executrix.—To a bill filed against a *feme covert* executrix, her husband is a necessary party, unless he is an exile, or has abjured the realm. Mitf. Pl. (4th ed.) 30. See Taylor v. Allen, 2 Atk. (Eng.) 213.

Executor or Administrator Durante Minore Aetate.—To a bill brought against an executor, during whose infancy the will appointed one an executor *durante minore aetate*, the latter must be made a party, unless the former has received all the testator's personal estate from the latter, upon an account between them. Glass v. Oxenham, 2 Atk. (Eng.) 121.

Administrators De Bonis Non.—In a suit for an account of the assets of the decedent, the personal representative of his former representative is a proper party defendant with the present personal representative. Holland v. Prior, 1 My. & K. (Eng.) 237. See Sortore v. Scott, 6 Lans. (N. Y.) 276, 277.

It seems, also, that he is a *necessary* party. Hall v. Austin, 2 Coll. (Eng.) 570.

1. Scurry v. Morse, 9 Mod. (Eng.) 89; Brown v. Pitman, Gibb. Eq. Rep. (Eng.) 75; Strickland v. Strickland, 12 Sim. (Eng.) 463; Dyson v. Morris, 1 Hare (Eng.), 413.

Though some of them be infants,—16 Vin. Abr. 251, tit. "Party," B, pl. 20; Botten v. Bateman, 2 Dev. Eq. (N. C.) 115; Clements v. Kellogg, 1 Ala. 330; Bregaw v. Claw, 4 John. Ch. (N. Y.) 116,—or insolvent,—Ashurst v. Eyre, 2 Atk. (Eng.) 51,—or actually released,—Smithby v. Hinton, 1 Vern. (Eng.) 31.

For a case where an executor, who had not been made a party to the bill, was ordered to be introduced into the decree as a party, and account before the master, without delaying the cause, see Pitt v. Brewster, Dick. (Eng.) 37.

But it is only necessary to join so many as have administered, for this is sufficient in law,—§ XVI. 1, b,—and much more in a court of equity. Brown v. Pittman, Gibb. Eq. Rep. (Eng.) 75; Dyson v. Morris, 1 Hare (Eng.), 413; Strickland v. Strickland, 12 Sim. (Eng.) 463.

As to an outlawed executor. Heath v. Percival, 1 P. Wms. (Eng.) 684.

2. § XII. 2, a.

3. Brown v. Dowthwaite, 1 Madd. (Eng.)

(4) *Process*. — *Writ ne exeat Regno*. — *Attachment*. — Process may be enforced against an executor or administrator by a writ of *ne exeat regno*,¹ or by attachment.²

(5) *Allegation of Representative's Character*. — In a suit which must be brought against the defendant in his representative character, if the allegations in the bill are sufficient to bring him before the court in that character, it is not necessary that he should

446; Lord Hertford *v.* Zichi, 9 Beav. (Eng.) 11, 15; Alsager *v.* Rowley, 6 Ves. (Eng.) 748; Gordon *v.* Small, 53 Md. 550.

In case of collusion or insolvency between the debtor and the executor, the bill may be brought against both. Newland *v.* Champier, 1 Ves. Sen. 105; Attason *v.* Mair, 2 Ves. Jr. 95; Doran *v.* Simpson, 4 Ves. (Eng.) 651; Toughton *v.* Binkes, 6 Ves. (Eng.) 573; Benfield *v.* Solomons, 9 Ves. (Eng.) 86; Boroughs *v.* Elton, 11 Ves. (Eng.) 29; Consett *v.* Bell, 1 G. & Coll. C. C. (Eng.) 569; Lancaster *v.* Evors, 4 Beav. (Eng.) 158; Barker *v.* Birch, 1 De G. & Sm. (Eng.) 376; Stainton *v.* Carron Co., 18 Beav. (Eng.) 146; Saunders *v.* Druce, 3 Drew (Eng.), 140. See Fisher *v.* Hubbell, 7 Lans. (N. Y.) 481; 65 Barb. (N. Y.) 74.

Where there is an administrator of the estate of a deceased legatee, the next of kin or distributees cannot join in a bill with the surviving legatees making the administrator a defendant. Sullivan *v.* Lawler, 72 Ala. 68.

To a bill for an account against the administratrix of a deceased partner, the heirs-at-law are proper, but not necessary, parties. A decree against the administratrix is conclusive against them as to the personal, but not as to the real, estate. Dwersey *v.* Johnson, 93 Ill. 547.

A suit by parties beneficially interested in the estate of a deceased partner cannot be maintained against both his executors and surviving partners in the absence of special circumstances; but collusion is clearly not the only ground for such a suit, and it may be maintained in all cases where the relation between the executors and surviving partners is such as to present a substantial impediment to the prosecution, by the executors, of the rights of the parties interested in the estate against the surviving partners. Turner, N. C., in Travis *v.* Milne, 9 Hare (Eng.), 141, 150. See also Stainton *v.* The Carron Co., 18 Beav. (Eng.) 146, 157; Boroshor *v.* Watkins, 1 Russ. & My. (Eng.) 277; Gidge *v.* Traill, 1 Russ. & My. (Eng.) 281; Davies *v.* Davies, 2 Keen (Eng.), 534; Law *v.* Law, 2 Coll. (Eng.) 141; Cropper *v.* Knapman, 2 Y. & Coll. (Eng.) 338.

But the principle does not entitle the plaintiff in an administration suit, without

some additional circumstances, solely on the ground of partnership, to sue the shareholder in a joint-stock company in which the testator might happen also to have shares. Romilly in Stainton *v.* The Carron Co., 18 Beav. (Eng.) 158.

Bills against Co-Executor. — To a bill by an executor or trustee against a co-executor or co-trustee, for a breach of trust, only such of the *cestuis que trust* need be made parties as participated in the breach. Jesse *v.* Bennett, 6 De G. M. & G. (Eng.) 609.

1. Wms. Exrs. (7th Eng. ed.) 2022.

To obtain the writ, the affiant ought to swear or aver to the best of his knowledge and belief that assets have come to the hands of the executor or administrator; and it should appear distinctly that he has a present intention to leave the country. Wms. Exrs. (7th Eng. ed.) 2022. See Anon. 2 Ves. Sen. (Eng.) 489; Darley *v.* Nicholson, 1 Dr. & W. (Eng.) 66.

Where a creditor files a bill for an account and administration of the assets, if there is a *clear* affidavit of assets received, a court of equity will grant the writ, although the plaintiff may have bail at law. Jones *v.* Alephsin, 16 Ves. (Eng.) 471. But see Swift *v.* Swift, 1 Ball & Beat. (Eng.) 327.

The affidavit should be as positive as to the equitable debt as an affidavit of a legal debt to hold to bail; but in the case of partners and executors, information and belief is held sufficient. Jackson *v.* Petrie, 10 Ves. (Eng.) 164; Rico *v.* Gualteer, 3 Atk. (Eng.) 501; Amsink *v.* Barklay, 8 Ves. (Eng.) 597.

It has been held by Lord Eldon that this writ cannot be sustained against a *feme covert executrix or administratrix*. Pannell *v.* Taylor, 1 Turn. & R. (Eng.) 96.

As to whether the fact that the *feme* has a separate estate would alter the case, see Moore *v.* Meynel, 1 Dick. (Eng.) 30; Jer-ningham *v.* Glass, 1 Atk. (Eng.) 409; Moore *v.* Hudson, Madd. & Geld. (Eng.) 218.

A present vested interest, though subject to divestment, will support the writ. Howkins *v.* Howkins, 1 Dr. & Sm. (Eng.) 75, 78.

For further discussion, see EQUITY.

2. Bungan *v.* Mortimer, Madd. & Geld. (Eng.) 278.

be styled executor or administrator, either in the process, in the commencement of the bill, or in the prayer for process.¹

(6) *Pleas and Defences.* — *Statute of Limitations.* — *Set-off.* — Suits in equity, while not within the words of the statute of limitations, are within its spirit; and therefore, upon all legal demands, courts of equity are bound by its provisions.² If the statute has once begun to be run in the lifetime of the deceased, its course is not affected by his death. The rule in this respect is the same in equity as at law.³ In case of fraud or mistake, the statute runs from discovery.⁴ The statute cannot be pleaded in bar to a

1. *Evans v. Evans*, 23 N. J. Eq. 72, 74.

2. *Hovenden v. Annesley*, 2 Sch. & Lef. (Eng.) 630, 631; *Foley v. Hill*, 1 Phill. C. C. (Eng.) 399; *Burdeck v. Carrick*, L. R. 5 Ch. App. 234, 240. See *McCarter v. Campbell*, 1 Barb. Ch. (N. Y.) 455; *Bellows, C. J.*, in *Sugar River Bank v. Fairbank*, 49 N. H. 139, 140.

As to whether equity will decree an account between a surviving partner and the estate of a deceased partner after six years' acquiescence, see *Barber v. Barber*, 18 Ves. (Eng.) 286; *Robinson v. Alexander*, 8 Bligh, N. S. (Eng.) 375; *Tatam v. Williams*, 3 Hare (Eng.), 347; *Baker v. Read*, 18 Beav. (Eng.) 398.

See further, as to the effect of laches and lapse of time as a bar in equity, *Sibbering v. Balcarras*, 3 De. G. & Sm. (Eng.) 735; *Wright v. Vanderplank*, 2 Kay & J. (Eng.) 1; *Portlock v. Gardner*, 1 Hare (Eng.), 594; *Downes v. Bullock*, 25 Beav. (Eng.) 54; s. c., 9 H. L. Cas. (Eng.) 1; *Flood v. Patterson*, 29 Beav. (Eng.) 293.

What stops Running of Statute. — It has been held that a bill filed by one creditor on behalf of himself and all other creditors prevented the statute from being a bar to a claim of another creditor who had come in under the decree. *Stemdale v. Hankinson*, 1 Sim. (Eng.) 393. See also *Tollner v. Marriott*, 4 Sim. (Eng.) 19; *Watson v. Birch*, 15 Sim. (Eng.) 523.

The soundness of this decision may be questioned; and at all events it is clear that great lapse of time, as twenty years, will bar the creditor from proving his debt under the decree. *Berrington v. Evans*, 1 Y. & Coll. (Eng.) 434. See *Tatam v. Williams*, 3 Hare (Eng.), 347.

Notice in a newspaper to creditors by the representative that he will pay all claims justly due, will take the case out of the statute; otherwise of an advertisement for creditors to present their claims to A. B. *Scott v. Jones*, 1 Russ. & My. (Eng.) 255; 4 Cl. & Fin. (Eng.) 382. See *Tanner v. Smart*, 6 B. & C. (Eng.) 603.

As the statute does not run against a trust, debts charged by will upon the lands of the deceased are not affected by it,

unless barred in the testator's lifetime. *Burke v. Jones*, 2 Ves. & B. (Eng.) 275; *Huges v. Wynne*, 1 Turn. & R. (Eng.) 307; *Hargreaves v. Michell*, 6 Madd. (Eng.) 326; *Pettingill v. Pettingill*, 60 Me. 423, 424.

Otherwise if the debts are charged upon the personalty, for such trust has no legal operation. *Scott v. Jones*, 4 Cl. & Fin. (Eng.) 382. See also *Freak v. Cranefeldt*, 3 My. & Cr. (Eng.) 499; *Evans v. Tweedy*, 1 Beav. (Eng.) 55.

Upon debts barred at the death, even a charge on realty will not prevent the bar of the statute. *O'Connor v. Haslem*, 5 H. L. Cas. (Eng.) 170.

Where the testator directed that the residue of his personal estate should be divided between certain creditors named in a schedule to his will, which contained both the names of the creditors and debts due them respectively, it was held that such direction prevented the operation of the statute. *Williamson v. Naylor*, 3 Y. & Coll. (Eng.) 208. See *Rose v. Gould*, 15 Beav. (Eng.) 189; *Jones v. Scott*, 1 Russ. & My. (Eng.) 255.

Debts scheduled under the insolvent act have been held not barred by the statute, on the ground that the liability arose, not from the original promise, but from the act. *Barton v. Tattersall*, 1 Russ. & My. (Eng.) 237; recognized by Lord Cottenham in *Ward v. Painter*, 5 My. & Cr. (Eng.) 298.

A court of equity will restrain the debtor from taking advantage of the statute in an action at law, when the delay necessary to create the bar was caused by its retaining the plaintiff's bill for consideration, with leave to bring the action. *Sirdefield v. Price*, 2 Y. & Jerv. (Eng.) 73.

3. *Webster v. Webster*, 10 Ves. (Eng.) 93; *Freak v. Cranefeldt*, 3 My. & Cr. (Eng.) 449. See XVI. 1, 6, (4), note.

4. *Brooksbank v. Smith*, 2 Y. & Coll. (Eng.) 58.

An executor cannot protect himself by the statute of limitations from payment of a debt due from himself to the testator, by deferring proof of the will. Such debt

demand for a legacy or distributive share.¹ A set-off may be pleaded in equity where the debts are in the same right.²

(7) *Production of Papers*.—A court of equity will compel an executor or administrator to produce the papers in the cause, on proper application by the parties interested.³

(8) *Motion for Payment of Money into Court*.—Immediately upon admission of assets by an executor or administrator, the court, on motion, will order so much as he admits in his hands to be paid into court.⁴ To warrant such order, the plaintiff must be

will be treated as assets. *Jugle v. Richards*, 28 Beav. (Eng.) 366.

1. Anon. 2 Freem. (Eng.) 22, pl. 20. See also *Parker v. Ash*, 1 Vern. (Eng.) 257; *McCarter v. Campbell*, 1 Barb. Ch. (N. Y.) 455, 465; *Smith v. Remington*, 42 Barb. (N. Y.) 75; *Wood v. Ricker*, 1 Paige (N. Y.), 616; *Sonzer v. Meyer*, 2 Paige (N. Y.), 574; *Sparhawk v. Buell*, 9 Vt. 41; *Cartwright v. Cartwright*, 4 Hayw. (Tenn.) 134; *Irby v. McCrea*, 4 Desaus. (S. C.) 422; *Doebler v. Snaveley*, 5 Watts (Pa.), 225; *Thompson v. McGaw*, 5 Watts (Pa.), 161; *Morris's Appeal*, 71 Pa. St. 106, 120, 121; *Lafferty v. Turley*, 3 Sneed (Tenn.), 157; *Brooks v. Lynde*, 7 Allen (Mass.), 64, 66; *Kent v. Durham*, 106 Mass. 586; *Perkins v. Gartnell*, 4 Har. (Del.) 270.

The reason for the position is that executors and administrators are considered in equity express trustees for the legatees and distributees, and the statute does not run against a trust. *Bailey v. Shannonhouse*, 1 Dev. Eq. (N. C.) 416; *Wren v. Gayden*, 2 Miss. 365; *Picot v. Bates*, 39 Mo. 292; *Smith v. Smith*, 7 Md. 55; *Knight v. Brawner*, 14 Md. 1; *Yingling v. Hesson*, 16 Md. 112; *Lafferty v. Turley*, 3 Sneed (Tenn.), 157; *Amos v. Campbell*, 9 Fla. 187. See also *Brittlebank v. Goodwin*, L. R. 5 Eq. Cas. (Eng.) 545; *Woodhouse v. Woodhouse*, L. R. 8 Eq. Cas. (Eng.) 514. But although the statute cannot be pleaded to a legacy, presumption of payment may arise from long lapse of time, or from permitting the assets to be distributed without making claim, and will be a good ground of defence by way of answer. *Higgins v. Crawford*, 2 Ves. Jr. (Eng.) 572; *Campbell v. Campbell*, 1 Russ. & My. (Eng.) 453; s. c., Dom. Proc. 8 Bligh (Eng.), 622; *Baldwin v. Preach*, 1 Y. & Coll. (Eng.) 453; *Prior v. Homiblow*, 2 Y. & Coll. (Eng.) 200; *Grenfell v. Girdlestone*, 2 Y. & Coll. (Eng.) 662; *Skinner v. Skinner*, 1 J. J. Marsh. (Ky.) 594; *Sager v. Warley*, Rice, Ch. (S. C.) 26; *Joy v. Rogers*, 1 Dev. Ch. 58; *Sassaer v. Young*, 6 Gill & J. (Md.) 243; *Carr v. Chapman*, 5 Leigh (Va.), 164; *Hayes v. Goode*, 7 Leigh (Va.), 452; *Hudson v. Hudson*, 3 Rand. (Va.) 117.

But such presumption, as the like presumption in the case of specialty debts, may be rebutted. *Ravenscroft v. Frisby*, 1 Coll. (Eng.) 16, 23; *Estate of Brown*, 8 Phil. (Pa.) 197.

2. See *Richards v. Richards*, 9 Price (Eng.), 219.

3. *Freeman v. Fairlee*, 3 Meriv. (Eng.) 29, 30.

An executor who has mixed the accounts with those of his own trading concerns, cannot thereby avoid producing the original books in which any part of the accounts of the estate may be inserted. Partners of the executor who have permitted him to mix the accounts, cannot object to the production. *Freeman v. Fairlee*, 3 Meriv. (Eng.) 30, 43, 44.

4. *Strange v. Harris*, 3 Bro. C. C. (Eng.) 365; *Rutherford v. Dawson*, 2 Ball & Beat. (Eng.) 17; *Blake v. Blake*, 2 Sch. & Lef. (Eng.) 26; *Danby v. Danby*, 5 Jur. N. S. (Eng.) 54; 2 Dan. Ch. Pr. (4th Am. ed.) 1771; *Clarkson v. De Peyster*, 1 Hopk. 274; *McKim v. Thompson*, 1 Bland (Md.), 156.

An admission by the executor of a debt due the testator from himself at the time of his death, is considered an admission of assets to the amount of the debt, and he is compellable to pay it into court. *White v. Barton*, 18 Beav. (Eng.) 792; *Rothwell v. Rothwell*, 2 Sim. & Stu. (Eng.) 28; *Costerker v. Horrox*, 3 Y. & Coll. (Eng.) 530; *Toulmin v. Copland*, 3 Y. & Coll. (Eng.) 625; *Lord Cottenham in Richardson v. Bank of England*, 4 My. & Cr. (Eng.) 174, 175.

So also of money admitted by the executor to be in the hands of his partner. *Johnston v. Aston*, 1 Sim. & Stu. (Eng.) 73; *White v. Barton*, 18 Beav. (Eng.) 192.

On the principle that assets which ought to be in the representative's hands are to be deemed come to hand for purposes of charging him (see XII. 3, a, note), it is now held that where the representative once charges himself with the receipt of a fund, he is bound by that charge till relieved by showing a proper application of the money; and as it is his duty to know the truth, and be ready with information, it is not enough for him to leave the application in doubt

solely entitled to the fund, or have such an interest jointly with others as to entitle him, on behalf of himself and of those others, to have it secured; ¹ and the knowledge upon which the court is asked to proceed, must be derived solely from the representative's own admission. ² It is not necessary for the plaintiff to show that the representative has abused his trust, or that the fund is in danger from his insolvency. ³ The relief will not be refused merely because the fund is subject to possible demands to which the executor may be liable; but in such case liberty will be reserved to the executor to apply to the court, to have a sufficient sum paid out again; and on application made accordingly, the court will order the demand to be paid directly out of the fund. ⁴ The relief granted on the motion will be confined to the payment of money into court: permanent relief, as the repurchase of stock sold by an executor, can only be obtained at the hearing. ⁵

(9) *Decree. — Effect of admitting Assets. — Nature of Such Admission.* — If the plaintiff's demand be uncontested or proved, and the executor admits assets, or discloses in his answer that he once had them, but has since been guilty of a misapplication; or if the bill charges that the executor has rendered himself personally

by merely expressing ignorance with regard to the charges to which the fund is subject. *Wigram, V. C.*, in *Roy v. Gibbon*, 4 Hare (Eng.), 65; *Hinde v. Blake*, 4 Beav. (Eng.) 597. But see *Freeman v. Fairlee*, 3 Meriv. (Eng.) 39.

An executor, after admitting assets, may discharge himself from payment into court by showing proper credits. *Middleton v. Poole*, 2 Coll. (Eng.) 246; *Roy v. Gibbon*, 4 Hare (Eng.), 65; *Nokes v. Seppings*, 2 Phill. (Eng.) 19.

Where he admits having received a certain sum belonging to the estate, but adds that he has made payments the amount of which he does not specify, the court will permit him to verify the amount by affidavit, and order him, on motion, to pay the balance into court. *Anon.* 4 Sim. Eng. 359. See also *Lord Langdale in Proudfoot v. Hurne*, 4 Beav. (Eng.) 477.

But after a sufficient admission of assets he cannot relieve himself from payment into court by showing any unauthorized application, investment, or disposition, — *Score v. Ford*, 7 Beav. (Eng.) 333; *Roy v. Gibbon*, 4 Hare (Eng.), 65; *Jugle v. Partridge*, 32 Beav. (Eng.) 661, — or by setting up the adverse title of a third party. *Lord v. Purchase*, 17 Beav. (Eng.) 171.

1. *Freeman v. Fairlee*, 3 Meriv. (Eng.) 29; *Danby v. Danby*, 5 Jur. N. S. (Eng.) 54; *Reeve v. Goodwin*, 10 Jur. (Eng.) 1050.

Where part of a residuary estate has been invested on an improper security, and the defendant has an interest therein, the

court, on being satisfied that there is no existing claim on the estate, sometimes confines the amount to be paid into court to the plaintiff's share. *Score v. Ford*, 7 Beav. (Eng.) 333.

It is also essential that the defendant have no equitable right to the fund; and the facts as there shown must be open to no further controversy. *M'Kim v. Thompson*, 1 Bland, 156.

2. *Meyer v. Montnice*, 4 Beav. (Eng.) 343; *Scott v. Wheeler*, 12 Beav. (Eng.) 366. The court will refuse to proceed upon its knowledge derived from any other source. *Lord Cottenham in Richardson v. Bank of England*, 4 My. & Cr. 176, 177.

3. *Strange v. Harris*, 3 Bro. C. C. (Eng.) 365; *Blake v. Blake*, 2 Sch. & Lef. (Eng.) 26.

If the fund is safe, reasonable time will be allowed the executor to bring it into court, to realize improper securities, and to show that no reason exists for making the order. *Roy v. Gibbon*, 4 Hare (Eng.), 65; *Score v. Ford*, 7 Beav. (Eng.) 333; *Hinde v. Blake*, 4 Beav. (Eng.) 597, 599.

4. 2 Dan. Ch. Pr. (4th Am. ed.) 1770, 1771; *Yare v. Harrison*, 2 Cox (Eng.), 377.

If the executor admits that all the testator's debts, etc., have been paid, the court will, on motion, order the income of a balance, paid in by the executor, to be paid to the person entitled to the residue. *Dando v. Dando*, 1 Sim. (Eng.) 510. But see *Abby v. Gilford*, 11 Beav. (Eng.) 28.

5. *Futter v. Jackson*, 6 Beav. (Eng.) 424.

liable by an admission before suit, and the allegation is sustained, he will be entitled to a decree of immediate payment without taking accounts.¹ An admission of assets to one claimant on them is an admission to all,² and cannot be retracted except in a case of clear mistake.³

(10) *Costs*.—In suits in equity against an executor or administrator, other than suits for the general administration of assets, the court will direct costs of the successful creditor to be paid out of

1. *Woodgate v. Field*, 2 Hare (Eng.), 211; *Rogers v. Soutten*, 2 Keen (Eng.), 598; *Barnard v. Pumfret*, 5 My. & Cr. (Eng.) 63; *Dimsdale v. Dudding*, 1 Y. & Coll. C. C. (Eng.) 265.

In such case the decree is against him in his individual character. *Barnard v. Pumfret*, 5 My. & Cr. (Eng.) 63; *Calhoun v. Whittle*, 56 Ala. 138. See *Simmons v. Ingram*, 60 Miss. 886.

An admission of assets for the payment of a legacy is an admission of assets for the purposes of the suit, and extends to costs if the court think fit to give them. *Philanthropic Society v. Hobson*, 2 My. & K. (Eng.) 357.

Where the answer admitted assets, but insisted that under the circumstances the legacy sought to be recovered had been paid, the court allowed the plaintiff to read the passage admitting the assets without reading that as to the payment. *Conop v. Hayward*, 1 Y. & Coll. C. C. (Eng.) 33.

If one of several executors admits assets, an account may be decreed against all. *Norton v. Terril*, 2 P. Wms. (Eng.) 145.

An admission of assets by the executor's answer is waived by the plaintiff's going on to an account, and procuring a receiver to be appointed. *Wall v. Bushby*, 1 Bro. C. C. (Eng.) 484.

2. *Cook v. Martyn*, 2 Atk. (Eng.) 2; *Lord Cottenham in Barnard v. Pumfret*, 5 My. & Cr. (Eng.) 70. See *Moorhead's Appeal*, 32 Pa. St. 297.

This means an admission to A. of assets to pay a legacy to B. can be taken advantage of by B., but not that an admission of assets to pay A.'s legacy is to be construed to mean that the executor has assets to pay all legacies. *Barnard v. Pumfret*, 5 My. & Cr. (Eng.) 70; *Postlethwaite v. Mormsey*, 6 Hare (Eng.), 33, note a.

At all events, where the bill in a creditor's suit does not specifically charge the executor with having made himself personally liable, but prays that an account may be taken, and the estate administered, the executor's admission in his answer, that he has paid certain legacies, is not such an admission of assets as to entitle the plaintiff to a decree without taking the account. *Wigram, V. C.*, in *Savage v. Lane*, 6 Hare (Eng.), 32.

3. *Drewry v. Thacker*, 3 Swanst. (Eng.) 548; *Roberts v. Roberts*, cited 1 Bro. C. C. (Eng.) 487; s. c., 2 Dick. (Eng.) 573. See *Foster v. Foster*, 2 Bro. C. C. (Eng.) 619; *Young v. Walter*, 9 Ves. 365.

The executor must clearly prove the mistake, and show that the circumstance upon which he built his admission has failed. *Horsley v. Challoner*, 2 Ves. Sen. (Eng.) 85; *Romilly, M. R.*, in *Payne v. Little*, 22 Beav. (Eng.) 69.

Where, in an examination put in by two executors, it was stated that their receipts had been joint, but it appeared by affidavit that the statement was made through mistake and inadvertence, and that one of the executors had in fact received nothing, liberty was given him to put in a supplemental affidavit to correct the mistake. *Hewes v. Hewes*, 4 Sim. (Eng.) 1.

What amounts to an Admission.—Payment of interest from time to time upon a legacy will be evidence of assets, though a single instance of payment of interest will not. *Corporation of Clergymen's Sons v. Swainson*, 1 Ves. Sen. (Eng.) 75; *Campbell v. Lord Radnor*, 1 Bro. C. C. (Eng.) 271; 5 My. & Cr. (Eng.) 70; *Att.-Gen. v. Chapman*, 3 Beav. (Eng.) 255; *Att.-Gen. v. Higham*, 2 Y. & Coll. C. C. (Eng.) 634.

But payment of interest upon a specific or demonstrative legacy, when that payment is not made out of the general assets, nor referable to them, is not an admission of general assets. *Severs v. Severs*, 1 Sm. & G. (Eng.) 400.

In *Postlethwaite v. Mormsey*, 6 Hare (Eng.), 33, n. (a), *Wigram, V. C.*, held that payment by the executor of the interest of a legacy to the tenant for life under the will was not conclusive upon him as an admission of assets. See also *Cadbury v. Smith*, L. R. 9 Eq. Ca. (Eng.) 37.

See further as to admissions of assets, *Campbell v. Lord Radnor*, 1 Bro. C. C. (Eng.) 271; *Elliott v. Holwell*, 1 Cas. temp. Lee (Eng.), 574; *Whittle v. Henning*, 2 Beav. (Eng.) 396; *Townsend v. Townsend*, 1 Giff. (Eng.) 201; *Hutton v. Rossiter*, 7 De G. M. & G. (Eng.) 9; *Holland v. Clark*, 2 Y. & Coll. C. C. (Eng.) 349; *Stephens v. Venables*, 31 Beav. (Eng.) 124.

the estate; but if the assets are insufficient, no decree for costs will be made against the representative personally.¹ But with regard to the representative's own costs, the court will give no directions, it being supposed that he may reimburse himself out of the assets, so that on deficiency of assets they must come out of his own pocket.² But where a suit is instituted for the general administration of assets, if the representative's conduct in the management of the suit has been free from blame,³ his costs are provided for, and, on a deficiency of assets to pay the creditors, constitute the first charge on the estate.⁴ After the costs of the executor or administrator are satisfied, the next claim on the assets is that of the plaintiff in the administration suit for his

1. 2 Dan. Ch. Pr. (4th Am. ed.) 1422, note 7; Lyse v. Kingdom, 1 Coll. (Eng.) 184.

As to rule at law, see XVI. 1, b, (16).

2. 2 Dan. Ch. Pr. (4th Am. ed.) 1422; Adair v. Shaw, 1 Sch. & Lef. (Eng.) 280.

3. This is essential. If the suit was occasioned by the ignorance, unreasonable caution, misbehavior, or negligence of the representative, his costs of suit, or so much of them as was occasioned by his misconduct, will not be allowed. Knight v. Martin, 1 Russ. & My. (Eng.) 70; Lyse v. Kingdom, 1 Coll. (Eng.) 184; O'Callahan v. Cooper, 5 Ves. (Eng.) 117; Wms. Exrs. (7th Eng. ed.) 2035; Heighington v. Grant, 1 Phill. C. C. (Eng.) 600; Bailey v. Gould, 4 Y. & Coll. (Eng.) 221; Noble v. Brett, 26 Beav. (Eng.) 233; Beer v. Tapp, 10 W. R. (Eng.) 277; Graham v. Wickham, 34 L. J. N. S. Ch. (Eng.) 220; Coson v. Martin, Phill. (N. C.) 125; Post v. Stevens, 13 N. J. Eq. 293. See also 2 Dan. Ch. Pr. (5th Am. ed.) *1414; Peil v. Ball, Spear's (S. C.), Ch. 48; Delafield v. Calden, 1 Paige (N. Y.), 139; Decker v. Miller, 2 Paige (N. Y.), 149.

An executor improperly denying assets may be postponed to the debt and costs of the creditor. Lodge v. Pritchard, 4 Giff. (Eng.) 294.

For fraud, evasion, or neglect of duty, the court will not only refuse to allow the executor his costs out of the assets, but will order him to pay the costs of the suit, or of so much of the suit as is attributable to his breach of duty. Wms. Exrs. (7th Eng. ed.) 2036; Beames on Costs, 91; 2 Dan. Ch. Pr. *1418, 1419; Heighington v. Grant, 1 Phill. C. C. (Eng.) 600; Hide v. Haywood, 2 Atk. (Eng.) 126; Hewett v. Foster, 7 Beav. (Eng.) 348. See Tower v. Thompson, 7 Sim. (Eng.) 145; Western v. Chapman, 1 Coll. (Eng.) 181; Tickner v. Smith, 3 Sm. & G. (Eng.) 42; Romilly, M. R., in Noble v. Meymott, 14 Beav. (Eng.) 471, 480; Boynton v. Richardson, 31 Beav. (Eng.) 340; Keeler v. Keeler, 18 N. J. Eq. 267; Reynolds v. Carter, 32 Ala. 444.

As to the effect of refusing to render accounts when asked, see White v. Jackson, 15 Beav. (Eng.) 191; Springett v. Dashwood, 2 Giff. (Eng.) 524; Wroe v. Seed, 4 Giff. (Eng.) 425; Kemp v. Burn, 4 Giff. (Eng.) 348.

As to whether, when an executor is directed to pay interest, he must also pay costs, see Beames on Costs, 153; Tedds v. Carpenter, 1 Madd. (Eng.) 308; Moseley v. Ward, 11 Ves. (Eng.) 581; Raphael v. Boehm, 11 Ves. (Eng.) 92, 407, 590; Ashburnham v. Thompson, 13 Ves. (Eng.) 402; Walrond v. Walrond, 29 Beav. (Eng.) 586; Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508.

In a controversy between the distributees and the administrator as to whether a particular fund belongs to the estate, or to the administrator individually, on an adverse decision, the administrator is personally liable for the costs. Jones v. Dyer, 16 Ala. 221. See Isenhardt v. Brown, 2 Edw. Ch. (N. Y.) 341; Hartzell v. Brown, 5 Bin. (Pa.) 138. Compare XVII. 5.

4. 2 Dan. Ch. Pr. (5th Am. ed.) *1423; Jackson v. Woolley, 12 Sim. (Eng.) 12; Otley v. Gilby, 8 Beav. (Eng.) 602; Tanner v. Danny, 9 Beav. (Eng.) 339; Haldenby v. Spofforth, 9 Beav. (Eng.) 195.

Where, on a bill filed by a simple contract creditor, the only specialty creditor was restrained by injunction from proceeding in his action at law on the assets proving insufficient to pay him, the executor was allowed his costs. Young v. Everest, 1 Russ. & My. (Eng.) 426.

If the executor or administrator becomes bankrupt or insolvent after the suit is instituted, and is indebted to the estate of the deceased, the costs incurred before the bankruptcy or insolvency will be set off against his debt; but the subsequent costs, if properly incurred, will be allowed out of the estate. Samuel v. Jones, 2 Hare (Eng.), 246. See also Cotton v. Clark, 16 Beav. (Eng.) 734.

costs incurred in it.¹ Creditors and next of kin, who come in under the decree, are not to be allowed the costs of establishing their claims.² If, in a creditor's suit, it turns out that there are

1. *Hearn v. Wells*, 1 Coll. (Eng.) 323.

The principle is, that where the suit is properly instituted, and the fund to be administered is insufficient to pay the plaintiff his costs, those who have come in and received a benefit under the decree must contribute to make good that loss which the plaintiff has borne on behalf of all the creditors. *Wms. Exrs.* (7th Eng. ed.) 2038.

The costs of the plaintiff, although only a simple contract creditor, are preferred to the claims of specialty creditors who come in under the decree. *Larkins v. Paxton*, 2 My. & K. (Eng.) 320; *Thompson v. Cooper*, 2 Coll. (Eng.) 87.

But formerly it was held otherwise. *Young v. Everest*, 1 Russ. & My. (Eng.) 426; *Rowlands v. Tucker*, 1 Russ. & My. (Eng.) 635.

Creditors have been compelled to contribute, although they obtained payment by reason of being associated with the defendant in the suit, who, as executor or administrator, had a right of retainer against the estate. *Thompson v. Cooper*, 2 Coll. (Eng.) 87.

Costs, as between solicitor and client, may be given the plaintiff as against specialty creditors, where the fund is insufficient to pay debts, but in this instance only. *Barker v. Wardle*, 2 My. & K. (Eng.) 818; *Brodie v. Bolton*, 3 My. & K. (Eng.) 168; *Tootle v. Spicer*, 4 Sim. (Eng.) 510. But see *Sutton v. Doggett*, 3 Beav. (Eng.) 9; *Thompson v. Cooper*, 2 Coll. (Eng.) 87.

Where a bill is filed by a legatee for the administration of the testator's estate, on the insufficiency of the estate to pay all the legacies, the legatee filing the bill, whether it is expressed or not that he files it on behalf of himself and all others, is considered as representing them all, and is entitled to his costs, as between solicitor and client. *Kindersley, V. C.*, in *Thomas v. Jones*, 1 Dr. & Sm. (Eng.) 134. See also *Cross v. Kennington*, 11 Beav. (Eng.) 89; *Wetenhall v. Dennis*, 33 Beav. (Eng.) 285. But compare *Wroughton v. Colquhoun*, 1 De G. & Sm. (Eng.) 357; *Hearn v. Wells*, 1 Coll. (Eng.) 323; *Weston v. Clowes*, 15 Sim. (Eng.) 610.

The plaintiff's right to costs is preferred to the executor's right to reimbursement for a debt paid after decree. *Jackson v. Woolley*, 12 Sim. (Eng.) 16, 17.

This is said to be the case, even where the debt was paid before suit. *Hearn v. Wells*, 1 Coll. (Eng.) 323, 332, 333. But see *Vernon v. Thelluson*, 1 Phill. C. C. (Eng.) 466, 470.

But the representative's right of retainer will prevail over the plaintiff's right to costs. *Chissum v. Deves*, 5 Russ. (Eng.) 29; *Tipping v. Power*, 1 Hare (Eng.), 405, 411; *Langton v. Higgs*, 5 Sim. (Eng.) 228; *Hall v. McDonald*, 14 Sim. (Eng.) 1.

The plaintiff will not be allowed his costs where the litigation was useless. *Ottley v. Gilby*, 8 Beav. (Eng.) 602.

Nor where the costs were incurred after notice that the assets were insufficient to pay specialty debts and costs of the administrator. *Sullivan v. Bevan*, 20 Beav. (Eng.) 399. See also *Thompson v. Clive*, 11 Beav. (Eng.) 475.

Even after the decree, the court may, if the case warrants it, order the plaintiff to pay the entire costs. *Dunning v. Hards*, 2 Phill. C. C. (Eng.) 294.

2. *Wms. Exrs.* (7th Eng. ed.) 2040; *Waite v. Waite*, 6 Madd. (Eng.) 110.

But see, as to next of kin, *Bennett v. Wood*, 7 Sim. (Eng.) 522; *Yeomans v. Haynes*, 24 Beav. (Eng.) 127; *Bakewell v. Tagart*, 3 Y. & Coll. (Eng.) 173; *Hutchinson v. Freeman*, 4 My. & Cr. (Eng.) 490; *Shuttleworth v. Howarth*, 4 My. & Cr. (Eng.) 492; *Shuttleworth v. Howarth*, 1 Cr. & Ph. (Eng.) 228; *Morg. & Davey's Costs in Chanc.* 127.

If next of kin are permitted, after establishing their claims, to mix in the cause as if they had been parties, then, in respect to such proceedings, they may be entitled to costs. *Wms. Exrs.* (7th Eng. ed.) 2040; *Waite v. Waite*, 6 Madd. (Eng.) 110.

Bills for Construction.—Where any doubt or ambiguity arises under a will, with reference to any bequest or devise, which renders an application to the court necessary, the costs occasioned by such application are to be paid, not out of the property, with respect to which the doubt arises, but out of the general assets not otherwise disposed of. 2 Dan. Ch. Pr. (5th Am. ed.) *1427. See *Shuttleworth v. Howarth*, 1 Cr. & Ph. (Eng.) 228; *Wilson v. Squire*, 13 Sim. (Eng.) 212; *Ripley v. Moysey*, 1 Keen (Eng.), 578; *Eyre v. Marsden*, 4 My. & Cr. (Eng.) 231; *Sawyer v. Baldwin*, 20 Pick. (Mass.) 388, 389; *Towle v. Swasey*, 106 Mass. 100, 108; *Bowditch v. Solbyk*, 99 Mass. 136, 141; *Deane v. Home* for Aged Women, 111 Mass. 132, 135; *Floyd v. Barker*, 1 Paige (N. Y.), 480; *Smith v. Smith*, 4 Paige (N. Y.), 271; *Wood v. Vanderpool*, 6 Paige (N. Y.), 271; *King v. Strong*, 9 Paige (N. Y.), 84; *Rogers v. Ross*, 4 John. Ch. (N. Y.) 608; *Annin v. Vandoim*, 14 N. J. Eq. 135; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185.

no assets applicable to the payment of the plaintiff's debt, the

If the opinion of the court is necessary to enable the executor or administrator to administer the estate properly, costs may be given the plaintiff, although the bill is dismissed. 2 Dan. Ch. Pr. (5th Am. ed.) *1411; Thomason v. Moses, 5 Beav. (Eng.) 77; Johnston v. Todd, 8 Beav. (Eng.) 489; Turner v. Frampton, 2 Coll. (Eng.) 331; Westcott v. Culliford, 3 Hare (Eng.), 274; Cooper v. Pitcher, 4 Hare (Eng.), 485; Boreham v. Bignall, 8 Hare (Eng.), 131; Knox v. Pickett, 4 Desaus. (S. C.) 199; Conolly v. Padon, 1 Paige (N. Y.), 291; Floyd v. Barker, 1 Paige (N. Y.), 480; Decker v. Miller, 2 Paige (N. Y.), 149; Hosack v. Rogers, 9 Paige (N. Y.), 401; Chase v. Lockerman, 11 Gill & J. (Md.) 185; Bigelow v. Morong, 103 Mass. 287.

Where an executor in a proper case filed a bill for instruction as to his duties under the will, and no factious or unnecessary opposition or costs were occasioned by any defendant, it was *held* that costs and counsel fees for both parties might be ordered to be paid out of the estate. Jacobus v. Jacobus, 20 N. J. Eq. 49.

Even in a case where a person, filling the double character of executor and trustee, makes a claim for his own benefit, and fails, yet if the claim is made by submitting the point to the opinion of the court, he shall be allowed his costs. 2 Dan. Ch. Pr. (5th Am. ed.) *1414; Rashleigh v. Master, 1 Ves. Jr. (Eng.) 205; Pell v. Ball, Spear's (S. C.) Ch. 48; Delafield v. Calden, 1 Paige (N. Y.), 139; Decker v. Miller, 2 Paige (N. Y.), 149.

But care must be taken to distinguish such a case from an attempt by a trustee, who has a private interest of his own separate and independent from the trust, to compel the *cestui que trust* to come into equity merely to have a point relating to his own private interest determined at the expense of the trust; for such misbehavior he will be decreed to pay the whole costs of the suit. 2 Dan. Ch. Pr. (5th Am. ed.) 1414, 1415; Henley v. Phillips, 2 Atk. (Eng.) 48; Dupont v. Johnson, 1 Bailey, Eq. (S. C.) 279; Jones v. Deyer, 16 Ala. 221; Hunn v. Norton, 1 Hopk. (N. Y.) 344; Gardner v. Gardner, 6 Paige (N. Y.), 455.

When Costs are payable out of a Particular Fund. — In regard to legacies, it has been laid down that if the executors, admitting the legacy to be payable, sever it from the estate, and a dispute arises between the persons to whom, or some of whom, the legacy belongs, and the court has to decide to whom it belongs, then the particular fund shall bear the costs; otherwise in a dispute as to the payment of the residue between claimants of the residue and the

residuary legatees. Wigram, V. C., in Att. Gen. v. Lawes, 8 Hare (Eng.), 43. See Bigelow v. Morong, 103 Mass. 287.

Where a residuary estate was divisible amongst several persons, and an account was made up, and the adults received their shares, and the infants filed a bill for an account against the executors and the other residuary legatees, who, being satisfied, deprecated the proceedings, and the accounts turned out to be substantially correct, it was *held* that the costs were payable out of the plaintiff's share alone. MacKenzie v. Taylor, 7 Beav. (Eng.) 467.

Where the plaintiff's interest was contingent, and wholly failed after a decree for an account had been obtained, it was *held* that he was not entitled to his costs, either as against the defendants or the fund. Hay v. Bowen, 5 Beav. (Eng.) 610. See Rosevelt v. Ellithorpe, 10 Paige (N. Y.), 415; McCammon v. Worrall, 11 Paige (N. Y.), 99.

Liability of Specific Legacies and Real Estate for Costs. — Where there are no other personal assets, costs must be paid out of the specific legacies *pari passu*. Bristow v. Bristow, 5 Beav. (Eng.) 289; Cookson v. Bingham, 17 Beav. (Eng.) 262.

In an administration suit, involving both real and personal estate, the rule is that the general personal estate is the primary fund for the payment of costs, although some of them may have been incurred in proceedings affecting the real estate only, and resulted in the benefit of a devisee. Ripley v. Moysey, 1 Keen (Eng.), 578; Stringer v. Harper, 26 Beav. (Eng.) 585; Pickford v. Brown, 2 K. & J. (Eng.) 426. But see Bagot v. Legge, 2 Dr. & Sm. (Eng.) 259; Sanders v. Miller, 25 Beav. (Eng.) 154.

But the costs of the sale of real estate under a decree in an administration suit are payable out of the proceeds of the sale. Barnwell v. Iremonger, 1 Dr. & Sm. (Eng.) 242, 255, 259.

In the case of a mixed fund of real and personal estate, the costs will be apportioned ratably out of each according to its value. Burnett v. Foster, 7 Beav. (Eng.) 540; s. c., *sub nom.* Christian v. Foster, 2 Phill. (Eng.) 161; Johnston v. Todd, 8 Beav. (Eng.) 489; Cradock v. Owen, 2 Sm. & Giff. (Eng.) 241; Eyre v. Marsden, 4 My. & Cr. (Eng.) 231.

Costs for Trusts of Settlement. — If the costs of an administration suit are increased by its being also a suit for the executor of the trusts of a settlement, the court has *held* that the additional costs must be borne by the settlement fund. Irby v. Irby, 24 Beav. (Eng.) 525.

executor or administrator is entitled to be paid his costs by the plaintiff.¹

(11) *Appointment of a Receiver*. — Any misconduct, waste, or improper disposition of the assets by the executor or administrator, is good ground for the appointment of a receiver.²

(12) *Remedy for Devastavit*. — Although a party injured by a *devastavit* has only the standing of a simple contract creditor of the personal representative,³ yet if, by the terms of the will, the representative is entitled to an annuity or a legacy, a court of equity will apply such annuity or legacy in discharge of his indebtedness to the estate.⁴

1. *Bluett v. Jessop*, Jacob. (Eng.) 240; *Fuller v. Green*, 24 Beav. (Eng.) 217; *Robinson v. Elliott*, 1 Russ. (Eng.) 599. See also *Anon.* 4 Madd. (Eng.) 373.

2. *Sir Wm. Grant* in *Anon.* 12 Ves. (Eng.) 5; *Middleton v. Dodswell*, 13 Ves. (Eng.) 268. See also *Havers v. Havers*, Barnard, Ch. (Eng.) 24; *Richards v. Perkins*, 3 Y. & Coll. (Eng.) 299; *Edwards v. Crenshaw*, 1 Harp. Ch. (S. C.) 224; *Jenkins v. Jenkins*, 1 Paige (N. Y.), 243; *Boyd v. Murray*, 3 John. Ch. (N. Y.) 48; *Stairley v. Rabe*, 1 McMullan, Ch. (S. C.) 22; *Sears v. Odell*, 66 Ga. 234.

Bankruptcy of a sole executor or trustee has been held sufficient. *Steele v. Cobham*, L. R. 1 Ch. App. (Eng.) 525.

So a court of equity may appoint a receiver, where an executor departs with the intent to remain without the State, leaving the estate and beneficiaries within the State. *Ex parte Galluchat*, 2 Hill, Ch. (N. Y.) 148.

But a court of equity will not make the appointment upon slight grounds. *Middleton v. Dodswell*, 13 Ves. (Eng.) 268; *Whitworth v. Whyddon*, 2 Mac. & G. (Eng.) 52; *Smith v. Smith*, 2 Y. & Coll. (Eng.) 353.

As for a mere misunderstanding between executors, though one of them is a man of limited means. *Fairbairn v. Fisher*, 4 Jones (N. C.), Eq. 390.

Nor has a court of equity power to remove one executor, and appoint another. *Hargood v. Wells*, 1 Hill, Ch. (N. Y.) 59; *Ex parte Galluchat*, 1 Hill, Ch. (N. Y.) 148.

In a proper case, a court of equity will appoint a fit person to protect the estate until a legal representative is appointed; but a bill to protect and administer is irregular. *Overington v. Ward*, 34 Beav. (Eng.) 175. "See Special and Limited Administration."

3. *Charlton v. Low*, 3 P. Wms. (Eng.) 331. See DEBTS OF DECEDENTS, § 2, pp. 242-244. The claim is barred after the lapse of six years by the statute of limitations. *Thorne v. Kerr*, 2 Kay & J. (Eng.) 54.

If an executor becomes bankrupt after having wasted the assets, the *devastavit*

may be proved under the commission. *Toller*, 429. See *Ex parte Moody*, 2 Rose (Eng.), 413; *Ex parte Colman*, 2 D. & Ch. (Eng.) 584. But the proceeds of a specific legacy belonging to the executor, which was sold by his assignees in bankruptcy, are not specifically liable to make good the *devastavit*. *Geary v. Beaumont*, 3 Meriv. (Eng.) 431.

Where one of several executors has, before his bankruptcy, received a part of the assets, the other executors may prove the amount against his estate. *Ex parte Phillips*, 2 Deac. (Eng.) 334; *Ex parte Brown*, 1 D. & Ch. (Eng.) 118.

If an executor commits a *devastavit*, and a decree is entered for the amount, the debt is considered as due from the time of the *devastavit*, and not from the date of the decree. Wms. Exrs. (7th Eng. ed.) 2054; 3 Madd. Pract. (2d ed.) 458; *Wheldale v. Wheldale*, 16 Ves. (Eng.) 376. See also *Wall v. Atkinson*, Cooper (Eng.), 198; s. c., 2 Rose (Eng.), 196.

4. *Skinner v. Sweet*, 3 Madd. (Eng.) 244; *Morris v. Livie*, 1 Y. & Coll. (Eng.) C. C. 380. See XI. 7.

If the executor, after the assignment of a reversionary legacy payable to himself, wastes the assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust. *Morris v. Livie*, 1 Y. & Coll. (Eng.) C. C. 380. See also *Barnett v. Sheffield*, 1 De G. M. & G. (Eng.) 371.

Where an executor who has committed a *devastavit* is dead, a court of equity, although the fact of the *devastavit* has not been established, will take cognizance of a suit against the sureties upon the bond, or their representatives, and those interested in any estate which the executor may have left, and will hold them liable for any waste or misapplication of assets; although, were the executor alive, and within reach of a court of law or the surrogate's court, this could not ordinarily be done. *Onondaga Trust, etc., Co. v. Pratt*, 25 Hun (N. Y.), 23.

Neither an administrator *de bonis non*

4. *Continuation and Revival of Suits.* — a. *At Law.* See ABATEMENT; SCIRE FACIAS; REVIVAL OF ACTIONS. — At common law the death of a sole plaintiff or defendant at any time before final judgment abated the suit;¹ but in England and most of the States it is now provided by statute that the death of a sole plaintiff or defendant before final judgment, when the cause of action survives, shall not cause the action to abate; but upon such death, and the appointment of the executor or administrator being suggested on the record, with leave of court, or on motion, the action may be continued by or against his personal representatives.² If

nor a public administrator can maintain a suit in equity to hold the representative or sureties of a former executor or administrator accountable for property lost, wasted, mismanaged, or converted by such former executor or administrator. *State v. Rotterken*, 34 Ark. 144.

1. 2 Saund. (Eng.) 72, u (6th ed.), note to *Underhill v. Devereux*.

2. 15 & 16 Vict. c. 76 (C. L. Pro. Act 1852), §§ 135-138; 17 & 18 Vict. (C. L. Pro. Act 1854) § 92; Rev. Stats. Mass. 1882, c. 165, §§ 5, 6, p. 958; Laws of Fla. (McClellan, Dig.) p. 829, § 74; Rev. Code Miss. 1880, § 1513; Mo. Rev. Stats. 1879, §§ 3663, 3671; Mich. Rev. Stats. 1882, §§ 7393-7395; Neb. Comp. L. 1885, p. 633, § 45; Minn. Rev. Stats. 1878, p. 711, § 41; Rev. Code Md. 1878, art. 64, pl. 32; New Mex. Rev. Stats. 1884, ch. 14, §§ 2139-2145; N. H. Gen. Laws 1878, ch. 226, § 12; N. J. Rev. Stats. p. 2, pl. 3; N. C. Code 1883, § 188; Or. Gen. Laws, p. 111, tit. 3, §§ 37, 38; Ohio Rev. Stats. 1884, §§ 5012, 5144; S. C. Code Civ. Pro. § 142; Tex. Civ. Stats. tit. 29, c. 7, arts. 1246-1248; tit. 52, art. 2907; Ill. Rev. Stats. (Cothrairie's ed.) 1887, ch. 1, p. 39, §§ 10, 11; Ga. Code, p. 868, §§ 34, 38; Ky. Gen. Stats. 1881, p. 179, § 1; Wyoming Code, § 2531, 2532; Vt. Rev. Laws 1880, §§ 732, 2135; Va. Code, § 2906; Wash. Code 1881, §§ 17, 491, 418; Conn. Rev. Stats. tit. 1, § 80; *Purd. Dig.* (Pa.) p. 52, pl. 4; *Gemmill v. Butler*, 4 Pa. St. 232; R. I. Pub. Sts. c. 204, § 9, p. 552; Wis. Rev. Stats. 1878, § 2803; Ariz. Rev. Stats. 1887, pl. 725, 726.

Where, in a pending action, both parties have deceased, the administrator of the plaintiff has a right to appear, and to summon the administrator of the defendant. *Rittenhouse v. Ammerman*, 64 Mo. 197.

Under the New York Code of Procedure, in case of the death of a party to an action, the court on motion at any time within one year thereafter, or afterwards on supplemental complaint, may allow or compel the action to be continued by or against his representative or successor in interest, if the cause of action survives. N. Y. Code of Pro. § 121. See Rev. Stats. Wis.

1878, § 2803; C. C. Pro. Cal. pl. 10, 385; Idaho Rev. Stats. 1887, § 4108; Ariz. Rev. Stats. 1887, pl. 725, 726; Wash. Code 1881, § 17; Ind. Rev. Stats. 1881, § 271. See also *Ridgway v. Bulkley*, 7 How. Pr. (N. Y.) 269; *Potter v. Van Vranken*, 36 N. Y. 619.

But in New York, where a sole defendant dies pending an action, after issue joined, and before trial, there seems to be no rule by which his personal representatives are entitled to an order requiring the plaintiff to continue the action against them as defendants. In such case the plaintiff at election may require it to be discontinued. *Keene v. La Farge*, 1 Bosw. (N. Y.) 671; 16 How. Pr. (N. Y.) 377. Compare Rev. Stats. Mass. 1882, c. 165, §§ 5, 6, *et seq.* p. 958.

Under the Connecticut statute, which provides that if any plaintiff shall die during the pendency of a suit, his administrator may enter, and prosecute the suit, if it be one which might have been originally prosecuted by the administrator, the action will survive if any of the causes of action declared on could have been prosecuted by the administrator, even though some of the causes of action declared on could not have been. *Booth's Admr. v. Northrop*, 27 Conn. 325.

In *New Hampshire*, actions pending at the death of either party in which the right of action does not survive, may be prosecuted to final judgment. N. H. Gen. Laws 1878, ch. 226, § 12. See *Clindenin v. Allen*, 4 N. H. 385.

In *Iowa*, all causes of action survive, and may be continued on motion by or against the legal representative or successor in interest. Rev. Code (Miller), § 2525-2527. See Wash. Code, § 718. If continued against the legal representative, notice to be served. *Walters v. R. Co.*, 36 Iowa, 458. Otherwise if for representative; nor is the substitution of such representative ground for continuance on behalf of defendant. *Masterman v. Brown*, 51 Iowa, 442.

In *Alabama*, motion to revive must be brought within eighteen months after death. Ala. Civ. Code, § 2603.

the deceased is a sole plaintiff or defendant, and dies after final judgment, and before execution, no execution can issue for or

In *Tennessee*, no suit abates or discontinues for the death of either party, until the second term after the death has been suggested and proved or admitted, and entry to that effect made of record. The intervention of one term between the death and qualification of the representative works neither abatement nor discontinuance. Tenn. Code, §§ 3560, 3561.

In *Massachusetts*, if the defendant in an action, the cause of which survives, dies, there is no limitation of the time within which his administrator must be cited to defend the same. *Bank of Brighton v. Russell*, 13 Allen (Mass.), 221. See *McLellan v. Lunt*, 14 Me. 254; *Pettingill v. Patterson*, 39 Me. 498.

Under the Vermont statute, on the decease of either party in a suit pending, when, by law, the cause of action survives, the executor or administrator must enter an appearance at the next term of court, or it will be an abandonment of the suit. If the opposite party wish to compel the appearance of such personal representative, for the purpose of obtaining judgment against the estate, he must serve a *scire facias* for that purpose, returnable at the next term after the appointment of such personal representative. *Tyler v. Whitney*, 8 Vt. 26.

A writ does not abate by the death of either party between the time when the writ is served and the time of entering the action, provided the cause of action by law survives. *Clindenin v. Allen*, 4 N. H. 385; Gen. Mass. Sts. c. 127, § 6. See *Lawson v. Newcomb*, 12 Ind. 439.

In *Pennsylvania*, when no declaration has been filed during the life of the plaintiff, and the suit has been continued by suggestion on the docket of his death, and the nomination of his executors, the declaration should be filed in the names of the original parties. *Chew v. Brown*, 1 Yeates (Pa.), 324.

In case of the death of a sole plaintiff, no further steps can be taken until a substitution or revival has been had. *Supervisors v. O'Malley*, 47 Wis. 332; *Reid v. Butler*, 11 Abr. Pr. (N. Y.) 128.

Under the English statute, it is held that if the suggestion of death be not made, all subsequent proceedings will be void. *Pinkus v. Sturch*, 5 C. B. (Eng.) 474; *Larchin v. Buckle*, 1 L. M. & P. (Eng.) 159; *Barnewell v. Sutherland*, 1 L. M. & P. (Eng.) 159, 2 Chitty, Pl. (16th Am. ed.) 15.

Death between Verdict and Judgment. — By stat. 17 Car. II. c. 8, sect. 1, it is enacted that in all actions, personal, real, and

mixed, the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within the terms after such verdict. Under this act the judgment is entered by or against the party as if he were living. *Weston v. James*, 1 Salk. (Eng.) 42; 2 Saund. (Eng.) 72, n.; *Saunders v. M'Gouran*, 12 M. & W. 221. See West Va. Code, 1887, tit. 29, ch. 127, § 1, pp. 795, 729; Tex. Civ. Sts. 7, tit. 29, ch. 7, art. 1251.

It must be entered within two terms after the verdict, and signing the judgment is an entering of it within the statute. *Helie v. Baker*, 1 Sid. (Eng.) 385; *Webb v. Spurrell*, Barnes (Eng.), 261; *Fewins v. Lethbridge*, 4 H. & M. (Eng.) 418.

Hence no execution can issue without a revival of the judgment. *Earl v. Brown*, 1 Wils. (Eng.) 302. Compare *Chauvel v. Chimelli*, 4 B. & Ad. (Eng.) 590; s. c., 1 Nev. & M. (Eng.) 731.

The proceedings to revive must follow the judgment, and be in the same form as if it had been entered in the lifetime of the deceased. *Colebeck v. Peek*, 2 Ld. Raym. (Eng.) 1280. See also *Burnet v. Holden*, 1 Lev. (Eng.) 277.

The statute is not confined to such actions as would have survived to the personal representative. Hence an executor may enter up a judgment on a verdict obtained by his testator in an action for libel. *Palmer v. Cohen*, 2 B. & Ad. (Eng.) 966.

The statute is said not to apply to cases of non-suit. *Dowbiggin v. Harrison*, 10 B. C. (Eng.) 480.

Where a party dies after leave reserved to enter a verdict, his executors may move in his name to set the verdict found by the jury aside, and, on the rule being made absolute, may enter the judgment under the statute. *Freeman v. Rosher*, 13 Q. B. (Eng.) 780; *Griffith v. Williams*, 1 Cr. & Jerv. (Eng.) 47.

If, after a verdict, and pending a rule for a new trial, the plaintiff dies, no cause can be shown against the rule until there is a personal representative. Cause cannot be shown on behalf of the attorney who claims a lien on the verdict for costs. *Shoman v. Allen*, 1 M. & Gr. (Eng.) 96, n. (c). See also *Lloyd v. Ogleby*, 5 C. B. N. S. (Eng.) 667; *Thomas v. Dunn*, 1 C. B. (Eng.) 139. But see *Manning v. Manning*, 61 Ga. 137.

Judgment Nunc pro Tunc. — If either party die after a special verdict, or special case, pending the time taken for argument or advising thereon, or after a motion in arrest of judgment or trial, or after a demurrer set down for argument, judgment

against his personal representatives without reviving the judgment by a writ of *scire facias*.¹

may be entered, at common law, after his death, as of the term in which the *postea* was returnable, or judgment would otherwise have been given, *nunc pro tunc*, that the delay arising from the act of the court may not prejudice the party. Where a verdict has been taken subject to an award, and the award is made in the lifetime of both parties, but the successful party dies pending a rule to set it aside, judgment may be entered *nunc pro tunc*, without reference to the statute of Car. II. But, unless the delay can be attributed to the act of the court, judgment cannot, at common law, be entered *nunc pro tunc*. Wms. Exrs. (7th Eng. ed.) 894; Tidd's Pract. (9th ed.) 932; Carlisle v. Garland, 9 Bing. (Eng.) 85; Miles v. Williams, 9 Q. B. (Eng.) 47; Key v. Goodwin, 1 M. & Scott (Eng.), 620; Copley v. Day, 4 Taunt. (Eng.) 702; Lawrence v. Hodgson, 1 G. & Jerv. (Eng.) 368; Freeman v. Tranah, 12 C. B. (Eng.) 406; Colt, J., in Kelley v. Riley, 106 Mass. 339, 341; Gunn v. Howell, 35 Ala. 144; Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 334; Brown v. Wheeler, 18 Conn. 199; Burnham v. Dal-ling, 18 N. J. Eq. 310; Griswold v. Hill, 1 Paine (C. C.), 483; Appleton, J., in Lewis v. Soper, 44 Me. 72, 76, 77; Corwin v. Lowell, 16 Pick. (Mass.) 170.

Under Mass. Gen. Sts. c. 133, § 7, the court may, in its discretion as justice requires, enter any judgment as of any day of a former term. Exceptions filed by the defendant after verdict for the plaintiff may be allowed, notwithstanding the defendant's death meanwhile, although the action does not survive; and if the exceptions are overruled, judgment may be rendered as of the day when the verdict was returned. Kelley v. Riley, 106 Mass. 339. See Goddard v. Bolster, 6 Greenl. (Me.) 427.

Death between Interlocutory and Final Judgment.—By stats. 8 & 9 W. II. c. 11, sect. 6, it is enacted that, if the cause of action survives the death of the plaintiff or defendant between interlocutory and final judgment, it shall not abate the action, but the plaintiff, or, if he be dead after such interlocutory judgment, his executors or administrators, shall have a *scire facias* against the defendant, if living, or, if dead, then against his executors or administrators, to show cause why damages in such action should not be assessed or recovered by him or them; and if, on the return of the *scire facias*, the defendant or his representatives shall fail to show or allege sufficient matter to arrest final judgment, or on the writ being returned, warned,

or upon two writs of *scire facias*, it be returned, that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the country, shall make default, that, thereupon, a writ of inquiry of damages shall be awarded, which being executed and returned, final judgment shall be given for the said plaintiff, his executors or administrators, prosecuting such writ or writs of *scire facias* against such defendant, his executors or administrators, respectively.

This statute has been substantially reenacted by C. L. Procedure Act, 1852, § 140. As to the form of the writ of revivor under the act, see 2 Saund. (Eng.) (6th ed.) 72 q; Tidd (9th ed.), 894, 1118.

It is essential to the application of the statute that the cause of action survive; when, therefore, the plaintiff in an action for libel died after interlocutory judgment signed, and writ of inquiry executed, but before the day in bank, it was held that final judgment could not be entered for the plaintiff for the damages assessed, the suit having abated by his death. Ireland v. Champneys, 4 Taunt. (Eng.) 884.

The statute only applies to cases of death after interlocutory judgment: where, therefore, the plaintiff had died before, it would be irregular to sign interlocutory judgment after, and proceed upon the statute. Wallop v. Irwin, 1 Wils. (Eng.) 315.

Similar or analogous legislation exists in most of the States. See local codes and statutes, *ante*.

Death of Executor or Administrator pending Suit.—In suits brought by the representative in his fiduciary capacity, the representative's death, resignation, or removal works no abatement; but the suit shall be conducted by the survivor, if there be one, or by the successor, the name of such survivor or successor being substituted in such suit or proceeding instead of that of the executor or administrator whose authority has ceased; nor shall such suit or proceeding be continued to another term on account of such death, unless at the option of such survivor or successor. Ind. R. S. 1881, § 2293. See Me. R. S. ch. 7, § 4; Miss. Rev. Code, § 1514; Tenn. Code 1884, § 35, 65; Tex. Civ. Sts. ch. 7, art. 1249; R. I. Pub. Sts. tit. 24, § 28, p. 480; Purd. Dig. (Pa.) p. 52, pl. 5. See State v. Murray, 8 Ark. 199; Russell v. Erwin, 41 Ala. 292; Lee v. Hopkins, 7 Pa. St. 385; Fletcher v. Weir, 7 Dana (Ky.), 345.

1. Wms. Exrs. (7th Eng. ed.) 899, 900, 1991; 2 Saund. 6, note (1) to Jefferson v. Morton; 2 Saund. (Eng.) 68 e, 68 f (6th ed.),

note to *Underhill v. Devereux*; *Day v. Sharp*, 4 Whart. (Pa.) 339; *Handley v. Fitzhugh*, 3 A. K. Marsh. (Ky.) 561; *Gwin v. Latimer*, 4 Yerg. (Tenn.) 22; 2 Inst. 395; Co. Litt. 290 a.

A writ of *scire facias*, at common law, when sued out by a personal representative, stated, in addition to the judgment, the death of the testator or intestate, as the court had been informed by the person suing it out, who was described as executor or administrator. Wms. Exrs. (7th Eng. ed.) 900. See Tidd, 1119 (9th ed.).

Under the Common Law Procedure Act, 1852, § 129, the same result is effected by writ of revivor, or entering suggestion on the roll to the effect that it manifestly appears that the representative is entitled to execution on the judgment.

As the practice differs in the several States, local codes must be consulted.

At common law, if any of the executors or administrators are *femes covert*, their husbands must be made parties to the proceedings to revive. 2 Saund. (6th ed.) 728, note to *Underhill v. Devereux*.

Under the Indiana statute execution may issue on a judgment obtained by the decedent, with or without revivor, or other notice to the defendant. Ind. R. S. § 2294; *Wyant v. Wyant*, 38 Ind. 48; *Armstrong v. McLaughlin*, 49 Ind. 370. So for a foreign executor. *Jefferson R. Co. v. Hendricks*, 41 Ind. 48; *Thomasson v. Brown*, 43 Ind. 203.

Under the Pennsylvania statute, an executor may prosecute a judgment of his testator without a *sci. fa.* by suggesting the death on the record. *Gemmill v. Butler*, 4 Pa. St. 232. See also *Dieser v. Sterling*, 10 S. & R. (Pa.) 119; *Fritz v. Evans*, 13 S. & R. (Pa.) 16.

An administrator cannot maintain an action for the purpose of procuring the issuance of an execution upon a judgment recovered in the district court by his intestate. Such execution should be procured by motion in the action in which the judgment was recovered. *Lough v. Pitman*, 25 Minn. 120.

In England there is no distinction between an attachment and an execution; and an executor of a judgment creditor cannot attach a debt due to the judgment debtor before he has made himself a party to the judgment. *Baynard v. Simmons*, 85 Eng. C. L. Rep. 57. *Contra*, *Ogilsby v. Lee*, 7 W. & S. 444; *Gemmill v. Butler*, 4 Pa. St. 232.

An execution issued without *scire facias* is not void, but voidable, and hence is a good justification in an action of trespass. *Day v. Sharp*, 4 Wh. (Pa.) 339.

If there are several executors, a rule *nisi* to revive the judgment must be served on all who have proved the will. *Panther v. Seaman*, 5 Nev. & M. (Eng.) 679.

Where there are several defendants, and one of them dies after judgment, but before execution, execution may be had against the survivors within a year without reviving the judgment against the personal representatives of the deceased. In such case the execution should be taken out in the joint names of all the defendants, otherwise it will not be warranted by the judgment. Tidd (9th ed.), 1120.

At common law, the execution creditor might have avoided the *sci. fa.* by issuing the *fi. fa.* after the death, but tested in the lifetime of the deceased. 1 Saund. (Eng.) 219, f, note to *Wheatley v. Lane*. See also *Harmer v. Johnson*, 14 M. & W. (Eng.) 342, by Parke, B.

But this abuse was remedied by Reg. Gen. 772 of H. T. 1853, directing that writs of execution shall bear date on the day on which they are issued.

Attachment.—Under a statute providing that if judgment is obtained before the death of the party, the executor or administrator shall proceed to execution in the same manner that the decedent might or could have done if he had survived, the executor or administrator may, suggesting the death on the record, issue an attachment in execution, on a judgment obtained by the deceased. *Gemmill v. Butler*, 4 Pa. St. 232. See *Ogilsby v. Lee*, 7 W. & S. (Pa.) 444; *Baynard v. Simmons*, 85 E. C. L. 57; s. c., 5 Ellis & Blackburne (Eng.), 59.

Administrators De Bonis Non.—At common law, an administrator *de bonis non* could not revive a judgment obtained by the original executor or administrator; for he comes paramount the judgment, and is no party thereto. But by stat. 17 Car. II. c. 8, § 2, "Where any judgment, after verdict, shall be had by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment. Wms. Exrs. (7th Eng. ed.) 900.

It has been held within the equity of the act that an administrator may perfect an execution already begun by his predecessor. — *Clerk v. Withers*, 1 Salk. (Eng.) 323; s. c., 2 Ld. Raym. (Eng.) 1072, 1074, 1076; *Treviban v. Lawrence*, 2 Ld. Raym. 1049; 2 Saund. (Eng.) 72, s; *Lea v. Hopkins*, 7 Pa. St. 385,—or revive a decree obtained by him. *Owen v. Curzon*, 2 Vern. (Eng.) 237; *Huggins v. York Bld. Comp.*, 2 Eq. Cas. Abr. (Eng.) 3.

At common law, no executor or administrator was responsible for a *devastavit* of his testator or intestate; but by 30 Car. II. c. 7, and 4 & 5 W. & M. c. 24, § 12, if a judgment be recovered against an executor who afterwards dies, one action may be brought against his executor or administrator, suggesting a *devastavit* by the first executor. Such actions must obviously be

But if the death occurred after execution was sued out, the writ might be executed without further proceeding.¹

brought in the *detinet* only, and the judgment must be *de bonis testatoris*. 1 Saund. (Eng.) 219, e, f, note (8) to Wheatley v. Lane; Coward v. Gregory, L. R. 2 C. P. 153, 173. See further, as to construction of the above statutes, Thorne v. Kerr, 2 Kay & J. (Eng.) 63, 64; Wilson v. Hodson, L. R. 7 Ex. (Eng.) 84.

In this action the judgment is as conclusive against the representative of the executor as it is upon the executor himself. Therefore, he cannot plead that the first executor fully administered the goods of the first testator, or any other plea purporting that he (i.e., the first executor) had no assets to satisfy the judgment any more than the executor himself could have done. For whatever act of the executor would have made him chargeable with the demand *de bonis propriis*, will, by virtue of the statute, make his *personal estate* liable in the hands of his executor or administrator. But the representative of the executor may plead that he (i.e., the defendant) has fully administered all the estate of his own testator or intestate. Wms. Exrs. (7th Eng. ed.) 1989, 1990; Skelton v. Hawling, 1 Wils. (Eng.) 258; 1 Saund. (Eng.) 219, d, e, note (8) to Wheatley v. Lane. See *ibid.* (10).

1. Wms. Exrs. (7th Eng. ed.) 901, 1991; Tidd (9th ed.), 366; 1 Chitty's Archb. (Prentice's ed.) 569. See Parkinson v. Herlock, 2 New. Rep. (Eng.) 240; Broughton v. Martin, 1 Bos. & Pull. (Eng.) 176; Camp v. Pote, 8 C. B. (Eng.) 375; Fothergill v. Walton, 4 Bing. (Eng.) 711; s. c., 1 M. & P. (Eng.) 743; Taylor v. Burgess, 16 M. & W. (Eng.) 781; Commonwealth v. Whitney, 10 Pick. (Mass.) 434.

Where there is no executor, and administration has not yet been granted, the money obtained by the execution should be brought into court, and there deposited until some person appear to claim it as the representative of the deceased. Clerk v. Withers, 2 Ld. Raym. (Eng.) 1072; 1 Chitt. Archb. (Prentice's ed.) 569.

Where the defendant dies after execution, the writ should be executed on his goods in the hands of his executors or administrators. 1 Chitt. Archb. (Prentice's ed.) 569.

When Executor may enter up Judgment on Warrant of Attorney given to Deceased.

—Death of either party countermands a warrant of attorney to confess judgment, unless the warrant be to enter up judgment *at the suit of A., his executors or administrators*, in which case judgment may be entered up by the administrators with leave of court. Co. Litt. 52 b; Tidd's

Pract. (9th ed.) 551; Coles v. Haden, Barnes (Eng.), 44. See Baldwin v. Thompson, 2 Dowl. (Eng.) 591; Fendall v. May, 2 M. & Sel. (Eng.) 76; 2 Chit. Arch. (9th ed.) 895.

Therefore, if, upon motion to enter up judgment, it appear that the defendant is dead, the court will not grant the motion. Tidd (9th Eng. ed.), 561; Harden v. Forsyth, 1 Q. B. (Eng.) 177.

As to a *cognovit actionem*, see Chitty's Archb. 883, Prentice's ed.

But judgment cannot be entered up, after the death of the plaintiff, on a warrant of attorney empowering him to enter up judgment to secure the payment of a sum of money to the plaintiff, his executors and administrators. Henshall v. Matthew, 7 Bing. (Eng.) 337; s. c., 1 Dowl. (Eng.) 217; Manvill v. Manvill, 1 Dowl. (Eng.) 544; Foster v. Claggett, 6 Dowl. (Eng.) 524.

But at common law, if the plaintiff died in vacation within a year after the giving of the warrant of attorney, judgment might be entered up, of course, at any time after in that vacation; and it would have been a good judgment as of the preceding term, though as against purchasers, under the statute of frauds, it took effect only from the signing. Wms. Exrs. (7th Eng. ed.) 908; Tidd's Pract. (9th ed.) 551.

Effect of Death upon an Award.—It seems to be the better opinion, that the authority of an arbitrator is determined by the death of either party before award made, although the submission is by order of *nisi prius*, and a verdict is taken for the plaintiff subject to the award. Wms. Exrs. (7th Eng. ed.) 908; Potts v. Marsh (Eng.), 366; Toussaint v. Hartop, 7 Taunt. (Eng.) 571; s. c., 1 B. Moore (Eng.), 287; Cooper v. Johnson, 2 B. & Ald. (Eng.) 394; Rhodes v. Haigh, 2 B. & C. (Eng.) 345; s. c., 3 D. & R. (Eng.) 610. *Contra*, Bacon v. Crandon, 15 Pick. (Mass.) 79. But see Tindal, C. J., in *Re Hare*, 6 Bing. N. C. (Eng.) 158, 163; s. c., 8 Scott (Eng.), 367; Bailey v. Stewart, 3 W. & S. (Pa.) 560.

But where the order of reference deed, or other instrument under which the submission is made, provides that in case of the death of either of the parties, the award shall be delivered to their personal representatives, such provision is good and available for or against the executors or administrators. Tyler v. Jones, 3 B. & C. (Eng.) 144; s. c., 4 D. & R. (Eng.) 740; Dowse v. Cox, 3 Bing. (Eng.) 20; s. c., 10 Moore (Eng.), 272; s. c., in *Error*, 6 B. & C. 255; 9 D. & R. 404; Prior v. Hambrow,

b: In Equity. See BILL OF REVIVOR. — Modern chancery practice, aided by the legislation of modern times, favors the continuance of the suit by order to revive merely; the representative appearing, or being summoned, to prosecute or defend.¹

5. *Remedies in Courts of Probate.* — In England a creditor, legatee, or distributee might proceed in the probate or ecclesiastical court to compel an executor or administrator to file an account, or exhibit an inventory, or to recover a legacy or distributive share; but the court could not decree the payment of a debt, and the only object accomplished by suing for an account in the probate court was to gain some insight into the state of the assets.² In all these matters, equity exercised a concurrent jurisdiction;³ and, as the remedy in equity was more complete and effective, the jurisdiction of the probate courts became practically obsolete.⁴ In the United States the whole tendency of legislation has been to enlarge the powers and elevate the character of the probate courts, and to render their jurisdiction exclusive in all matters affecting the administration of decedent's estates.⁵ Therefore,

8 M. & W. (Eng.) 873; Abbott, C. J., in *Cooper v. Johnson*, 3 B. & Ald. (Eng.) 395.

But it cannot be enforced by attachment. *Newton v. Walker*, Willes (Eng.), 315; 3 B. & C. (Eng.) 146.

Where either party dies *after* the award is made under an order of *nisi prius*, where a verdict has been taken subject to the award, judgment may be entered within two terms after the verdict by the stat. 17 Car. II. c. 8, § 1. Wms. Exrs. (7th Eng. ed.) 908; Tidd (9th ed.), 823.

But it cannot be entered up *nunc pro tunc* after that time, unless the delay can be attributed to the act of the court. *Copley v. Day*, 4 Taunt. (Eng.) 702; *Lawrence v. Hodgson*, 1 Y. & Jerv. (Eng.) 368; *Bridges v. Smyth*, 8 Bing. (Eng.) 29; s. c., 1 M. & Scott (Eng.), 39; *Miller v. Spurr*, 2 M. & Scott (Eng.), 730. But see *Rogers v. Stanton*, 7 Taunt. (Eng.) 575, note; *Maffey v. Goodwin*, 1 Nev. & M. (Eng.) 101; 1 Dowl. (Eng.) 538.

Writs of Error. — See ERROR; APPEALS.

An executor or administrator may bring error on a judgment recovered against his testator or intestate, in a personal action, where the deceased himself could have done so had he been living. Where, therefore, the testator's attorney had agreed that no writ of error should be brought, the court of queen's bench, on motion, ordered the attorney to *non pros* a writ of error brought by the executors in violation of such agreement. Exrs. of *Wright v. Nutt*, 1 T. R. (Eng.) 388; Wms. Exrs. (7th Eng. ed.) 903. See Ind. R. S. 1887, p. 439, § 2293.

As the executor or administrator has no title to the realty, no writ of error lay for

him, at common law, in a real action. Wms. Exrs. (7th Eng. ed.) 903.

In mixed actions, the executor could bring error to avoid the judgment as to damages. *Williams v. Williams*, Cro. Eliz. 558, cited and admitted in *R. v. Ayloff*, Comberb. (Eng.) 114.

As to suits to recover realty, see *i, a, ante*.

1. Wms. Exrs. (7th Eng. ed.) 890; Dan. Ch. Pract. (5th Am. ed.) *1508; 15 & 16 Vict. c. 86, § 52; Mass. Pub. St. c. 165, § 19; *Cheney v. Gleason*, 125 Mass. 166; *Egremont v. Thompson*, L. R. 4 Ch. (Eng.) 448. See local statutes.

2. Wms. Exrs. (7th Eng. ed.) 2057-2062.

3. See XVI. 3, *b*, (1), (a), (b), (c), (d).

4. Schoul. Exrs. & Admsrs. § 518; Story, Eq. Jur. § 534; Wms. Exrs. (7th Eng. ed.) 2005, 2006.

By the court of probate act (20 & 21 Vict. c. 77, § 23), by which the jurisdiction of the ecclesiastical courts was transferred to the court of probate, it is provided that that court shall entertain no suits for legacies or the distribution of residue. Bills for discovery and administration suits had already, in practice, superseded the creditor's application to the ecclesiastical court for a citation to account. See Toller, 495.

5. In New Hampshire, the statutes "providing for the settlement and distribution of estates in most cases give ample powers to the courts of probate and common law to enforce all needful remedies to secure the rights of all parties; and, so far as the statutes may apply to the settlement of estates, they take from chancery its jurisdiction." Eastman, J., in *Walker v. Cheever*,

bills for the administration of assets,¹ account, and discovery have been in most States superseded by statutory proceedings in probate, which have the advantage of being cheaper, quicker, and more effective.² Bills for the appointment of a receiver have

35 N. H. 345. See *Parsons v. Parsons*, 9 N. H. 309.

The rule laid down in *Wilson v. Leishman*, 12 Met. (Mass.) 316, is that the remedy is not to be sought in a court of equity so long as plain, adequate, and complete relief can be obtained in the court of probate. See also *Morgan v. Rotch*, 97 Mass. 396.

In some States, equity interferes in aid of the probate courts on occasions of difficulty. See *Morse v. Slason*, 13 Vt. 296; *West v. Bank of Rutland*, 19 Vt. 403; *Adams v. Adams*, 22 Vt. 50; *Freeland v. Dazey*, 25 Ill. 294; *Gaines v. Chew*, 2 How. U. S. 619; *Hagan v. Walker*, 14 How. (U. S.) 29; *Ledyard v. Johnston*, 16 Ala. 548; *Stewart v. Stewart*, 31 Ala. 207; *Pharis v. Leachman*, 20 Ala. 662; *Beattie v. Abercrombie*, 18 Ala. 9; *Parsons v. Parsons*, 9 N. H. 309; *Walker v. Cheever*, 35 N. H. 339; 1 Story, Eq. Jur. § 543, a.

In some States, courts of equity exercise concurrent jurisdiction with courts of probate. *Gould v. Hayes*, 19 Ala. 438; *Colbert v. Daniel*, 32 Ala. 329; *Marsh v. Richardson*, 49 Ala. 431; *Griffin v. Pringle*, 56 Ala. 486; *Sanderson v. Sanderson*, 17 Fla. 820; *Ewing v. Moses*, 50 Ga. 264; *Seymour*, 4 John. Ch. (N. Y.) 409; *Van Mater v. Sickler*, 1 Stockt. (N. J.) 483; *Clarke v. Johnston*, 2 Stockt. (N. J.) 287. See also *Trescott v. Trescott*, 1 McCord, Ch. (S. C.) 417; *Fleming v. McKesson*, 3 Jones, Eq. (N. C.) 316; *Daboll v. Field*, 9 R. I. 266, 285, 286; *Kent v. Cloyd*, 30 Gratt. (Va.) 555; *Bluie v. Pollock*, 55 Miss. 309; *Jones v. Irwin*, 23 Miss. 361.

But in such States, when the probate court has once assumed jurisdiction, equity will not interfere without some special and satisfactory reason. *Seymour v. Seymour*, 4 John. Ch. (N. Y.) 409; *Van Mater v. Sickler*, 1 Stockt. N. J. Ch. 483.

In some States, however, provision exists for removing the settlement of an estate from the probate to the chancery court. *Marsh v. Richardson*, 49 Ala. 431. See *Hooper v. Smith*, 57 Ala. 557; *Bowden v. Perdue*, 59 Ala. 409.

In the case of one who has resigned or been discharged from his trust, the tendency of American authority is to treat him as one who had died in office, and close his accounts in the probate court. *Gould v. Hayes*, 19 Ala. 438; *Gerould v. Wilson*, 81 N. Y. 573; *Stalworth's Admr. v. Farnham*, 64 Ala. 259. But see *Washburn v. Dorsey*, 8 Sm. & M. (Miss.) 214; *Denson v. Denson*, 33 Miss. 560.

The jurisdiction of probate courts in the United States is statutory, and must be exercised in the manner prescribed. *Thompson v. Mott*, 1 Dem. (N. Y.) 32; s. c., 1 Redf. (N. Y.) 574; *Franks v. Groff*, 14 S. & R. (Pa.) 181; *Weyand v. Weller*, 39 Pa. St. 443.

1. *Walker v. Cheever*, 35 N. H. 345; *Adams v. Adams*, 22 Vt. 50; *Morgan v. Rotch*, 97 Mass. 396.

2. Mass. Gen. Sts. c. 99, § 6; *Martin v. Clapp*, 99 Mass. 470; *Wilson v. Leishman*, 12 Met. (Mass.) 320; *Boston v. Boyston*, 4 Mass. 322; *Arnold v. Sabin*, 4 Cush. (Mass.) 46; *Case's Appeal*, 35 Conn. 115; *Kimball v. Kimball*, 19 Vt. 579; *Higbee v. Bacon*, 7 Pick. (Mass.) 14; *O'Dee v. McCrate*, 7 Greenl. (Me.) 467; *Caleb v. Hearn*, 72 Me. 231; Col. Gen. Laws, § 2871; *Hughes v. People*, 5 Colo. 436.

In Indiana and New Jersey a bill in equity may be entertained. *Thorn v. Tyler*, 13 Blackf. (Ind.) 504; *Carpenter v. Gray*, 37 N. J. Eq. 389. *Contra*, *Caleb v. Hearn*, 72 Me. 231. See also XVI. 3, b, (1).

In most States the summary proceeding in the probate court for a discovery of assets may be employed either by or against the executor or administrator. But under Ohio Rev. St. §§ 6053-6059, authorizing an examination under oath on complaint by "executor, administrator, creditor, devisee, legatee, heir, or other person interested in the estate against any person" suspected of embezzling property of the deceased, it was held that proceedings could not be taken against an administrator or executor. *Meinzer v. Bevington*, 42 Ohio St. 325.

In New York the surrogate's authority to order an examination of one charged with secreting the property of an estate extends to cases where reasonable grounds for the inquiry are shown, and is not, under New York Code, § 2706, limited to cases in which the petitioner distinctly swears that property is in the possession or under the control of the party whom it is sought to examine. *Mead v. Sommers*, 2 Demarest (N. Y.), 296.

But a special direction of the surrogate is necessary, and the citation cannot be issued by the clerk as of course. *Manran v. Hawley*, 2 Dem. (N. Y.) 396.

The petition may be based on information and belief. *Re Walsh*, 3 Dem. (N. Y.) 202.

All of the administrators should be parties to a proceeding to compel the exami-

been in most States superseded by an application to the probate court for the removal of the executor or administrator, and the appointment of a successor.¹ Bills for legacies and distributive shares have been in some States superseded by statutory actions at law,² or by petition in the probate court.³ The proceedings in a court of probate are by petition and citation,⁴ and its decree

nation of one suspected of concealing property of the estate. *Re Slingerland*, 36 Hun (N. Y.), 575. *Contra, Re Ten Eyck*, 3 Dem. (N. Y.) 1.

Where the proceedings are instituted by an executor for the discovery of assets, if the respondent claims the property absolutely, the proceeding must be dismissed according to the amendment of 1881 to New York Code, § 2710. If, however, the respondent claims under a lien, he must state the facts necessary to sustain his claim. *Metropolitan Trust Company v. Rogers*, 1 Demarest (N. Y.), 365.

But the jurisdiction is not ousted where only a part of the property is so claimed by the respondent, or where the allegations of ownership are indefinite. *Public Administrator v. Elias*, 4 Dem. (N. Y.) 139.

Under Wag. Mo. St. p. 85, §§ 7-11, providing for the recovery of assets of a decedent's estate, where "any person has concealed or embezzled any goods, chattels, money, papers, or evidences of debt of the deceased, and has them in his possession, or under his control," it was held that recovery might be had, even where they openly held under claim of title. *Evans v. Evans*, 79 Mo. 53.

Upon an application under N. Y. Code Civ. Pro. § 2606, to compel the representative of a deceased co-representative to account and deliver over property, the respondent must submit to an examination under § 2735, notwithstanding a verified denial that property has come to his hands, or is under his control. *Wood v. Crooke*, 5 Redf. (N. Y.) 381.

Under Md. Code, § 239, providing for an examination under oath, on allegation that "the administrator has concealed, or has in his hands, and has omitted to return in the inventory, . . . any part of his decedent's assets," the petition must show collusion by the administrator. *Hignutt v. Cranor*, 62 Md. 465.

1. Schoul. Exrs. & Admsrs. § 154.

As to what grounds justify removal, see Mass. Gen. Sts. c. 101, §§ 2, 17; c. 100, § 8; c. 99, § 26; *Newcomb v. Williams*, 9 Met. (Mass.) 525; *Thayer v. Horner*, 11 Met. (Mass.) 104; *Hussey v. Coffin*, 1 Allen (Mass.), 354; *Andrews v. Tucker*, 7 Pick. (Mass.) 250; *Foltz v. Prouse*, 17 Ill. 487; *Peale v. White*, 7 La. An. 449; *Travis v. Iresley*, 28 La. An. 784; *Succession of Heard*, 28 La. An. 800; *Reynolds*

v. Zink, 27 Gratt. 29; *Kellberg's Appeal*, 86 Pa. St. 129; *Freeman v. Kellogg*, 4 Redf. (N. Y.) 218; *Harris v. Seals*, 29 Ga. 585; *Richards v. Sweetland*, 6 Cush. (Mass.) 324; *Estate of Stow, Myrick* (Cal.), Prob. 97; *Andrews v. Carr*, 2 R. I. 117; *Gregg v. Wilson*, 24 Ind. 227; 77 N. C. 360; *McFadden v. Council*, 81 N. C. 195; *Dwight v. Simon*, 4 La. An. 490; *Cooper v. Cooper*, 5 N. J. Eq. 9; *Carpenter v. Gray*, 32 N. J. Eq. 692; *Killam v. Costley*, 52 Ala. 85; *Randle v. Carter*, 62 Ala. 95; *Wright v. McNatt*, 49 Tex. 425; *Bills v. Scott*, 49 Tex. 430; *Davenport v. Irvine*, 4 J. J. Marsh. (Ky.) 60; *Morgan v. Dodge*, 44 N. H. 261.

Executors and testamentary trustees will not be ordered to dispose of securities which they should have disposed of, at the instance of an objector to their account, no harm having resulted from the retention. The remedy should be sought in proceedings for their removal from office, or for the protection of a suitable bond. *Adams v. Van Vleck*, 4 Dem. (N. Y.) 343. See IV. 1 & 2, notes. See "Probate and Letters of Administration."

2. *Purd. Dig. (Pa.)*; Mass. Gen. Sts. c. 97, § 22; *Prescott v. Barker*, 14 Mass. 428; *Blackler v. Boott*, 114 Mass. 24; *Kent v. Dunham*, 106 Mass. 586; *Colwell v. Alger*, 5 Gray (Mass.), 67; *Wilson v. Wilson*, 3 Bin. (Pa.) 559; *Clark v. Herring*, 5 Bin. (Pa.) 33; *Solliday v. Bissey*, 12 Pa. St. 341; *Colt v. Colt*, 32 Conn. 422, 451. See further, as to such actions, *Tappan v. Tappan*, 30 N. H. 505; *Cowell v. Oxford*, 6 N. J. L. 432; *Woodruff v. Woodruff*, 3 N. J. L. 552; *Tole v. Hardy*, 6 Cowen (N. Y.), 333; *De Witt v. Schoonmaker*, 2 John. (N. Y.) 243; *McNeil v. Quince*, 2 Hayw. (N. C.) 153. See LEGACIES.

3. *Hurlburt v. Durant*, 88 N. Y. 121; *Steinelle v. Oechsler*, 5 Redf. (N. Y.) 312.

But in Massachusetts, the question to whom and at what time a legacy or distributive portion under the will is to be paid, is one of which the judge of probate has no jurisdiction. *Shaw, C. J.*, in *Cowdin v. Perry*, 11 Pick. (Mass.) 503, 511, 512.

4. *Beall v. Elder*, 34 La. An. 1098; *Hood v. Hood*, 1 Dem. (N. Y.) 392.

Applications for the vacating of a decree for the revocation of letters testamentary, for a discovery and for an account, should not be united in one petition. *Hood v. Hood*, 1 Demarest (N. Y.), 392.

upon all matters within its jurisdiction is final unless vacated by appeal.¹

XVII. Accounts and Allowances. — 1. *Duty of Accounting.* — *Law in England and in the United States.* — *Settlement out of Court.* — *Effect of Death, Resignation, or Removal.* — *Effect of Lapse of Time.* — Under the English practice an executor or administrator may be cited to account by the spiritual court at the instance of an interested party,² but not *ex officio* of its own motion;³ and, unless so cited, he is under no obligation to do so.⁴ In the United States the duty of accounting in the probate court, at stated and regular intervals, is generally made a condition of the administration bond;⁵ the accounts so rendered become matter of public record; and in many States the representative may be cited to account by the probate court of its own motion.⁶ Moreover, in

1. Appleton, J., in *Williams v. Cushing*, 34 Me. 370, 375.

As to enforcing obedience to its orders by arrest and imprisonment, see *Leach v. Peabody*, 58 Vt. 485; *Ex parte Leahey*, 58 Vt. 724.

2. *Wms. Exrs.* (7th Eng. ed.) 2057.

The representative may be cited at the instance of any one having an interest, or even the *appearance* of interest. *Wms. Exrs.* (7th Eng. ed.) 975, 976, 2057; *Reilley v. Duffy*, 4 Dem. (N. Y.) 366.

A debt on which the statute of limitations has attached will enable the creditor to compel the representative to account. *Wainford v. Barker*, 1 Ld. Raym. (Eng.) 232; *Philipson v. Harvey*, 2 Cas. temp. Lee (Eng.), 344.

3. *Toller*, 491; *Archbishop of Canterbury v. Wills*, 1 Salk. (Eng.) 315, 316.

4. § XI. 7.

5. § XI. 7. See *Cowles v. Whitman*, 10 Conn. 121; *Atwater v. Bruce*, 21 Conn. 237. An executor's account cannot be settled in a suit on the probate bond. *Brush v. Bacon*, 36 Conn. 292. See *Prescott v. Parker*, 14 Mass. 429; *Coffin v. Jones*, 5 Pick. (Mass.) 61; *Adams v. Adams*, 16 Vt. 228; *Judge of Probate v. Adams*, 49 N. H. 150.

6. *Witman's Appeal*, 23 Pa. St. 376; *Re Campbell*, 12 Wis. 369.

In Alabama, when the administrator is also guardian of the distributees, the probate court has no jurisdiction. *Vaughn v. Sugg* (Ala.), 2 So. Rep. 32. See *Eatman v. Eatman* (Ala.), 2 So. Rep. 729.

Where a representative has appeared in answer to a citation, he is affected with knowledge of all subsequent proceedings. *Duffy v. Buchanan*, 8 Ala. 27.

In the United States, as in England, the representative is bound to account upon the application of any one interested in the estate. *Becker v. Hager*, 8 How. (N. Y.) Pr. 68. Creditors, legatees, and

distributees are such parties. *Harris v. Ely*, 25 N. Y. 138; *Wever v. Marvin*, 14 Barb. (N. Y.) 376; *Hobbs v. Craige*, 1 Ired. L. (N. C.) 332.

The citation is a matter of right. *Smith v. Black*, 9 Pa. St. 308.

But in *Freeman v. Rhodes*, 3 Sm. & M. (Miss.), it was held that a general creditor could not compel the administrator to account generally in the probate court, unless his claim was authenticated, and could not be recovered in all probability by suit.

One who is a devisee for life, and a pecuniary legatee, can only compel an account in chancery of what is due him. *Clifton v. Exrs. of Haig*, 4 Desaus. (S. C.) 330, 341. See *Rush v. Warren* (S. C.), 1 S. E. Rep. 363.

A *prima facie* right is sufficient to entitle a party to the citation: the court will not investigate questions which should be passed upon at the audit. *Disston's Estate*, 14 Phila. (Pa.) 310; *Bushong's Estate*, 14 Phila. (Pa.) 332; *R. Sayre*, 3 Dem. (N. Y.) 264.

But one who has no valuable interest in the estate cannot cite the executors to file an account. *Appeal of Beeber* (Pa.), 8 Atl. Rep. 191. See *Lee's Estate*, 14 Phila. (Pa.) 304.

Sisters of the deceased, who claim through their father, are not "persons interested," within the Pennsylvania statute. *Brook's Estate*, 14 Phila. (Pa.) 325.

Where one entitled to a legacy has become of age since the last accounting of the executor, he may demand a further accounting. Such coming of age is a "new fact," upon which such a demand may be predicated. *Hood v. Hood*, 1 Demarest (N. Y.), 392.

The court will refuse leave to a temporary administrator to compel a settlement of his account, until executors have been appointed. *American Bible Society v. Oakley*, 4 Dem. (N. Y.) 450.

some States, an executor or administrator who fails to account on being cited, not only incurs liability on his official bond, but is subject to indictment,¹ fine,² and removal.³ Settlement out of court does not dispense with the duty of accounting, and is not a compliance with the condition of the bond.⁴ But a residuary legatee who has given the required bond,⁵ or an executor or administrator, to whose hands no property has come, need not account.⁶

2. *Accounts of Co-Executors and Co-Administrators.* — See JOINT EXECUTORS AND ADMINISTRATORS.

If the applicant has no interest, that is sufficient defence before the probate court. *Becker v. Hager*, 8 How. Pr. (N. Y.) 68.

But relief by injunction cannot be granted upon that ground. *Becker v. Hager*, 8 How. Pr. (N. Y.) 68. See *Okeson's Appeal*, 2 Grant (Pa.), 303.

Accounting before Citation unnecessary. — The executor or administrator is not considered as neglecting or refusing to account, within the usual meaning of American statutes, until citation. *Probate Court v. Kimball*, 42 Vt. 320; *Barcalow, Matter of*, 29 N. J. Eq. 282; *Nelson v. Jaques*, 1 Greenl. 139. But see *McKim v. Harwood*, 129 Mass. 75. Compare § XI. 7.

1. *Davis v. Harper*, 54 Ga. 180; *State v. Parrish*, 4 Humph. (Tenn.) 285; 14 La. An. 779; *Judge of Probate v. Gross* (Me.), 9 Atl. Rep. 612; § XI. 7.

He may also be imprisoned for contumacy. *Carpenter v. Castille*, 14 La. Ann. 779.

2. *Collins v. Hollier*, 13 La. Ann. 585.

3. *Schoul. Exrs. & Admsrs.* § 154. See Mass. Gen. Sts. c. 101, § 2; c. 99, § 26; *Townsend's Succession*, 37 La. An. 405.

Mere delay in settling accounts has been leniently regarded where no fraud or misconduct has intervened. *Jones v. Williams*, 2 Call (Conn.), 102. See *Clark v. Hughes*, 71 Ala. 163; *Baumgarten's Succession*, 36 La. Ann. 46; *Trevelyan v. Lofft* (Va.), S. E. Rep. 901.

The duty of probate accounting is not affected by the pendency of a chancery suit. *Jones v. Jones*, 41 Md. 354. See *People v. Rollins*, 33 Hun (N. Y.), 47.

A sheriff or *ex officio* administrator may be cited to account. *McLaughlin v. Nelms*, 9 Ala. 925. See PUBLIC ADMINISTRATORS.

Provisions in the will may materially affect the duty. *Scott v. West*, 63 Wis. 529.

4. *Clark v. Clay*, 11 Fost. (N. H.) 393.

An administrator may be compelled to account in the probate court, although he produces the receipts of all the distributees. *Bard v. Wood*, 3 Met. (Mass.) 74. See

Harris v. Ely, 25 N. Y. 138; *Stewart v. Stewart*, 31 Ala. 207; *Smilie v. Siler*, 35 Ala. 88.

Even if the assets were all used in preferred charges, he is accountable. *Griffin v. Simpson*, 11 Ire. (N. C.) 126.

But if an executor has settled with a legatee, he cannot afterwards be compelled, in his account as executor, to charge himself with securities set apart to the legatee. They are held as agent, not as executor. *Woodruff v. Young*, 31 Hun (N. Y.), 420.

5. § XI. 2. See *Clarke v. Tufts*, 5 Pick. (Mass.) 337; *McElroy v. Hathaway*, 44 Mich. 399; *Copp v. Hersey*, 31 N. H. 317.

6. *Walker v. Hall*, 1 Pick. (Mass.) 20. See *In re Soutter* (N. Y.), 12 N. E. Rep. 34.

If one would have an account from the executor of a deceased executor of A.'s estate, he must aver in his petition that there are assets of A.'s estate in the hands of the executor of A.'s executor. *Maze v. Brown*, 2 Demarest (N. Y.), 217; *Le Count v. Le Count*, 1 Dem. (N. Y.) 29.

Effect of Death, Resignation, or Removal. — In the absence of express legislation, the probate court has no jurisdiction over unsettled accounts between the executor and the estate after resignation: after that time, his relations to the estate differ in no respect from those of other creditors or debtors. *Ingram v. Maynard*, 6 Tex. 130.

N. Y. Code, § 2605, specifies the persons who may call an executor to account after his letters have been revoked. Creditors cannot. *Re Duffy*, 3 Dem. (N. Y.) 251.

In many States, statutes provide that an executor or administrator shall not be permitted to resign without first settling his account, after due notice to interested parties. Mass. Gen. Stats. c. 101, § 5. See local codes; also *Thayer v. Homer*, 11 Met. (Mass.) 144; *Morgan v. Dodge*, 44 N. H. 258; *Coleman v. Raynor*, 3 Cold. (Tenn.) 25; *Haynes v. Meek*, 10 Cal. 110; *Carter v. Anderson*, 4 Ga. 516; *Sevier v. Succession of Gordon*, 25 La. An. 231; *Waller v. Ray*, 48 Ala. 468; *Ingram v. Maynard*, 6 Tex. 130.

3. *Mode of presenting Accounts. — Citation. — Authentication. — Periodical Returns.* — In American probate practice, the executor or administrator usually presents his account, on oath,¹ to the register, who issues a citation to next of kin, creditors, legatees, and all other persons interested in the estate, to appear before the probate court at a day stated, and show cause, if any they have, against its allowance.² At the hearing, parties in interest may

The successor in the trust is a proper party to such final accounting. *Waller v. Ray*, 48 Ala. 468.

Where the representative is discharged or removed, parties in interest have the usual right to object to the account. *Poulson v. Frenchtown Bank*, 33 N. J. Eq. 618.

Final probate decree on settlement of the accounts of a removed executor or administrator concludes his sureties. *Kelly v. West*, 80 N. Y. 139.

When a sole executor or administrator dies without accounting, his final account should be settled by his executor or administrator. *Curtis v. Bailey*, 1 Pick. (Mass.) 199. See *Maze v. Brown*, 2 Dem. (N. Y.) 217; *Le Count v. Le Count*, 1 Dem. (N. Y.) 29.

It has also been held that it may be settled by his surety's representative to protect the bond. *Curtis v. Bailey*, 1 Pick. (Mass.) 199. But see *Schenck v. Schenck*, 2 Pen. (N. J.) L. 562. Compare § XI. 6.

When one co-executor or co-administrator dies, his accounts must be settled by the survivor or survivors. *Mass. Pub. Sts. c. 144*.

In conclusion it should be observed, that the settlement of the accounts of a representative who has died, been removed, or resigned, is in the nature of a transfer of the balance due to his successor. *Allison v. Abrams*, 40 Miss. 747. See *Price v. Simmons*, 13 Ala. 749; *Hamaker's Estate*, 5 Watts (Pa.), 204.

As to the remedies for recovering a balance found due on the account of a deceased predecessor, see *Munroe v. Holmes*, 9 Allen (Mass.), 244; *Re Bingham*, 32 Vt. 329.

Effect of Lapse of Time. — In the absence of special circumstances, as the death of all parties cognizant of the transactions, loss of papers, or destruction of records, unless the administration has been closed, and the executor or administrator been discharged, lapse of time for less than twenty years is no bar to an order by the probate court to account. *Campbell v. Bruen*, 1 Bradf. (N. Y.) 224. See *Portis v. Cummings*, 14 Tex. 139; *Stamper v. Garnett*, 31 Gratt. (Va.) 550; 9 Phila. (Pa.) 344; *Landis's Estate*, 13 Phila. (Pa.) 305. See *Foster v. Town*, 2 Dem. (N. Y.) 333; *Montgomery v. Cloud* (S. C.), 3 S. E. Rep. 195.

An executor has been ordered to file an

account although twenty-five years have elapsed since the testator's death. *Nixon's Estate*, 14 Phila. (Pa.) 297.

An executor failed to account for a long period, and pleaded the statute of limitations and laches to a demand for an accounting. *Held*, that his obligation to account was continuous, and the right to demand one could be asserted as long as the duty remained unperformed. *In re Sanderson* (Cal.), 15 Pac. Rep. 753.

1. *Schoul. Exrs. & Admsrs. § 525.*

In some States this oath, to the effect that the account is just and true, is administered in open court by the probate judge; but current legislation generally permits it to be taken before a justice of the peace or a notary public. See *Gardner v. Gardner*, 7 Paige (N. Y.), 112.

2. *Schoul. Exrs. & Admsrs. § 523.*

Citation is usually by newspaper publication, but differs somewhat in the several States: the requirements of the local statute must be strictly pursued. It should follow the prayer of the petition. See *Robinson v. Steele*, 5 Ala. 473; 21 Ala. 363; *Scott v. Kennedy*, 12 B. Mon. (Ky.) 510; *Neal v. Wellons*, 20 Miss. 649; *Steele v. Morrison*, 4 Dana, 617; 5 Hayw. 261; *Schlegel v. Winckel*, 2 Dem. (N. Y.) 232.

But in some States accessible parties are entitled to personal service. *Roberts v. Roberts*, 34 Miss. 322.

Citation may be dispensed with when all interested parties (or more particularly those entitled to the surplus) express in writing their request that the account may be allowed without further notice. In some States it has also been held unnecessary in the case of partial accounts. *Schoul. Exrs. & Admsrs. § 523.*

In some States, infants and persons *non sui juris* interested in the account must have a special guardian appointed to represent them. *Gunning v. Lockman*, 3 Redf. (N. Y.) 273.

But, although the probate decree may be voidable at the option of an infant, such disability cannot be invoked by another in his own behalf. *Hutton v. Williams*, 60 Ala. 107.

Notice is not a prerequisite of jurisdiction, and the want of notice may be cured by voluntary appearance. *Semoice v. Semoice*, 35 Ala. 295.

appear and object, and the judge, in his discretion, may ask proof of particular items, and ascertain judicially that the account is correct before allowing it.¹

4. *Form and Contents.* — The characteristic of probate accounting is, that the representative charges himself in the first instance with the total amount of the personal property as returned in the inventory; and if any of these assets realize at a loss, or subsequently become worth less than their valuation, he asks a special credit for the difference between the actual value and the amount so charged against him.² On the other hand, if particular assets

Neglect of parties who have been properly notified to attend the final settlement enables the representative to proceed *ex parte* as to those who fail to appear. *Owens v. Thurmonds*, 40 Ala. 289.

1. Schoul. Exrs. & Admsrs, § 525. See *Trotter v. Trotter*, 40 Miss. 704; *McFarlane v. Randle*, 41 Miss. 411.

The probate court may proceed to determine whether a party who objects to an account has any interest in the estate, notwithstanding such party's sworn statement that he has an interest. *Garwood v. Garwood*, 29 Cal. 514. *Halleck's Estate*, 49 Cal. 111.

The interest should be alleged of record. 2 *Harring*. (Del.) 273. When one of two executors presents his account for settlement, his associate may contest it. *Mead v. Willoughby*, 4 Dem. (N. Y.) 364.

Creditors of distributees have not sufficient interest to entitle them to object. *Owens v. Thurmonds*, 40 Ala. 289.

In American probate practice, as in the old ecclesiastical practice, the personal representative is a competent witness to small charges, but large items objected to must be verified by vouchers or extraneous proof. *Bailey v. Blainchard*, 12 Pick. (Mass.) 166; *Hall v. Hall*, 1 Mass. 101; *Davenport v. Lawrence*, 19 Tex. 317; *Succession of Foulkes*, 12 La. An. 537; *Peyton v. Smith*, 2 Dev. & B. (N. C.) Eq. 325.

Under some local codes, interrogatories are proposed to the representative touching any specific matter affecting his accounts, and the objecting party may disprove his answers. *Stearns v. Brown*, 1 Pick. (Mass.) 530; *Higbee v. Bacon*, 8 Pick. (Mass.) 484; *Smith*, Prob. Pract. 183; *Hammond v. Hammond*, 2 Bland (Md.), 306; 44 Mich. 57. See *Ogilvie v. Ogilvie*, 1 Bradf. (N. Y.).

Where chancery precedents are followed, a party seeking to surcharge an account should specify the particular items objected to, and an issue will be framed accordingly. *Tanner v. Skinner*, 11 Bush (Ky.), 120; *Gardner v. Gardner*, 7 Paige (N. Y.), 114; *Buchan v. Rintoul*, 70 N. Y. 1.

As to the effect and necessity of producing vouchers, see *Lidderdale v. Robinson*, 2 Brock. (C. C.) 159; *Finch v. Ragland*, 2

Dev. Eq. N. C. 137; *Romig's Appeal*, 84 Pa. St. 235.

Payments cannot be rejected because neither the accounts nor the oath show to whom the payments were made: the testimony of the representative is admissible on this point. *Re Nichols*, 4 Redf. (N. Y.) 288.

As to appointing an auditor, see *Dwyer v. Kaltayer* (Tex.), 5 S.W. Rep. 75. As to sending an issue to a jury, and effect of verdict. *Ward v. Tinkham* (Mich.), 32 N.W. Rep. 901. *In re Moore* (Cal.), 13 Pac. Rep. 880.

Periodical Returns. — American probate practice generally requires an executor or administrator to file his account within one year, and, if the estate is not wound up within that period, to file other accounts annually until final settlement. See Mass. Pub. Sts. c. 144; *Musick v. Beebe*, 17 Kan. 47; *Wellborn v. Rogers*, 24 Ga. 558; *Koon v. Munro*, 11 S.C. 139; *Irwin's Appeal* (Pa.), 9 Atl. Rep. 298.

Where assets come to the hands of the executor or administrator after a partial account, he is bound to render a supplemental account, including such assets, within a reasonable time afterwards. *Witman's Appeal*, 28 Pa. St. 376; *Shaffer's Appeal*, 46 Pa. St. 131.

A further accounting will not necessarily be ordered merely because additional assets have come to the executor's hands. The accounting may be postponed, in the discretion of the court, until it can be made a final accounting. *Re Wetmore*, 3 Demarest (N. Y.), 414.

An administratrix will not be required to file an account when it appears that the money that she has received since her former account was audited was required to make up a balance then found to be due to her. *Lee's Estate*, 14 Phila. (Pa.) 304.

An administrator is not excused for his failure to file annual accounts by the fact that an account filed by him several years before had never been acted upon. *Ex parte Pearce*, 44 Ark. 509.

2. Schoul. Exrs. & Admsrs. §§ 524, 536. See *Bogan v. Walter*, 12 Sm. & M. (Miss.) 666.

A convenient form in many States makes the general statement on the face of the account refer for details to schedule A.

prove to be worth more than the amount stated in the inventory, the representative must charge himself with the actual value. Every description of personal property — new assets, assets omitted from the inventory, income interest, and profits derived directly or indirectly out of the assets — should be included in the account.¹ But real estate, or the profits of real estate, should not be included.²

5. *Charges and Allowances.* — *Assets not inventoried nor credited.* — *Profits.* — *Charging Interest and Compound Interest.* — *Payments, Expenses, Disbursements.* — *Contracts made by Representative in the Interests of the Estate.* — *Maintenance and Education of Minors.* — *Disbursements to Legatees and Distributees.* — *Payments to Collectors, Factors, and Agents.* — *Counsel Fees.* — *Costs.* — *Commissions and Compensation.* — Assets neither inventoried nor credited,³ and

and schedule B. Schedule A. contains all the items with which the representative charges himself, making the inventory valuation the first item in a first account, and the balance from the next preceding account the first item in each succeeding account. Schedule B. contains in detail the losses upon the inventory valuation, payments, and charges. The usual rules of single-entry book-keeping are observed. Schoul. Exrs. & Admsrs. § 524. The items of the inventory need not be repeated in the account, but only the gross amount debited. Sheldon v. Wright, 7 Barb. (N. Y.) 39.

While the above form of making up the account is desirable, it is not essential: a clear and definite presentation only is necessary. *Re Solomon's Estate*, 3 Dem. (N. Y.) 307.

The proper number of each administration account should be stated on its face; a final account should distinctly purport to be such. Bennett v. Hannifin, 87 Ill. 31.

But the mere fact that an account which appears on its face to be final is not so styled in the caption, will not prevent its being so considered. Stevenson v. Phillips, 21 N. J. L. 70.

1. Schoul. Exrs. & Admsrs. § 537. See Sugden v. Crossland, 3 Sm. & G. (Eng.) 192; Liddell v. McVickar, 11 N. J. L. 44; Allen v. Hubbard, 8 N. H. 487.

The account should include a statement of partnership affairs, if the surviving partner be executor. Woodruff v. Woodruff, 17 Abb. (N. Y.) Pr. 165.

Every item of receipt and expenditure should be distinctly entered. Hutchinson's Appeal, 34 Conn. 300. *Re Jones*, 1 Redf. (N. Y.) 263; 4 Day (Conn.), 137.

Income should be stated as a separate item from principal. Evan's Estate, 11 Phila. (Pa.) 113; Stone v. Stilwell, 23 Ark. 444.

If there is no increase of profit, that fact should be stated. *In re Jones*, 1 Redf. (N. Y.) 263.

An administrator having appeared before the commissioner appointed for the purpose of making a settlement of his ac-

count, it was proper to include the settlement of his account as agent for the testator during her lifetime, although no notice was given that he would be called upon to settle his accounts as such agent. Trevelyan's Admr. v. Lofft (Va.), 1 S. E. Rep. 901. See further, as to what property the administrator is chargeable with, Morrell's Estate, 13 Phila. (Pa.) 305; Haberman's Appeal, 101 Pa. St. 329; Wilson v. Arrick, 4 McArthur (D. C.), 228; Hooper's Exrs. (W. Va.) 1 S. E. Rep. 280; Schick v. Grote (N. J.), 7 Atl. Rep. 852; Miller v. Harris (Ill.), 10 N. E. Rep. 387; Sanderson v. Sanderson, 20 Fla. 292. Debts due from the representative to the estate. Condit v. Winslow, 106 Ind. 142; Baucus v. Stover, 89 N. Y. 1; Sorrels v. Trantham (Ark.), 3 S. W. Rep. 198; *Re Consalus*, 95 N. Y. 340.

2. See Walker's Appeal (Pa.), 9 Atl. Rep. 564; Levis v. Carson, 3 S. W. Rep. 483. See XVII. 5, n.

If the heirs or devisees permit the representative to take charge of the realty, his account to them becomes a special account as attorney. See § XII. 3, c.

Otherwise of chattels real. See Gottsberger v. Smith, 2 Bradf. (N. Y.) 86.

Real estate sold by the representative for the payment of debts is generally accounted for under special schedules, as may all funds set apart for special purposes in compliance with law or with the directions of the will. Schoul. Exrs. & Admsrs. § 539.

3. Boston v. Boylston, 4 Mass. 318, 322; Hurlburt v. Wheeler, 40 N. H. 73. See Wills v. Drum, 5 Gratt. (Va.) 384; Downie v. Knowles, 37 N. J. Eq. 513; *In re Kellogg* (N. Y.), 10 N. E. Rep. 152.

Executors cannot be charged, on reference to a master, with assets which they might, but for their wilful default, have received, where the decree at the hearing directed only the common accounts against them; and, on the case coming on for further directions on the master's part, Lord Langdale, M. R., held that no inquiry could

all profits directly or indirectly derived out of the assets, either spontaneously or through the representative's acts,¹ will be charged against him in the final settlement of the estate, although not included in his account.² Interest will only be charged against an executor or administrator when he has actually received interest, or has been guilty of negligence in not making investments for the benefit of the estate, or retained money in his own hands which he ought to have paid over, or applied the funds of the estate to his own use.³

then be directed on the subject. *Garland v. Littlewood*, 1 Beav. (Eng.) 527. See *Brown v. Spooner*, 1 Ves. Jr. (Eng.) 291; *Sanderson v. Overman* (N. C.), 3 S. E. Rep. 502.

1. Wms. Exrs. (7th Eng. ed.) 1841. See § XV. 2, *f*; XV. 3, *b*, (3); XIII. 7. Sales by executors, etc., purchases by himself. *Palmer v. Mitchell*, 2 My. & K. (Eng.) 672; *Willett v. Blanford*, 1 Hare (Eng.), 253; *Wedderburn v. Wedderburn*, 22 Beav. (Eng.) 100; *Cook v. Collinbridge*, Jacob. (Eng.) 607; *Barker v. Smith*, 1 Dem. (N. Y.) 290; *Re Gilbert*, 39 Hun (N. Y.), 61; *Re Glenn*, 20 S. C. 64; *Crawford v. Tribble*, 69 Ga. 519; *Dilworth's Appeal*, 108 Pa. St. 92.

This is on the principle that a trustee shall derive no profit from the use of the trust funds. *McKnight v. Walsh*, 24 N. J. Eq. 498, 509; *Norris's Appeal*, 71 Pa. St. 106; *Watson v. Whitten*, 3 Rich. (S. C.) 224.

Surviving partners, who, while executors of a deceased partner, continued the trade with the assets of the deceased, must account for the profits made by such assets, although they took the precaution of securing them by a mortgage upon the real and personal property of the partnership. *Townend v. Townend*, 1 Giff. (Eng.) 201.

An executor who compounds debts or mortgages, and buys them in at a discount, is only entitled to credit for the sum paid. *Anon.* 1 Salk. (Eng.) 155. *Ex parte James*, 8 Ves. (Eng.) 346; *Calvert v. Holland*, 9 B. Mon. (Ky.) 458; *Carruthers v. Corbin*, 38 Ga. 75; *Paff v. Kinney*, 1 Bradf. Sur. (N. Y.) 1; *Heager's Exrs.* 15 John. (N. Y.) 65; *Chevalier v. Wilson*, 17 Ev. 161; *Miller v. Towles*, 4 J. J. Marsh. (Ky.) 255; *Trimble v. James*, 40 Ark. 393.

A purchase of legacies by the executor at a discount cannot be upheld. *Barton v. Hassard*, 3 Dr. & W. (Eng.) 461.

So, a person who, with a view to taking administration of the estate, buys claims against it at a discount, is entitled to credit only for the sum actually paid. *Chevallier v. Wilson*, 1 Tex. 161.

For the same reason, the executor may be required by the probate court to pay the debts of the estate in the kind of money he has received as the property of the estate. *Magraw v. McGlynn*, 26 Cal. 420; *In re Sanderson* (Cal.), 15 Pac. Rep. 753.

Bonuses from borrowers belong to the estate. *Savage v. Gould*, 60 How. Pr.

(N. Y.) 217. *Contra*, *Gordon v. West*, 8 N. H. 444, 456, 457.

Usury, when received, will be charged. *Barney v. Saunders*, 16 How. (U. S.) 543.

The personal representative cannot take assets at the appraised value, and make what he can out of them. *Weed v. Lermond*, 33 Me. 492.

2. *Boston v. Boylston*, 4 Mass. 318; *Hurlburt v. Wheeler*, 40 N. H. 73; *Hovey v. Smith*, 1 Barb. (N. Y.) 372; *Gardner v. Gardner*, 7 Paige (N. Y.), 112. Under what circumstances the representative will be charged with losses, see *Harwood v. Robinson*, 14 Ill. App. 560; *Torrance v. Davidson*, 92 N. C. 437; s. c., 43 Am. Rep. 419; *Haight v. Brisbin*, 100 N. Y. 219; *Rolfe v. Van Sickle*, 40 N. J. Eq. 158; *De-priest v. Patterson*, 92 N. C. 402; *Turbeville v. Flower* (S. C.), 3 S. E. Rep. 542; *Clark v. Enbank* (Ala.), 3 So. Rep. 49; *Re Storm*, 28 Hun (N. Y.), 499; *Weldy's Appeal*, 102 Pa. St. 454; *Gillespie's Estate*, 13 Phila. (Pa.) 239; *Cline's Appeal*, 106 Pa. St. 617; *Rogers v. Hand*, 39 N. J. Eq. 270; *Sherman v. Lenier*, 39 N. J. Eq. 249; XV. 3.

3. Wms. Exrs. (7th Eng. ed.) 1844; *Lincoln v. Allen*, 4 Bro. P. C. (Tomi. ed.) 553; *Ashburnham v. Thompson*, 13 Ves. 401. See *Parker, C. J.*, in *Wyman v. Hubbard*, 13 Mass. 232, 233; *Williams v. American Bank*, 4 Met. (Mass.) 317, 324; *Wilde in Stearns v. Brown*, 1 Pick. (Mass.) 531; *Richardson, C. J.*, in *Griswold v. Chandler*, 5 N. H. 497; *Gilchrist, C. J.*, in *Mathes v. Bennett*, 21 N. H. 199; *Sargent, J.*, in *Lund v. Lund*, 41 N. H. 359; *Knight v. Loomis*, 30 Me. 204, 209, 210; *Norris's Appeal*, 71 Pa. St. 106; *Dexter v. Arnold*, 3 Mason (C. C.), 290; *The State v. Mayhew*, 4 Halst. (N. J.) 70, 77; *Voorhees v. Spotohoff*, 6 Halst. (N. J.) 145; *Darrel v. Edne*, 3 Des. (S. C.) 241; *Turney v. Williams*, 3 Des. (S. C.) 173, 213; *Hough v. Harvey*, 71 Ill. 72; *Lake v. Park*, 4 Harrison (Del.), 199; *Gray v. Thompson*, 1 John. Ch. (N. Y.) 82; *Wright v. Grovier*, 25 Mich. 428. See *Perry on Trusts*, §§ 468-472; *Walker's Appeal*, 9 (Pa.) Atl. Rep. 654.

Greater reluctance is shown in charging executors or administrators with interest for simply allowing funds to lie idle than in the case of trustees, since their primary function is to administer, not to invest. *Parker, C. J.*, in *Wyman v. Hubbard*, 13 Mass. 232, 233.

As a general rule, executors and administrators are not chargeable with interest for one year after they have taken out letters (that time being allowed them to get in the estate, and settle their accounts), unless they have actually received it, or have used the money during that time. *Fox v. Wilcox*, 1 Bin. (Pa.) 194; *Brandon v. Hoggatt*, 32 Miss. 335, 340; *Verner's Estate*, 6 Watts (Pa.), 250. See *Findley v. Smith*, 7 S. & R. (Pa.) 264, 268; *Bitzer v. Hahn*, 14 S. & R. (Pa.) 232; *Commonwealth v. Mateer*, 16 S. & R. (Pa.) 416, 421; *Walthour v. Walthour*, 2 Grant (Pa.), 102; *Levin on Trusts* (5th Eng. ed.), 279; *Ogilvie v. Ogilvie*, 1 Bradf. (N. Y.) Sur. 356; *Jacob v. Emmett*, 11 Paige (N. Y.), 145; *ante*, XV. 3, 6(3), n.

After the expiration of the year, interest begins to run on the balance found in their hands on the annual accounting. *McCall's Estate*, 1 Ashm. (Pa.) 357, 362; *Boynton v. Dyer*, 18 Pick. (Mass.) 2, 8; *Gilman v. Gilman*, 2 Lans. (N. Y.) 1.

Where sums have been received after that time, the court will allow six months from the time of receipt before the charge of interest is to commence. *Merrick's Estate*, 1 Ashm. (Pa.), 305; *Worrell's Appeal*, 23 Pa. St. 44. See *Karl, Ch.*, in *Dunscomb v. Dunscomb*, 1 John. Ch. (N. Y.) 511; *Ringgold*, 1 H. & Gill, 11; *McKnight v. Walsh*, 24 N. J. Eq. 498, 509; *Voorhees v. Stoothoff*, 6 Hast. (N. J.) 155.

At all events, reasonable time should be allowed the executor in which to seek investments. *Dillard v. Tomlinson*, 1 Munf. (Va.) 183; *Carter v. Cutting*, 5 Munf. (Va.) 223; *Ringgold v. Ringgold*, 1 H. & Gill (Md.), 11.

In *Barney v. Saunders*, 16 How. (U. S.) 544, three months was considered not too long to allow money to remain on deposit.

In *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231, one year from the death of the testator was allowed to make an investment directed by the will.

The executor or administrator may exempt himself from liability by showing that he duly appropriated the fund to the purposes of the estate, or that he retained it *bona fide* to await the result of suits brought, or likely to be brought, against the estate. *Lamb v. Lamb*, 11 Pick. (Mass.) 371, 374, 375; *Dortch v. Dortch*, 71 N. C. 224; *Grattan v. Appleton*, 2 Story, 755, 766; *Arndt v. Linney*, 1 Dev. Eq. (N. C.) 367; *Lafont v. Ricaud*, 1 Bailey, Eq. (S. C.) 487; *Pace v. Burton*, 1 McCord, Ch. (S. C.) 247; *Wilson v. Wilson*, 3 Gill & J. (Md.) 20, 24; *Burtis v. Dodge*, 1 Barb. Ch. (N. Y.) 78, 90; *Booker v. Armstrong* (Mo.), 4 S. W. Rep. 727.

But the mere existence of outstanding demands is no excuse for allowing the money to lie idle. 3 Bro. C. C. (Eng.) 434; 1 Madd. (Eng.) 305.

As against a distributee or legatee, it is also a good defence to an application to charge interest for undue delay in paying

over a legacy or distributive share, that no demand was made and refunding bond tendered (where that is required before suit, to give a right of action); and in case of a minor, that no guardian was appointed, and that he has not used the funds for his own purposes. *Patterson v. Nichol*, 6 Watts (Pa.), 379, 382; *Sparhawk v. Buell*, 9 Vt. 42, 82; *Cavendish v. Fleming*, 3 Munf. (Va.) 201; *Overstreet v. Potts*, 4 Dana (Ky.), 138; *Handy v. State*, 7 Harr. & J. (Md.) 43, 46. But see *Hullett v. Allen*, 13 Ala. 555, 558; *Bourne v. Meehan*, 1 Gratt. (Va.) 292; *Flintham's Appeal*, 11 S. & R. (Pa.) 16.

Executors or administrators who trade with the assets, mingle them with their own funds, or deposit them in bank in their own name, are chargeable with interest on the assets so treated. *Matter of Davis*, 62 Mo. 454; *Treves v. Townshend*, 1 Bro. C. C. (Eng.) 385; *Sutton v. Sharp*, 1 Russ. (Eng.) 151, 152; *Rocke v. Hart*, 11 Ves. 61; *Mayor v. Murray*, 7 De G. M. & G. (Eng.) 519; *Griswold v. Chandler*, 5 N. H. 492; *Kerr v. Laird*, 27 Miss. 544; *Troup v. Rice*, 55 Miss. 278; *Clark's Estate*, 53 Cal. 355; *Union Bank of Georgetown v. Smith*, 4 Cranch (C. C.), 509; *Clark v. Knox*, 70 Ala. 607; *Grigsby v. Wilkinson*, 9 Bush (Ky.), 91; *Dunscomb v. Dunscomb*, 1 John. Ch. (N. Y.) 510; *Brown v. Ricketts*, 4 John. Ch. (N. Y.) 303, 305; *Mumford v. Murray*, 6 John. Ch. (N. Y.) 1; *Garniss v. Gardiner*, 1 Edw. Ch. (N. Y.) 128; *Kellett v. Rathbun*, 4 Paige (N. Y.), 102; *Jacob v. Emmett*, 11 Paige (N. Y.), 142; *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 77; *Spear v. Tinkham*, 2 Barb. Ch. (N. Y.) 211; *Diffenderfer v. Winder*, 3 Gill & J. (Md.) 341; *Peyton v. Smith*, 2 Dev. & B. Eq. (N. C.) 325; *Jameson v. Shelby*, 2 Humph. (Tenn.) 198; *In re Thorp*, *Daveis* (U. S. D. C.), 290; *Merrick's Estate*, 2 Ashm. (Pa.) 485; *Dyott's Estate*, 2 W. & S. (Pa.) 565; *Norris's Appeal*, 71 Pa. St. 106.

Some cases seem to hold, that, in addition to the mere mingling or use of the money by the representative, there must be super-added a breach of trust, — a neglect or refusal to invest the money at the time and in the mode which the trust instrument or the law has pointed out. *Rapalje v. Hall*, Exr. of *Norsworthy*, 1 Sandf. Ch. (N. Y.) 399. See *Graver's Appeal*, 50 Pa. St. 189.

A trustee, who is a member of a firm of bankers, may make a deposit with the firm in his own name as trustee without rendering himself chargeable with interest, although the firm made a profit on the deposit. *Hess's Estate*, 69 Pa. St. 454.

On improper payments, disallowed in the accounts, one is not readily charged with interest. *Clauser's Estate*, 84 Pa. St. 51.

An administrator is chargeable with interest upon uncollected notes bearing interest at the rate they bear. *Strong v. Wilkison*, 14 Mo. 116.

It has also been *held* that he is liable for interest where, by his wrongful act, he disappoints claimants, as by mispayments. *Jones v. Ward*, 10 Yerg. (Tenn.) 161, 163.

An executor or administrator who has diligently and faithfully discharged his trust, will only be charged with the interest actually made. Commonwealth to use of *Huston v. Mateer*, 16 S. & R. 416; *Karr v. Karr*, 6 Dana (Ky.), 3; *Voorhees v. Stoothoff*, 11 N. J. L. 145.

In Massachusetts an administrator may be examined under oath to ascertain whether he is liable to pay interest on certain moneys of the estate. *Saxton v. Chamberlain*, 6 Pick. (Mass.) 423. See *Johnson v. Holifield* (Ala.), 2 So. Rep. 753.

An administrator is not chargeable with interest agreed to be paid on a loan improperly made by him, unless he has collected, or could collect, such interest. *In re Moore* (Cal.), 13 Pac. Rep. 880.

Under what circumstances it is negligence in an executor or administrator to keep money dead in his hands, see *Longmore v. Broom*, 7 Ves. (Eng.) 124; *Ashburnham v. Thompson*, 13 Ves. (Eng.) 401; *Turner v. Turner*, 1 Jac. & W. (Eng.) 39; *Goodchild v. Fenton*, 4 Y. & Jerv. (Eng.) 481; *Stafford v. Fiddon*, 23 Beav. (Eng.) 380; *Johnson v. Prendergast*, 28 Beav. (Eng.) 480; *English v. Harvey*, 2 R. (Pa.) 305; *Billington's Appeal*, 3 R. (Pa.) 48; *Clarke's Appeal*, 2 Watts (Pa.), 405; *McCall's Est.* 1 Ashm. (Pa.) 305; *Aston's Estate*, 5 Whart. (Pa.) 228; *Armstrong v. Miller*, 6 Ham. 118; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185; *Lomax v. Pendleton*, 3 Call, 528; *Dunscomb v. Dunscomb*, 1 John. Ch. (N. Y.) 508; *Schieffelin v. Stewart*, 1 John. Ch. (N. Y.) 620; *Darrel v. Eden*, 3 Des. (S. C.) 261; *Handly v. Snodgrass*, 9 Leigh (Va.), 484; *Garniss v. Gardiner*, 1 Edw. Ch. (N. Y.) 128; *Williamson v. Williamson*, 6 Paige (N. Y.), 298.

If money already out at interest is recalled by the executor without reason, he will be chargeable with interest. *Sir Jos. Jekyll in Taylor v. Gerst, Morseley* (Eng.), 99; *Verner's Estate*, 6 Watts (Pa.), 250; But see *McQueen's Estate*, 44 Cal. 584; *Brooks v. Brooks*, 12 S. C. 422. But if he thinks an interest bearing debt at hazard, he has an honest discretion to recall it. *Lord Thurlow in Newton v. Bennett*, 1 Bro. C. C. (Eng.) 359, 361.

Mere neglect by an executor to invest funds which he may be called upon at any moment to pay over to the distributees, is no ground for charging him with interest if the money has been kept in bank, or otherwise ready to be paid over if called for. *Burtis v. Dodge*, 1 Barb. Ch. (N. Y.) 77. Compare *Baskin v. Baskin*, 4 Lans. (N. Y.) 90; *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 440, 448; *Hasler v. Hasler*, 1 Bradf. Sur. (N. Y.) 248. Nor is retention of a balance by the representative under a fairer

apprehension of his right to it. *Bruere v. Pemberton*, 12 Ves. (Eng.) 386; *Wright v. Grovier*, 25 Mich. 428.

Nor is he liable to pay interest on money paid away under a mistake as to the legal right to it. *Saltmarsh v. Barrett*, 31 Beav. (Eng.) 349.

As to the liability of an administrator *pendente lite* for interest, see *Gallivan v. Evans*, 1 Ball & Beat. (Eng.) 191.

An executor or administrator is chargeable with interest if he unreasonably neglects or refuses to account. *Lyles v. Hatton*, 6 Gill & J. (Md.) 122; *Comegys v. The State*, 10 Gill & J. (Md.) 176, 186; *Turney v. Williams*, 7 Yerger (Tenn.), 172; *Smithers v. Hooper*, 23 Md. 273; *Lommen v. Tobiasian*, 52 Iowa, 665. See *Matter of Davis*, 62 Mo. 450; *Binion v. Miller*, 27 Ga. 78; *Walker's Appeal* (Pa.), 9 Atl. Rep. 654. Or to make distribution. *Gray v. Thompson*, 1 John. Ch. (N. Y.) 82; *Smithers v. Hooper*, 23 Md. 273; *Wright v. Grovier*, 25 Mich. 428. But not if those interested in the estate have been equally guilty of laches in protracting the settlement. *Forward v. Forward*, 6 Allen (Mass.), 494. See *Johnson v. Holifield* (Ala.), 2 So. Rep. 753.

Executors and administrators are not chargeable with interest on funds in their hands during the pendency of their accounts in court, on exceptions or appeal, because it could not be paid over before final confirmation, unless in the interval they have used the money. *Hoopes v. Brinton*, 8 Watts (Pa.), 73; *Stearns v. Brown*, 1 Pick. (Mass.) 530, 533; *Wendell v. French*, 19 N. H. 205, 213; *Duncan v. Dent*, 5 Rich. Eq. (S. C.) 7. See *Flint-ham's Appeal*, 11 S. & R. (Pa.) 17; *Yundt's Appeal*, 13 Pa. St. 575, 581, 582; *January v. Poyntz*, 2 B. Mon. (Ky.) 404; *Brandon v. Hoggatt*, 32 Miss. 335; *Young v. Brush*, 38 Barb. (N. Y.) 294.

During the pendency of a suit for account and distribution of fund in his hands, the representative should ask leave to pay such fund into court, or for authority to invest it under the court's direction. *Hosack v. Rogers*, 9 Paige (N. Y.), 461.

But after final settlement, and an order of distribution, he becomes liable for interest without demand. *Henry v. State*, 9 Miss. 778.

Where an executor or administrator, after the settling of the estate, assumes the functions of guardian or trustee, or the will clothes him with a trust to invest, he becomes liable as guardian or trustee to invest, and chargeable with interest accordingly for failure to do so. *Karr*, 6 Dana (Ky.), 3, 5; *Smith v. Lampton*, 8 Dana (Ky.), 69, 73; *Bitzer v. Hahn*, 14 S. & R. (Pa.) 232; *Adams v. Spalding*, 12 Conn. 350, 360.

In the absence of wilful default, American practice does not favor charging the representative with interest upon funds

which he is prepared to disburse, and denying him commissions at the same time. *Troup v. Rice*, 55 Miss. 278; *Lloyd's Estate*, 82 Pa. St. 143.

Manner of calculating Interest. — Annual Balances. — In taking the account, it has been held proper to treat funds received during the current year as unproductive until its close, and to regard all expenditures, including compensation and commissions of trustees in the course of the year, as made before the balance struck, and on the balance so struck to calculate the interest in such way as to avoid compounding it. *Pettus v. Clawson*, 4 Rich. Eq. (S. C.) 92; *Burwell v. Anderson*, 3 Leigh (Va.), 348; *Garnett v. Carr*, 3 Leigh (Va.), 407; *Campbell v. Williams*, 3 Monr. 122; *Powell v. Powell*, 10 Ala. 900; *Jones v. Ward*, 10 Verg. (Tenn.) 160; *Walker v. Bynum*, 4 Desaus. (S. C.) 555; *Jordan v. Hunt*, 2 Hill, Eq. 145; *Rowland v. Best*, 2 McCord, Ch. (S. C.) 317; *Reynolds v. Walker*, 29 Miss. 250; *Crump v. Gerock*, 40 Miss. 765; *Roach v. Jelks*, 40 Miss. 754; *Clarkson v. De Peyster*, 2 Wend. (N. Y.) 78; *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.), 288; *Boynton v. Dyer*, 18 Pick. (Mass.) 1; *Luken's Appeal*, 47 Pa. St. 356; *Callaghan v. Hall*, 1 S. & R. (Pa.) 241.

Where an executor's account showed a balance in his hands in 1842, for which he should account to the legatees, less the expense of accounting, held, that that expense should be deducted after and not before computing interest on the balance. *Re Barcalow*, 36 N. J. Eq. 611.

But where the annual balances are too small to have been put at interest, and the executor has received no credit or profit from them, interest will only be charged on the accumulated balances. See *Rapalje v. Nosworthy*, 1 Sand. Ch. (N. Y.) 399; *Luken's Appeal*, 47 Pa. St. 356; *Graver's Appeal*, 50 Pa. St. 189; *Fay v. Howe*, 1 Pick. (Mass.) 527; *Gilman v. Gilman*, 2 Lans. (N. Y.) 1; *Woods v. Garnett*, 6 Leigh (Va.), 271; *Bond v. Abbott*, 42 Ala. 499.

Rate of Interest. — The English rule, as established by the authorities, is that, if an executor or administrator has retained balances in his hands which he ought to have invested, the court will charge him with simple interest at 4 *l.* per cent on the balances; but if, in addition to such retention, he has committed a direct breach of trust, mingled the funds of the estate with his own, or been guilty of misconduct, he will be charged after the rate of 5 *l.* per cent, that being the highest legal rate, and the presumed amount of profits. *Romilly, M. R.*, in *Jones v. Foxall*, 15 Beav. (Eng.) 338; *Williams v. Powell*, 15 Beav. (Eng.) 461; *Knott v. Cottee*, 16 Beav. (Eng.) 80; *Treves v. Townshend*, 1 Bro. C. C. (Eng.) 385; *Rocke v. Hart*, 11 Ves. (Eng.) 61.

The presumption that he has made 5 *l.*

per cent may be rebutted. *Rocke v. Hart*, 11 Ves. (Eng.) 61.

As to how far the English chancery practice of varying the rate of interest upon equitable principles has been adopted in the United States, see *Christie's Estate*, 1 Tuck. (N. Y.) Sur. 81; *Wendell v. French*, 19 N. H. 213; *Griswold v. Chandler*, 5 N. H. 497; *Lund v. Lund*, 41 N. H. 359; *Diffenderfer v. Winder*, 3 Gill & J. (Md.) 311, 328; *Miller v. Beverley's*, 4 Hen. & Munf. (Va.) 415; *Myers v. Myers*, 2 McCord (S. C.), 214, 266; *Manning v. Manning*, 1 John. Ch. (N. Y.) 527; *Schieffelin v. Stewart*, 1 John. Ch. (N. Y.) 620, 625, 626; *Dunscomb v. Dunscomb*, 1 John. Ch. (N. Y.) 510; *Brown v. Ricketts*, 4 John. Ch. (N. Y.) 303, 305; *Kerr v. Laird*, 27 Miss. 544; *Clarke's Estate*, 53 Cal. 255; *Williams v. Petticrew*, 62 Mo. 460; *Scott v. Crews*, 72 Mo. 461, 468; *Hook v. Payne*, 14 Wal. (U. S.) 252; *Touzanne's Succession*, 36 La. An. 420.

It has not been adopted in New Jersey. *Frey v. Frey*, 2 C. E. Greene (N. J.), Ch. 71, 73.

The Pennsylvania act of March 29, 1832, § 17, *Purd. Dig.* 300, pl. 65, provides that the amount of interest to be paid in all cases by executors and administrators shall be determined by the Orphans' Court under all the circumstances of the case, but shall not in any case exceed the legal rate for the time being. See *Norris's Appeal*, 71 Pa. St. 106, 124; *Dyott's Estate*, 2 W. & S. (Pa.) 505; *Merrick's Estate*, 2 Ashm. (Pa.) 485.

An executor or administrator who trades with the assets, in States where the English practice is adopted, will be charged the highest rate allowed by law. *McKenzie v. Anderson*, 2 Woods (U. S. C. C.), 357; *Williams v. Petticrew*, 62 Mo. 460; *Scott v. Crews*, 72 Mo. 461, 468; *Hook v. Payne*, 14 Wal. (U. S.) 252.

Rests and Compound Interest. — The better opinion is, that, in directing compound interest against an accounting party, the court proceeds upon the principle that he has made, or has placed himself in such position that he must be presumed to have made, that amount of profit out of the estate, and not with a view to punishing him for using the plaintiff's money. *Lord Hatherley* in *Burdick v. Garrick*, 5 Ch. App. (Eng.) 233, 241; *Lord Cranworth* in *Atty.-Gen. v. Alford*, 4 D. M. & G. (Eng.) 843, 850, 851, 852; *Docker v. Somes*, 2 My. & K. (Eng.) 655-666. See *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.), 524; *Hood's Estate*, 1 Tuck. (N. Y.) Sur. 396; *Prescott's Estate*, 1 Tuck. (N. Y.) Sur. 430; *Spear v. Pinkham*, 2 Barb. Ch. (N. Y.) 213; *Manning v. Manning*, 1 John. Ch. (N. Y.) 527; *McKnight v. Walsh*, 24 N. J. Eq. 498; *English v. Harvey*, 2 R. (Pa.) 305; *Harland's Accounts*, 5 R. (Pa.) 329, 333; *Light's Appeal*, 24 Pa. St. 181; *McCall's Estate*, 1 Ashm. (Pa.) 357; *Grier, J.*, in

Barney v. Saunders, 16 How. (U. S.) 542; Williams v. Petticrew, 62 Mo. 460; Scott v. Crews, 72 Mo. 260, 268.

If it appears that the profits were not equal to the interest, annual rests will be refused. Kyle v. Barnett, 17 Ala. 306, 311; Ringgold v. Ringgold, 1 H. & Gill, 11; Johnson v. Miller, 33 Miss. 553; Utica Ins. Co. v. Lynch, 11 Paige (N. Y.), 521; Wright v. Wright, 2 McCord, Ch. (S. C.) 188; Myers v. Myers, 2 McCord, Ch. (S. C.) 214.

To make out a case for compound interest, there must be some special and peculiar circumstance, involving a breach of duty beyond mere negligence. It has even been held that a case of gross delinquency and known violation of duty must be shown. Boynton v. Dyer, 18 Pick. (Mass.) 1; De Peyster v. Clarkson, 2 Wend. (N. Y.) 77; Ackerman v. Emott, 4 Barb. (N. Y.) 626; Garniss v. Gardiner, 2 Edw. Ch. (N. Y.) 128; Lansing v. Lansing, 45 Barb. (N. Y.) 182; Knight v. Walsh, 24 N. J. Eq. 498; Fay v. Howe, 1 Pick. (Mass.) 527, 528, note (1); Garniss v. Gardiner, 1 Edw. Ch. (N. Y.) 128; Grier, J., in Barney v. Saunders, 16 How. (U. S.) 542, 543; Clemens v. Caldwell, 7 B. Mon. (Ky.) 171; Luken's Appeal, 7 W. & S. (Pa.) 48; Clemens v. Caldwell, 7 B. Mon. (Ky.) 171; Fall v. Simmons, 6 Ga. 272; Kenan v. Hall, 8 Ga. 417; Cartledge v. Cutliff, 21 Ga. 1; Kyle v. Barrett, 17 Ala. 306, 311; Crockett v. Bethune, 1 Jac. & W. (Eng.) 586; Tedds v. Carpenter, 1 Madd. (Eng.) 290.

In the absence of express provision in the will directing investment and accumulation, something more is necessary than merely mingling trust and individual funds without investment. Kerr's Admr. v. Snead, 11 Law Rep. (Boston) 217, 226; Gibson, J., in Harland's Accounts, 5 Rawl. (Pa.) 323, 333. See Walworth, Ch., in Spear v. Pinkham, 2 Barb. Ch. (N. Y.) 213; Williams v. Petticrew, 62 Mo. 460; Scott v. Crews, 72 Mo. 461, 468.

Where an executor or trustee is expressly directed by the will, or by an order of court, to invest and accumulate, and particular investments are specified, an investment upon other and improper securities will render him chargeable with annual rests. Knott v. Cottee, 16 Beav. (Eng.) 77; Stackpoole v. Stackpoole, 4 Dow. (Eng.) 209; Raphael v. Boehm, 11 Ves. (Eng.) 92; 13 Ves. (Eng.) 407, 590; Latimer v. Hanson, 1 Bland, Ch. (Md.) 57; Clemens v. Caldwell, 7 B. Mon. (Ky.) 171, 176.

Compound interest has been allowed, although no particular investment has been specified by the direction in the will, and the executor has only allowed the fund to remain idle. Elliott v. Sparrell, 114 Mass. 404. See Diffenderfer v. Dyer, 2 Bland's Ch. (Md.) 205; Voorhees v. Stoothoff, 6 Halst. (N. J.) 145, 161.

Also for disobeying a direction in the

will to pay the interest annually. Bowles v. Drayton, 1 Desaus. (S. C.) 489.

Where an executor or administrator, after settling the estate, becomes, or acts as, guardian, or the executor is by the will clothed with a trust to invest, they become liable as guardians or trustees to invest all, and chargeable with interest simple or compound, according to circumstances, if they do not invest. Karr v. Karr, 6 Dana (Ky.), 3, 5; Smith v. Lampton, 8 Dana (Ky.), 69, 73; Bitzer v. Hahn, 14 S. & R. (Pa.) 232; Adams v. Spalding, 12 Conn. 350, 360; Hodge v. Hawkins, 1 Dev. & Bat. Eq. (N. C.) 564.

An executor who refuses to account, claims the trust fund as his own, has been in the habit of receiving compound interest, and repels, in an unsatisfactory way, the imputation of fraud or gross negligence, is chargeable with compound interest, with annual rests, from the time when he ought to have settled his account. Jennison v. Hapgood, 10 Pick. Mass. 77, 104, 105. Compare Scott v. Crews, 72 Mo. 261.

Great delay in settling the estate has been held sufficient in itself to justify charging compound interest on balances, with annual rests. *In re Sanderson* (Cal.), 15 Pac. Rep. 753.

Compound interest with annual rests has been charged against the accountant for detaining commissions which have been disallowed. McKnight v. Walsh, 24 N. J. Eq. 498. For mixing the trust funds with his own, and using them in his own trade. Walker v. Woodward, 1 Russ. (Eng.) 107; Jones v. Foxall, 15 Beav. (Eng.) 388; Williams v. Powell, 15 Beav. (Eng.) 461; Schieffelin v. Stewart, 1 John. Ch. (N. Y.) 620; Winder v. Diffenderfer, 2 Bland's Ch. (Md.) 166; Lathrop v. Smalley's Exrs., 23 N. J. Eq. 192, 194; Hook v. Payne, 10 Wal. (U. S.) 252, 257; Clark's Estate, 53 Cal. 355. For selling stock specifically bequeathed to an infant, and detaining the proceeds after an order to pay over. Walrond v. Walrond, 29 Beav. (Eng.) 586.

In computing compound interest from any given date, as July 16, 1805, on the balance then in hand, one year's interest is calculated on such balance, and added to the principal, due on July 16, 1806, and both made principal, upon which aggregate sum interest is again calculated for another year, to July 16, 1807, and added to the balance of the principal due on that alone, and so on, for each year, during the whole term. Schieffelin v. Stewart, 1 John. Ch. (N. Y.) 620. See Ackerman v. Emmett, 4 Barb. (N. Y.) 626; Utica Ins. Co. v. Lynch, 11 Paige (N. Y.), 620; Greenwood v. Fox, 12 B. Mon. (Ky.) 190; Hodge v. Hawkins, 1 Dev. & Bat. (N. C.) Eq. 566; McKnight v. Walsh, 24 N. J. Eq. 498; Wright v. Wright, 2 McCord, Ch. 185; Diffenderfer v. Winder, 3 Gill & J. (Md.) 341; Latimer

The representative is entitled to be allowed all proper payments and disbursements made by him,¹ and all reasonable expenses in-

v. Hanson, 1 Bland (Md.), 51; *Hook v. Payne*, 14 Wal. (U. S.) 252. See also *Binnington v. Harwood*, 1 Turn. & R. (Eng.) 481.

How often rests shall be taken, depends upon the circumstances of the particular case. From the above cases, it appears that they are generally taken yearly. *Karr v. Karr*, 6 Dana (Ky.), 6; *Fall v. Simmons*, 6 Ga. 265, 272; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171, 176; *Williams v. Petticrew*, 62 Mo. 460; *Scott v. Crews*, 72 Mo. 261.

In cases of gross misbehavior, they have been allowed half-yearly. *Raphael v. Boehm*, 11 Ves. (Eng.) 92; s. c., 13 Ves. (Eng.) 407, 590. But see *Docker v. Somes*, 2 My. & K. (Eng.) 655, 666.

In Kentucky, biennial rests have been thought proper. *Karr v. Karr*, 6 Dana (Ky.), 3. But see *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171; *Greening v. Fox*, 12 B. Mon. (Ky.) 187.

In *Kenan v. Hall*, 8 Ga. 417, interest was charged annually, and compounded every six years.

In calculating the compound interest, the most equitable rule seems to be to have the account settled with a rest for every year, including principal and interest, and the balance thus struck carried forward to be again on interest whenever the sum should be so large that a trustee acting faithfully and discreetly would put that sum into a productive state. *Fay v. Howe*, 18 Pick. (Mass.) 527. See *McKnight v. Walsh*, 23 N. J. Eq. 136.

In England, if the executor fails to make investments directed by the will, the interest will be compounded at 4 *l. per cent per annum*: if he trades with the assets, at 5 *l. per cent*. *Knott v. Cottee*, 16 Beav. (Eng.) 77; *Jones v. Foxall*, 15 Beav. (Eng.) 388; *Williams v. Powell*, 15 Beav. (Eng.) 461. See *Hook v. Payne*, 14 Wal. (U. S.) 255; *Clark's Estate*, 53 Cal. 355; *Scott v. Crews*, 72 Mo. 261, 268; *Williams v. Petticrew*, 62 Mo. 460.

Under Penn. Stat. March 29, 832, § 17, P. D. 300, pl. 65, which provides that the amount of interest to be paid in all cases by executors and administrators shall not exceed the legal rate for the time being, it was held that compound interest *as such* could not be charged. *Norris's Appeal*, 71 Pa. St. 123. But see *Luken's Appeal*, 7 W. & S. (Pa.) 48; *Hughes's Appeal*, 53 Pa. St. 500; *Pennypacker's Appeal*, 11 Pa. St. 494.

But, if he has used the money, he may be charged with profits, although they amount to more than the compound interest would have done, and be disallowed commissions. *Norris's Appeal*, 71 Pa. St. 106, 124.

1. *Schoul. Exrs. & Admrs.* §§ 541, 542; *Sewell v. Slinghaff*, 62 Md. 592; *Wright v. Dugan*, 15 Abb. N. Cas. (N. Y.) 107; *Gundry v. Henry*, 65 Wis. 559; *Edelen v. Edelen*, or 11 Md. 30 Conn. 205. The burden of proving the debt rests on the administrator. *Jenks v. Terrell*, 73 Ala. 238. As to mode of proof, vouchers, and effect of allowance, see *Watson v. Watson*, 58 Md. 442; *Owens v. Collinson*, 3 Gill & J. (Md.) 25; *Burke v. Coolidge*, 35 Ark. 180; *Fell City, etc., Co. v. Stiles*, 60 Miss. 849; *Rose's Estate*, 63 Cal. 349; *Hill's Estate*, 62 Cal. 186; *In re Herteman* (Cal.), 15 Pac. Rep. 121; *Sorrello v. Trantham* (Ark.), 3 S. W. Rep. 198; *Lynch v. Hickey*, 13 Ill. App. 139; *Price's Succession*, 35 La. Ann. 905; *DEBTS OF DECEDENTS*, § 1. (g).

Thus, if the representative pays a debt or discharges an obligation which constituted a just charge against the estate out of his own funds, such payment may be allowed him in his account. *Woods v. Ridley*, 27 Miss. 119; *Watson v. McClanahan*, 13 Ala. 57.

The fact that a payment, in other respects proper, was made prematurely, does not affect his right to an allowance of it. *Johnson v. Corbett*, 11 Paige (N. Y.), 265.

Payments made in good faith under a *de facto* appointment, afterwards revoked, may be allowed. *Bloomer v. Bloomer*, 2 Bradf. (N. Y.) 339.

A sale of assets at a sacrifice to meet obligations, or in order to comply with the law, may be justified. In such case the loss or depreciation should be stated by way of credit, and, if proper, may be allowed. *Wingate v. Pool*, 25 Ill. 118. *Ex parte Jones*, 4 Cr. C. C. 185; *Re Jones*, 1 Redf. (N. Y.) 263.

Payments made improperly or dishonestly will not be allowed; nor can he be credited with the payment of debts without legal obligation to save family disgrace. *Jones v. Ward*, 10 Yerg. (Tenn.) 160. See *Perry v. Phelps*, 1 Ves. Sr. (Eng.) 254; *Morford v. Bliss*, 8 Ves. (Eng.) 258; *Burke v. Coolidge*, 35 Ark. 180; *McMahon v. Sullivan*, 14 Abb. (N. Y.) N. Cas. 405; *McMahon v. Jones*, 14 Abb. (N. Y.) N. Cas. 406; *Lewis v. Carson* (Mo.), 3 S. W. Rep. 483.

Payment of a claim of doubtful legality, made in good faith, without knowledge that the consideration was illegal, may be allowed. *Coffee v. Ruffin*, 4 Coldw. (Tenn.) 487. See *Parker v. Cowell*, 16 N. H. 149; 2 P. & H. (Va.) 124; *Re Frazer*, 92 N. Y. 239. But see *Loomis v. Armstrong*, 49 Mich. 521; *Overfield's Estate*, 13 Phila. (Pa.) 306.

Payment for necessities furnished an infant or lunatic decedent before the ap-

curred for the benefit of the estate.¹ Interest may also be allowed him on sums advanced from his own funds for necessary outlays

pointment of a committee may be allowed. *La Rue v. Gilkyson*, 4 Pa. St. 375; *Smith v. Mayo*, 9 Mass. 62.

As to debts incurred by an infant decedent for things other than necessities, see *Schoul. Dom. Rel.* (3d ed.) § 402; *Washburn v. Hale*, 10 Pick. (Mass.) 429; *Smith v. Mayo*, 9 Mass. 62; *Smith v. McLaughlin*, 77 Ill. 596.

Proof of Payment. — Creditor's Receipt. — The creditor's receipt is sufficient to entitle the representative to a credit for a payment, although it appears that the matter is left open for adjustment on settlement of their private accounts. *Henderson v. Simmons*, 33 Ala. 291.

Maintenance and Education of Minors. — Necessaries furnished Distributees. — Expenses of the maintenance and education of minors, and board, lodging, and necessities furnished distributees, cannot be credited the representative in his accounts. Such outlay, if matter of allowance at all, can only affect the share of the distributee so advanced, and not the general estate. *Brewster v. Brewster*, 8 Mass. 131; *Trueman v. Tilden*, 6 N. H. 201; *Latta v. Russ*, 8 Jones L. (N. C.) 111; *Price v. Mitchell*, 10 Sm. & M. (Miss.) 179; *Sorin v. Olinger*, 12 Ind. 29; *Willis v. Willis*, 9 Ala. 330. See *Fitzgerald's Estate*, 57 Wis. 508; *State v. Donegan*, 83 Mo. 374.

Express direction in the will may authorize such application. *Harris v. Foster*, 6 Ark. 388; *Trigg v. Daniel*, 2 Bibb (Ky.), 301.

In New York, the surrogate has power, on the settlement of an administrator's accounts, to allow, on equitable principles, sums advanced for the support and maintenance of an infant distributee. *Hyland v. Baxter*, 98 N. Y. 610. See *In re Moore* (Cal.), 13 Pac. Rep. 880; *Bradley v. Bradley* (Va.), 1 S. E. Rep. 477; *Munden v. Bailey*, 70 Ala. 63; *Groome's Estate*, 14 Phila. (Pa.) 246.

Before an administrator will be allowed for money expended in the maintenance of minors, he must show that there were assets remaining after the payment of debts and expenses which could properly be so applied, and that the disbursements were made in good faith, and were such as would have been sanctioned by a court of equity had he occupied the position of guardian. *Wright v. Wright*, 64 Ala. 88; *Hyland v. Baxter*, 31 Hun (N. Y.), 354; *Rogers v. Traphagen* (N. J.), 11 Atl. Rep. 336.

Statutory allowances to widow and children stand upon their own peculiar footing, and are generally created preferred claims. Mass. Gen. Sts. c. 96, § 5; *Kingsbury v. Wilmarth*, 2 Allen (Mass.), 310; s. c., 5 Allen (Mass.), 144; *Giddings v. Crosby*, 24 Tex. 295; *Elfe v. Cole*, 26 Ga.

197; *Mead v. Byington*, 10 Vt. 116; *Scott v. Dorsey*, 1 Har. & J. (Md.) 227; *Simmons v. Byrd*, 49 Ga. 285.

1. *Potts v. Leighton*, 15 Ves. (Eng.) 277; *Hide v. Haywood*, 2 Atk. (Eng.) 126; *Nimmo v. Commonwealth*, 4 H. & M. (Va.) 57; *Re Wilson*, 2 Pa. St. 325; *Clarke v. Blount*, 2 Dev. Eq. (N. C.) 51; *Whitted v. Webb*, 2 Dev. & Bat. Eq. 442; *Glover v. Holley*, 2 Bradf. (N. Y.) 291; *Williamson v. Williamson*, 6 Paige (N. Y.), 298; *Edelen v. Edelen*, 11 Md. 415; *Pearson v. Darrington*, 32 Ala. 227; *Kost's Appeal*, 107 Pa. St. 143.

In this way only is he indemnified against loss upon contracts relating to the estate, upon which he has incurred personal responsibility. See *Emanuel v. Norcum*, 7 How. (Miss.) 150; *Byrd v. Wells*, 40 Miss. 712. *Re Weisenbach*, 3 Dem. (N. Y.) 145; § XV. 2, b.

Those interested in an estate cannot accept the profits of an illegal or improper investment by the executors, and, at the same time, compel the executors to assume the incidental expenses thereof. *Wheelwright v. Rhoades*, 11 Abb. (N. Y.) N. Cas. 382; s. c., 28 Hun (N. Y.), 57.

Travelling expenses actually incurred may be allowed. *Dey v. Codman*, 39 N. J. Eq. 258. *In re Moore* (Cal.), 13 Pac. Rep. 880.

But an administrator has no right to charge more by reason of living at a distance from the place where his duties have to be performed. *Watkins v. Romine*, 106 Ind. 378.

All expenses to be allowed must be incurred *bona fide* in prosecuting the business of the estate. *Haggard v. Mayfield* (Tenn.), 5 Hayw. 121.

Expenses incurred through his own negligence cannot be allowed. *Pannel v. Fenn*, Cro. Eliz. (Eng.) 348; *Brackett v. Tillotson*, 4 N. H. 208; *Robbins v. Wolcott*, 27 Conn. 234; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77.

Losses incurred through his not taking a refunding bond from distributees may render him liable. *McKee v. McKee*, 8 B. Mon. (Ky.) 461.

Proper expenses incurred by an executor before qualifying will be allowed. *Emanuel v. Norcum*, 7 How. (Miss.) 150. See acts before.

The expense of keeping a horse which could not be sold may be allowed. *Branham v. Adair*, 7 J. J. Marsh. (Ky.) 190. Also expenses of repairing a dwelling-house. *Henderson v. Simmons*, 33 Ala. 291.

Expenses incident to a sale of assets may be charged to the estate. *Pinkard v. Pinkard*, 24 Ala. 250.

This does not include liquors furnished at an auction, nor refreshments to customers. *Griswold v. Chandler*, 5 N. H. 492.

to preserve the assets, or discharge debts carrying interest, although such a charge deserves close scrutiny.¹ If the circumstances of the estate are such as to render the employment of an agent proper and justifiable, the reasonable charges paid by the

Expenses attending a sale of land in a foreign jurisdiction, or taxes paid on such real estate, are not properly allowed upon an administration account in the domestic forum. *Storer v. Hinkly*, 1 Root (Conn.), 182; *Jennison v. Hapgood*, 10 Pick. 77; *Roberts v. Rogers*, 28 Miss. 152.

Taxes, water-rates, and similar charges against real estate before the decease of its owner, are properly included in the account of the administrator. It is ordinarily otherwise as to those accruing after the decease. *Fell's Estate*, 13 Phila. (Pa.) 289. See *Polhemus v. Middleton*, 37 N. J. Eq. 240; *Dey v. Codman*, 39 N. J. Eq. 258; *Dillard v. Dillard*, 77 Va. 820.

An executor cannot be allowed for money paid for repairs and insurance on real estate, as so much paid to the devisees on account of their interests in the personal estate. *Aldridge v. McClelland*, 36 N. J. Eq. 288.

But where land has been sold to pay debts, the executor may be allowed, in his account, for taxes and arrears of ground-rent accruing after the conformation of the sale and before the execution of the deed, and for the amount of a city claim for work done to the premises during the same period. *Eddy's Estate*, 13 Phila. (Pa.) 262. Compare *Clark v. Knox*, 70 Ala. 607.

An administrator who pays a tax will be allowed credit therefor, although there may have been a technical defect in its assessment. *Sanderson v. Sanderson*, 20 Fla. 292.

So of municipal assessments paid in good faith under a law afterwards declared unconstitutional. *Dey v. Codman*, 39 N. J. Eq. 258.

All reasonable expenses incurred for the funeral will be allowed; but as to what expenses will be considered reasonable, see § XIV. 1; also DEBTS OF DECEDENTS, § II. p. 249. See further, *Re Allen*, 3 Dem. (N. Y.) 524; *Spire v. Lovell*, 17 Ill. App. 559; *Bell v. Briggs*, 63 N. H. 592; *Cannon v. Apperson*, 14 Lea (Tenn.), 553; *Crapo v. Armstrong*, 61 Iowa, 697; *Lutz v. Gates*, 62 Iowa, 513; *Pistorius's Appeal*, 53 Mich. 350; *Quin v. Hill*, 4 Dem. (N. Y.) 69; s. c., 17 Abb. N. Cas. (N. Y.) 273. An administrator will not be allowed for the expense of unnecessarily removing his intestate's body from a suitable place of interment where his children desired it to remain. *Watkins v. Romine*, 106 Ind. 378.

No allowance will be made for representative's time and trouble in attending the funeral, nor for payments to friends and relatives for such services. *Lund v. Lund*, 41 N. H. 355, 361, 362.

But extraordinary cases may occur in

which allowance may properly be made for travelling expenses incurred by the representative in accompanying the conveyance of the body of the deceased from a distant city where he had died, to the place of residence, and for the expenses of a special messenger to communicate the intelligence to the family. See *Mann v. Lawrence*, 3 Bradf. Sur. (N. Y.) 424; *Metz's Appeal*, 11 Ser. & R. (Pa.) 204; *Wall's Appeal*, 38 Pa. St. 464.

As to status of executor's claim for reimbursement, see *post*.

Debts for which the deceased was not in fact liable, do not become obligatory by a direction in the will that "all just debts should be paid." *Mason v. Man*, 3 Desau. (S. C.) 116; *Smith v. Mayo*, 9 Mass. 62.

The allowance of the representative's own claim against the estate is on the same footing as that of any other creditor, except that in some cases it may invite closer scrutiny. *Kerr v. Hill*, 2 Desau. (S. C.) 279; *Wood v. Rusco*, 4 Redf. (N. Y.) 380; *Metz's Appeal*, 11 S. & R. (Pa.) 204; *Wall's Appeal*, 38 Pa. St. 464. See DEBTS OF DECEDENTS, § I. p. 288.

But when the estate is settled in the insolvent course, such claim cannot be allowed, unless the citation for such settlement contained notice of its nature and amount. *Tuttle v. Robinson*, 33 N. H. 104.

1. *Small v. Wing*, 5 Bro. P. C. (Toml. ed.) 72; *Hosack v. Rogers*, 9 Paige (N. Y.), 461; *Rix v. Smith*, 8 Vt. 365; *Liddel v. McVickar*, 11 N. J. L. 44; *Mann v. Lawrence*, 3 Bradf. (N. Y.) 424; *Crawford v. Tribble*, 69 Ga. 519.

But not when he might have met the demands seasonably out of the assets. *Billingslea v. Henry*, 20 Md. 282; *Booker v. Armstrong* (Mo.), 4 S. W. Rep. 727.

An executor without assets who advances his own money to redeem land of estate, mortgaged for less than its value, to prevent foreclosure, is entitled to interest on the money so advanced. *Jennison v. Hapgood*, 10 Pick. (Mass.) 77, 102. See *Barrel v. Joy*, 16 Mass. 224; *Hayward v. Ellis*, 13 Pick. (Mass.) 272; *Pettingill v. Pettingill*, 60 Me. 411, 425; *Callaghan v. Hall*, 1 S. & R. (Pa.) 241; *Evarts v. Nason*, 11 Vt. 122.

Interest on costs paid by an executor pending a suit by or against the estate will not be allowed. *Gordon v. Trail*, 8 Price (Eng.), 416; *Lewis v. Lewis*, 13 Beav. (Eng.) 82.

Where interest is allowed on sums carrying interest, it should be calculated from the time of a balance being struck on the general report; for until that time, it cannot be ascertained that the executor has

executor to such agent should be allowed.¹ Bills for legal services, counsel fees, and costs of litigation, will be allowed the personal representative when the expense was incurred in good faith for the benefit of those ultimately entitled to the estate.² In all the

not the money in his hands. *Richards, C. B., in Gordon v. Trail*, 8 Price (Eng.), 416.

Compound interest will never be allowed in favor of executors and administrators. *Walker's Estate*, 3 Rawle (Pa.), 243; *Evertson v. Tappen*, 5 John. Ch. N. Y. 498, 517; *Trimble v. James*, 40 Ark. 393. But see *Storer v. Storer*, 9 Mass. 37.

1. *McWhorter v. Benson*, 1 Hopkins (Tenn.), 28, 34. See *Bonithon v. Hockmore*, 1 Vern. (Eng.) 316; *Davis v. Dendy*, 3 Madd. (Eng.) 170; *Succession of Schmidt*, 16 La. An. 256; *Brown's Accounting*, 16 Abb. Pr. N. S. (N. Y.) 457; *Dey v. Codman*, 39 N. J. Eq. 258; *In re Moore* (Cal.), 13 Pac. Rep. 880.

The employment of agents by the executor or administrator is justifiable when the service to be performed requires special skill or appliances, or is not within the ordinary line of his duty. *Henderson v. Simmons*, 33 Ala. 291, 299. See *Dorsey v. Gwynn*, 4 Gill & J. (Md.) 453; *Dey v. Codman*, 39 N. J. Eq. 258.

The same principle applies as to the allowance of counsel fees. *Raymond v. Dayton*, 4 Dem. (N. Y.) 333; *Kingland v. Scudder*, 36 N. J. Eq. 284; *John v. McKee*, 2 Dem. (N. Y.) 236; *Journalt v. Ferris*, 2 Dem. (N. Y.) 320; *Willson v. Willson*, 3 Dem. (N. Y.) 462; *Hanover v. Reynolds*, 4 Dem. (N. Y.) 385; *Eppinger v. Canepa*, 20 Fla. 262.

An executor cannot charge, ordinarily, for legal services in preparing the inventory. *Pullman v. Willets*, 4 Dem. (N. Y.) 536.

It is no ground for an allowance to counsel of a larger compensation than is usual for services rendered an executor, that his unfamiliarity with accounts and book-keeping made the services of counsel more onerous. *O'Reilly v. Meyer*, 4 Dem. (N. Y.) 161.

The fees of an attorney acting for an administrator should be allowed, though he was also attorney for the contestant of the will, but not in the same proceeding. *Re Handfield*, 16 Mo. App. 332.

On the same principle, where the collection of any part of the assets involves peculiar and extraordinary difficulties, reasonable compensation to agents employed for that purpose may be allowed. *Kennedy's Appeal*, 4 Pa. St. 150. See *Hopkinson v. Roe*, 1 Beav. (Eng.) 180; *Cockburn v. Raphael*, 2 Sim. & Stu. (Eng.) 453.

It would also seem that the expense of employing a bailiff, or receiver, where a good business man would employ such agent in his own affairs, may be allowed. *Wilkinson v. Wilkinson*, 2 Sim. & Stu. (Eng.) 237; *Giles v. Dyson*, 1 Stark. N. P. C. (Eng.) 32; *Weiss v. Dill*, 3 My.

& K. (Eng.) 26. See *Bonithon v. Hockmore*, 1 Vern. (Eng.) 316; *Davis v. Dendy*, 3 Madd. (Eng.) 170; *McWhorter v. Benson*, 1 Hopk. (Tenn.) 28, 34; *Henderson v. Simmons*, 33 Ala. 292. *Contra*, *Gwynn v. Dorsey*, 4 Gill & J. (Md.) 453; *Edmonds v. Crenshaw*, Harp. Ch. (S. C.) 225, 232.

The services of brokers and auctioneers are within the principle. *Pinckard v. Pinckard*, 24 Ala. 250; *Myrick, Prob.* (Cal.) 86. See *Tucker v. Tucker*, 29 N. J. Eq. 286; *Jones v. Powell*, 6 Beav. (Eng.) 418.

So with the expenses of a detective employed to establish the will. *In re Lewis*, 35 N. J. Eq. 99.

The nature of the accounts may be such as to justify the employment of an expert accountant. *Henderson v. M'Iver*, 3 Mad. (Eng.) 275. See *Fowler v. Lockwood*, 3 Redf. (N. Y.) 465, 467.

In the absence of special circumstances, American probate practice does not allow a charge for services purely clerical. *Fowler v. Lockwood*, 3 Redf. (N. Y.) 465; *Miles v. Peabody*, 60 Ga. 729.

2. *McNamara v. Jones*, Dick. (Eng.) 587. See *Pusey v. Clemson*, 9 S. & R. (Pa.) 389; *Mumper's Appeal*, 3 W. & S. (Pa.) 443; *Armstrong's Estate*, 6 Watts, Pa. 237; *Stewart v. McMinn*, 5 W. & S. (Pa.) 120; *Scott's Estate*, 9 W. & S. (Pa.) 100; *Dietrich v. Heft*, 5 Pa. St. 976; *Brinton's Estate*, 10 Pa. St. 411; *Royer's Appeal*, 13 Pa. St. 573; *Wilson's Appeal*, 41 Pa. St. 94; *McElhenry's Appeal*, 46 Pa. St. 347; *Wendell v. French*, 19 N. H. 205; *Tuttle v. Robinson*, 33 N. H. 104; *Noel v. Harvey*, 29 Miss. 335; *Brandon v. Hoggatt*, 32 Miss. 335; *Brady v. Dilley*, 27 Md. 570; *Edelen v. Edelen*, 11 Md. 415; *Hawley v. James*, 16 Wend. (N. Y.) 61; *Lindsay v. Howerton*, 2 Hen. & Munf. (Va.) 9; *Collins v. Hoxie*, 9 Paige (N. Y.) 81; *Clapp v. Cable*, 1 Dev. & B. (N. C.) Eq. 177; *McPaxton v. Dickson*, 15 Ark. 97; *Polhemus v. Middleton*, 37 N. J. Eq. 240; *Taylor v. Wright*, 93 Ind. 121; *Clark v. Enbank* (Ala.), 3 So. Rep. 49; *Clement's Appeal*, 49 Conn. 519; *In re Simons* (Conn.), 11 Atl. Rep. 36; *Kingsland v. Scudder*, 36 N. J. Eq. 284; *Re Maney*, 65 Cal. 287. See further, as to allowance and individual liability of representative for costs, *Chesebro v. Hicks*, 66 How. (N. Y.) Pr. 194; *Wilkinson v. Littlegood*, 67 How. (N. Y.) Pr. 174; *Miller v. Miller*, 32 Hun (N. Y.) 481; s. c., 67 How. (N. Y.) Pr. 135; *Hall v. Edmonds*, 67 How. (N. Y.) 202; *Pursell v. Fry*, 19 Hun (N. Y.) 595; *Berwick v. Halsey*, 4 Redf. (N. Y.) 18; *Lough v. Flaherty*, 29 Minn. 295; *Wolf v. Schaeffer*, 51 Wis. 53; *Ladd v. Anderson*, 58 Wis.

United States, except Delaware, in addition to his reasonable expenses, charges, and disbursements, the executor or adminis-

591; *Taylor v. Webb*, 56 Miss. 631; *Barton's Estate*, 55 Cal. 87; *Savage v. Gould*, 60 How. Prac. 217; *Noe v. Miller*, 31 N. J. Eq. 234; *Bostwick v. Brown*, 15 Hun (N. Y.), 308; *Field v. Field*, 77 N. Y. 294; *Snyder v. Snyder*, 26 Hun (N. Y.), 324; *Horton v. Brown*, 29 Hun (N. Y.), 654; *Wooley v. Pemberton* (N. J.), 10 Atl. Rep. 159; *Clark v. Wright* (S. C.), 1 S. E. Rep. 814; *Carter v. Beckwith* (N. Y.), 10 N. E. Rep. 350; *Mackey v. Ballou* (Ind.), 11 West Rep. 328; *Lamson v. Vevay Bank*, 82 Ind. 21.

As to costs of appeal. *Hazard v. Engs*, 14 R. I. 5; *Heath's Estate*, 58 Iowa, 36; *Beatty v. Cory Universalist Soc.*, 39 N. J. Eq. 452; *Ruch v. Biery* (Ind.), 11 N. E. Rep. 312; *Wolf v. Schaeffner*, 51 Wis. 53.

The principle thus stated applies to the expense of probate and taking out letters of administration, accounting, and bills for instruction. *Wms. Exrs.* (7th Eng. ed.) 376, 594, 1894, 2034, 2038. See PROBATE AND LETTERS OF ADMINISTRATION. *L. R. Cleare & Forster v. Cleare*, 1 P. & D. (Eng.) 655; *Williamson v. Mason*, 23 Ala. 498; *Henderson v. Simmons*, 33 Ala. 291; *Ex parte Young*, 8 Gill (Md.), 285; *Matter of Howe*, 1 Paige (N. Y.), 214; *Bryson v. Nickols*, 2 Hill (S. C.), Ch. 113; *Forward v. Forward*, 6 Allen (Mass.), 494, 497; *Wood v. Goff*, 7 Bush (Ky.), 59; *Trammel v. Phil- leo*, 33 Tex. 395; *Pearson v. Darrington*, 32 Ala. 227, 273; *Noe v. Miller*, 31 N. J. Eq. 234; *In re Simon's Will* (Conn.), 11 Atl. Rep. 36; *Heath's Estate*, 58 Iowa, 36.

In some States it is not customary to allow costs in probate cases to either party. *Waters v. Stickney*, 12 Allen (Mass.), 17; *Woodbury v. Obear*, 7 Gray (Mass.), 472; *Osborne v. McAlpine*, 4 Redf. (N. Y.) 1.

An administrator may be allowed reasonable compensation for services and expenses in rectifying mistakes, made without his fault, in dower proceedings, though the committee's report has been accepted, and no appeal taken. *Bartlett v. Fitz*, 59 N. H. 502.

Expenses (including both counsel fees and costs) incurred by the representative in resisting claims honestly believed upon reasonable grounds to be unjust, should be allowed, although the suit be lost. *Pearson v. Darrington*, 32 Ala. 228; *Crofton v. Isley*, 6 Greenl. 48; *Forward v. Forward*, 6 Allen (Mass.), 494; *matter of Miller*, 4 Redf. (N. Y.) 302; *Holmes v. Holmes*, 28 Vt. 765; *Ammon's Appeal*, 31 Pa. St. 311; *Efinger v. Richards*, 35 Miss. 540; *Wendell v. French*, 19 N. H. 205. See also *Clapp v. Coble*, 1 Dev. & Bat. Eq. 177; *Warden v. Burts*, 2 McCord, Ch. 73; *Atcheson v. Robertson*, 3 Rich. Eq. (S. C.) 132; *Poindexter v. Gibson*, 1 Jones, Eq. 44; *Davis v. Rawlins*, 2 Harr. (Del.) 125; *Harris v. Parker*, 41 Ala. 604; *Dean v. Roseboom*, 37 Hun (N. Y.), 310.

But where the expense of the litigation

was caused by the representative's misconduct or negligence, or incurred against the interests of the estate, and for his own express benefit, as in contesting a proper charge against him, neither costs nor counsel fees will be allowed. *Swartzwalter's Account*, 4 Watts (Pa.), 77; *Sterrett's Appeal*, 2 Penn. 419, 426; *Heister's Appeal*, 7 Pa. St. 457; *Stephens's Appeal*, 56 Pa. St. 409; *Price's Estate*, 81 Pa. St. 263; *Reynolds v. Canal & Bkg. Co.*, 30 Ark. 520; *Blake v. Pegram*, 109 Mass. 541; *Gilman v. Id.*, 6 Thom. & C. (N. Y.) 211; *O'Neill v. Donnell*, 9 Ala. 734; *Green v. Fagan*, 15 Ala. 335; *Anderson v. Anderson*, 37 Ala. 683; *Mims v. Mims*, 39 Ala. 716; *Cameron v. Cameron*, 15 Wis. 1; *Mumma's Accounts*, 5 Am. Law Reg. (O. S.) 489. See also *Brandon v. Hoggatt*, 32 Miss. 335; *Satterwhite v. Littlefield*, 13 Sm. & M. (Miss.) 302; *Sherman v. Angel*, 2 Hill, Ch. (S. C.) 26; *Withers's Appeal*, 13 Pa. St. 582; *Villiard v. Robert*, 1 Strobb. Eq. (S. C.) 393; *Garrett v. Garrett*, 2 Strobb. Eq. (S. C.) 272; *Morrow v. Allison*, 39 Ala. 70; *Holman v. Sims*, 39 Ala. 709.

Thus, where an executor or administrator states his account unintelligibly, he may be ordered to restate it at his own expense. *Fell's Estate*, 13 Phila. (Pa.) 289.

He cannot charge the estate for services of counsel in watching over the interests of residuary legatees, or in defending a suit properly brought against him to recover or secure the trust fund, or with the costs of exceptions to his report, or with the expense of contesting with other legatees the amount claimed by himself as legatee on final settlement. *Kingsland v. Scudder*, 36 N. J. Eq. 284; *Lilly v. Griffin*, 71 Ga. 535; *Heath's Estate*, 58 Iowa, 36; *In re Simon's Will* (Conn.), 11 Atl. Rep. 36; *Re Marrey*, 65 Cal. 287. See *Gorton v. Perkins*, 63 Md. 589.

Executors who were also devisees under a will, instead of selling the real estate to pay the testator's debts, suffered themselves to be sued by his creditors, and consented to a decree against themselves. *Held*, that they were not entitled to recover the costs of this unnecessary litigation. *Cranmer v. McSwords*, 26 W. Va. 412.

On the question of allowing charges on an executor's account for defending an appeal which involved three questions, two of which concerned him personally, and in one of which he was successful, and the other concerned the estate, *held*, that the charges should be apportioned. *Clement's Appeal*, 49 Conn. 519.

Neither costs nor counsel fees will be allowed, unless the representative has actually paid them. *Thacher v. Dunham*, 5 Gray (Mass.), 26; *Modawell v. Holmes*, 40 Ala. 391; *Bates v. Vary*, 40 Ala. 421; *Succession of Holbert*, 3 La. An. 436.

trator is entitled to commissions or compensation for the time

In *Hoke v. Hoke*, 12 W. Va. 429, it was held that if he has not paid counsel fees, the court may, in its discretion, allow them directly to the attorneys.

Counsel fees will not be allowed for more counsel than were actually needed. *Crowder v. Shackelford*, 35 Miss. 321; *Liddel v. McVickar*, 11 N. J. L. 44. See *Smyley v. Reese*, 53 Ala. 89; *Estate of Nicholson*, 1 Nev. 518. Nor where the duties performed were such as would naturally devolve upon the representative personally. *Harbin v. Darby*, 28 Beav. (Eng.) 325; *Estate of Ballentine*, Myrick, Prob. (Cal.) 86; *Beatty v. Clark*, 20 Cal. 11; *Fulton v. Davidson*, 3 Heisk. (Tenn.) 614. See *Lancaster's Estate*, 14 Phila. (Pa.) 237; *Cahill's Estate*, 14 Phila. (Pa.) 309. Nor where the prosecution of the suits for which the fees were paid constituted no part of his official duties. *Hart v. Hart*, 2 Bibb (Ky.), 609; *Lusk v. Anderson*, 1 Met. (Ky.) 426.

Where the expenditure is justified, contingent fees may be allowed. *Kennedy's Appeal*, 4 Pa. St. 151; *Lindsay v. Howerton*, 2 H. & M. (Va.) 9; *Noel v. Harvey*, 29 Miss. 72. See *Gorton v. Perkins*, 63 Md. 589.

In the absence of express agreement, the executor or administrator is personally liable for the fees of counsel in the first instance. *Mygatt v. Willcox*, 1 Lans. (N. Y.) 55. See § XV. 2, b.

In allowing costs and fees of litigation, each case must stand to a great extent upon its own merits. *O'Neill v. Donnell*, 9 Ala. 734.

In some States, such allowances are regulated by statute. *Seaman v. Whitehead*, 78 N. Y. 306.

Expenses incurred in maintaining or resisting the Will. — The general principle to be deduced from the English authorities appears to be that an executor propounding a will for probate, acting in good faith, is entitled to costs and counsel fees, whether probate be granted or refused, on the ground that it is his duty to present the will, and, if disputed, to have its validity tried in the mode prescribed by law. *Perrine v. Applegate*, 14 N. J. (1 McCarter) Ch. 531; *Day v. Day*, 2 Green (N. J.), Ch. 549, 557; *In re Lewis*, 35 N. J. Eq. 99; *Critchell v. Critchell*, 3 Sw. & Tr. (Eng.) 41; 1 Phillim. (Eng.) 160, note (e) to Dabbs v. Chisman. See also *Lovett v. Harkness*, 1 Cas. temp. Lee (Eng.), 332; *Bradford v. Boudinot*, 3 Wash. (C. C.) 122; *Compton v. Barnes*, 4 Gill (Md.), 55. But see *Gorton v. Perkins*, 63 Md. 589. Compare *Brown v. Eggleston*, 53 Conn. 110.

Where the decree of the probate court allowing a will is appealed from, the executor may prosecute the probate in the appellate court at the expense of the estate. *Hazard v. Engs*, 14 R. I. 5.

An executor has no right to buy off con-

testants to a will at the expense of the estate. *Re Rogers*, 3 Dem. (N. Y.) 43.

Where the evidence shows that the executor, in propounding and maintaining the will, has not acted in good faith, or has been grossly ignorant of the law, as where he knew that the will presented for probate was not the last will of the deceased, or had been guilty of exercising undue influence over the mind of the testator, or where the will presented was not properly attested, costs may be decreed against him. *Martin v. Robinson*, 2 Cas. temp. Lee (Eng.), 535; *Nash v. Yelloly*, 3 Sw. & Tr. (Eng.) 59; *Warren v. High*, 1 Murph. (N. C.) 436.

On the same principle, expenses incurred in good faith by a regularly appointed administrator in contesting a will, or maintaining his right to administer, may be allowed. *Menzies v. Pulbrook*, 2 Curt. (Eng.) 845, 851; *Ex parte Young*, 8 Gill (Md.), 285; *Compton v. Barnes*, 4 Gill (Md.), 55. See *Ammon's Appeal*, 31 Pa. St. 311; *Edelen v. Edelen*, 11 Md. 415; *Fairman's Appeal*, 30 Conn. 205. *Contra, Re Parsons*, 65 Cal. 240. See *Dalrymple v. Gamble*, 11 Atl. Rep. 718.

But in some States, to charge the estate with the expenses in an issue of *devisavit vel non*, it is not enough that the executor has no pecuniary interest in the settlement of the imputed will: to confer that right, it must appear that his course was dictated by a regard for the profit of those eventually found to be entitled to the property. In such States the executor is not bound to become a party to such a contest, unless indemnified by those interested in the disputed paper, or may call upon them to assume the responsibility of carrying it on. *Royer's Appeal*, 13 Pa. St. 569, 573, 574. See *Dietrich's Appeal*, 2 Watts (Pa.), 332; *Brinton's Estate*, 10 Pa. St. 411; *Scott's Estate*, 9 W. & S. (Pa.) 98; *Sheetz's Appeal*, 100 Pa. St. 197; *Brown v. Vinyard*, Bailey, Eq. (S. C.) 460; *Andrews v. Andrews*, 7 Ohio St. 143; *Close v. Close*, 13 La. Ann. 590.

In Pennsylvania the doctrine has been applied, although the validity of the will is established. *Mumfer's Appeal*, 3 W. & S. (Pa.) 441; *Royer's Appeal*, 13 Pa. St. 569, 571. But not to an administrator resisting a claim to the whole property, under a contract of devise. *Ammon's Appeal*, 31 Pa. St. 311.

Costs and Expenses when chargeable upon a Particular Fund. — The costs and expense attending litigation respecting a particular fund in the hands of an executor between the specific legatee, the residuary legatee, and the heir-at-law, and also the commissions of the executor receiving and disbursing the money, are properly chargeable out of the fund, and not out of the estate generally. *Johnson v. Holifield* (Ala.), 2 So. 753. See *Kingsland v. Scudler*, 36 N. J. Eq. 284; *In re Simon's Will*

and labor expended in discharging the duties of his office.¹

(Conn.), 11 Atl. Rep. 36; *Re Marey*, 65 Cal. 287.

1. Schoul. Exrs. & Admsrs. § 545; Wms. Exrs. (7th Eng. ed.) 1853; *Barney v. Sanders*, 16 How. (U. S.) 542; *Perry on Trusts*, § 918. See *Northern Central R. Co. v. Keighton*, 29 Md. 572; *Mason v. Roosevelt*, 5 John. Ch. (N. Y.) 534; *State v. Platt*, 4 Harring. (Del.) 154.

In England it is a general principle that an executor or administrator shall have no allowance at law or in equity for personal trouble and loss of time in the execution of his duties. *Robinson v. Pett*, 3 P. Wms. (Eng.) 251; *Brocksop v. Barnes*, 5 Madd. (Eng.) 90; *Scattergood v. Harrison*, Mosely (Eng.), 130; Wms. Exrs. (7th Eng. ed.) 1853.

In many States the practice is to allow compensation by commission upon the gross amount of property which comes to hand. *Pusey v. Clemson*, 9 S. & R. (Pa.) 209; *Hemphill's Estate*, 1 Pars. Eq. 31; *Bird's Estate*, 2 Pars. Eq. (Pa.) 171; *Pennell's Appeal*, 2 Pa. St. 216; *Currier's Appeal*, 79 Pa. St. 230; *Wood's Appeal*, 86 Pa. St. 346; *Stevenson's Estate*, 4 Wh. (Pa.) 98; *Burrell v. Joy*, 16 Mass. 229; *Demey v. Packer*, 1 Pick. (Mass.) 147; *Gibson v. Crehore*, 5 Pick. (Mass.) 161; *Longley v. Hall*, 11 Pick. (Mass.) 124; *Ellis v. Ellis*, 12 Pick. (Mass.) 183; *Jenkins v. Eldridge*, 3 Story, 225; *Granberry v. Granberry*, 1 Wash. (C. C.) 246; *Kee v. Kee*, 2 Gratt. (Va.) 132; *Hipkins v. Bernard*, 4 Munf. (Va.) 83; *Miller v. Beverleys*, 4 H. & M. (Va.) 420; *Taliaferro v. Minor*, 2 Call (Va.), 197; *Waddy v. Hawkins*, 4 Leigh (Va.), 458; *Hodge v. Hawkins*, 1 Dev. & B. (N. C.) 567; *Peyton v. Smith*, 2 Dev. & B. (N. C.) 349; *Walton v. Avery*, 2 Dev. & B. (N. C.) 405; *Turnage v. Green*, 2 Jones, Eq. (N. C.) 66; *Bond v. Turner*, 2 Taylor (N. C.), 125; *Bendell v. Bendell*, 24 Ala. 306. See *Stephenson v. Yandle*, 5 Hayw. (Tenn.) 261; *Harris v. Martin*, 9 Ala. 899; *Gould v. Hayes*, 25 Ala. 432; *Succession of Fontelieu*, 28 La. An. 638.

In Kentucky no sum is fixed as a proper compensation: from five to ten per cent has been allowed. *Phillips v. Bustard*, 1 B. Mon. (Ky.) 350; *Lane v. Coleman*, 8 B. Mon. (Ky.) 571; *Bank of United States v. Hirst*, 4 B. Mon. (Ky.) 439; *Ramsey v. Ramsey*, 4 B. Mon. (Ky.) 152; *Greening v. Fox*, 12 B. Mon. (Ky.) 190; *Fleming v. Wilson*, 6 Bush (Ky.), 610; *Logan v. Troutman*, 3 A. K. Marsh. (Ky.) 67.

The reckoning by percentage is used only for convenience: the real question is one of compensation for labor and responsibility. *Montgomery's Appeal*, 86 Pa. St. 160.

Unless expressly fixed by statute, the rate of compensation lies within the discretion of the court. *Scudder v. Crocker*, 1 Cush. (Mass.) 382; *Dixon v. Homer*, 2 Met. (Mass.) 422; *Blake v. Pegram*, 101 Mass. 262; *Cantfield v. Bostwick*, 21 Conn.

555; *Kendall v. New Eng. Carpet Co.*, 13 Conn. 392; *Clark v. Platt*, 30 Conn. 282; *Wendell v. French*, 19 N. H. 210; *Tuttle v. Robinson*, 33 N. H. 118; *Pusey v. Clemson*, 9 S. & R. (Pa.) 209; *Marsteller's App.*, 4 Watts (Pa.), 268; *Harland's Appeal*, 5 Rawle (Pa.), 331; *Stephenson's Estate*, 4 Wh. (Pa.) 104; *Walker's Estate*, 9 S. & R. (Pa.) 225; *Miller's Estate*, 1 Ash. (Pa.) 335; *Nathan v. Morris*, 4 Wh. (Pa.) 389; *Green's Estate*, 1 Ash. (Pa.) 317; *Shunk's Appeal*, 2 Pa. St. 307; *Montgomery's Appeal*, 86 Pa. St. 160; *Phillips v. Bustard*, 1 B. Mon. (Ky.) 350; *Lane v. Coleman*, 8 B. Mon. (Ky.) 571; *Greening v. Fox*, 12 B. Mon. (Ky.) 190; *Fleming v. Wilson*, 6 Bush (Ky.), 610; *Sperrel v. Shepard*, 19 Fla. 300; *Johnston's Appeal* (Pa.), 11 Atl. Rep. 78; *McCloskey's Estate*, 13 Phila. (Pa.) 254; *Werner's Estate*, 13 Phila. (Pa.) 328; *Rogers v. Hand*, 39 N. J. Eq. 270; *Pomeroy v. Mills*, 37 N. J. Eq. 578; *Metcalfe v. Colles* (N. J.), 1 Atl. Rep. 804.

In some States the rate of commission is fixed by statute. 2 N. Y. Rev. St. 93; Vol. 6 N. Y. Gen. St. c. 362, § 8, Acts of 1863, c. 115, Act of 1866; *Nixon's N. J. Dig.* 562, Act 1855, §§ 9, 10; *Hutch. & How. (Miss.)* 414, § 96; 2 Ill. Rev. St. 1219, Act March 3, 1845, § 36; *Kerwin's Ohio Dig.* 607, Act 1840, c. 208, § 175; s. c., Rev. Dig. 392; Me. Rev. St. 1857, c. 116, § 16; *Vt. Rev. St. c. 53*, § 12.

As to construction of these and analogous acts in the several States, see *Matter of Roberts*, 3 Johns. Ch. (N. Y.) 43; s. c., 3 Johns. Ch. 630; *Mason v. Roosevelt*, 5 Johns. Ch. (N. Y.) 534; *Dakin v. Demming*, 6 Paige (N. Y.), 95; *De Peyster's Case*, 4 Sandf. Ch. (N. Y.) 514; *Wagstaffe v. Lowerre*, 23 Barb. (N. Y.) 224; *Rapalje v. Hall*, 1 Sandf. Ch. (N. Y.) 406; *Stevenson v. Maxwell*, 2 Sandf. Ch. (N. Y.) 284; *Griffin v. Barney*, 2 Const. (N. Y.) 372; *Nichols v. McEwen*, 21 Barb. (N. Y.) 66; *Wetmore v. Wetmore*, 37 Barb. (N. Y.) 133; *Griffin v. Barney*, 2 Const. (N. Y.) 372; *Valentine v. Valentine*, 3 Barb. Ch. (N. Y.) 438; *Gloss v. Naylor*, 2 Dem. (N. Y.) 257; *Ward v. Ford*, 4 Redf. (N. Y.) 34; *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.), 288; *Meacham v. Sterns*, 9 Paige (N. Y.), 405; *Cairns v. Chaubert*, 9 Paige (N. Y.), 161; *M'Whorter v. Benson*, Hopk. (N. Y.) 28; *Jewett v. Woodward*, 1 Edw. Ch. (N. Y.) 199; *Morgan v. Hannas*, 49 N. Y. 667; *In re Schell*, 53 N. Y. 202; *Moore v. Zabriskie*, 3 Green (N. J.), 51; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 27; *Scott v. Dorsey*, 1 Harr. & J. (Md.) 232; *William v. Mosher* (Md.), 454; *McKim v. Duncan*, 4 Gill (Md.), 72; *Differderfer v. Winter*, 3 G. & J. (Md.) 347; *Ex parte Young*, 8 Gill (Md.), 287; *Widener v. Fay*, 51 Md. 273; *Peyton v. Smith*, 2 Dev. & B. (N. C.) 349; *Walton v. Avery*,

2 Dev. & B. (N. C.) 405; Turnage v. Greene, 2 Jones, Eq. (N. C.) 66; Oden v. Windley, 2 Jones, Eq. (N. C.) 445; Everts v. Nason, 11 Vt. 122; Hubbard v. Fisher, 25 Vt. 542; Emerson, Appellant, 32 Me. 159; *Ex parte* Witherspoon, 3 Rich. Eq. (S. C.) 14; Norton v. Gillison, 4 Rich. Eq. (S. C.) 219; College of Charleston v. Willingham, 13 Rich. Eq. (S. C.) 195; Logan v. Logan, 1 McCord, Ch. (S. C.) 5; Snow v. Callum, 1 Des. (S. C.) 542; Esswein v. Seigling, Riley (S. C.), Eq. 202; Ruff v. Summers, 4 Des. (S. C.) 529; Fall v. Simmons, 6 Ga. 274; Kenan v. Hall, 8 Ga. 417; Merrill v. Moore, 7 How. (Miss.) 292; Cherry v. Jarratt, 3 Cush. (25 Miss.) 221; Shurtliffe v. Witherspoon, 1 Sm. & M. (Miss.) 622; Satterwhite v. Littlefield, 13 Sm. & M. (Miss.) 306; Roach v. Jelks, 40 Miss. 754; Shirley v. Shattuck, 6 Cush. (28 Miss.) 26; Gilbert v. Sutliff, 3 Ohio St. 149; Constant v. Matteson, 22 Ill. 546; Hough v. Harvey, 71 Ill. 72; Smart v. Fisher, 7 Mo. 581; First Nat. Bank v. Owen, 23 Iowa, 185; Ellig v. Naglee, 9 Cal. 683; Biscoe v. State, 23 Ark. 592.

The executor's right to commissions depends on the statute, not on any implied contract. If the rate is lessened by statute after his appointment, but before his accounting, he takes at the reduced rate. Gaines v. Reutch, 64 Md. 517.

In New York, compensation is confined to commissions, and cannot be allowed as a gross sum or as a *per diem* charge. M'Whorter v. Benson, Hopk. (N. Y.) 28; Vanderheyden v. Vanderheyden, 2 Paige (N. Y.), 288; Valentine v. Valentine, 2 Barb. Ch. (N. Y.) 438. But see Jewett v. Woodward, 1 Edw. Ch. (N. Y.) 199. *Compare* Me. Rev. Sts. 1857, c. 116, § 16; Wendell v. French, 19 N. H. 210; Tuttle v. Robinson, 33 N. H. 118; Everts v. Nason, 11 Vt. 122; Ringgold v. Ringgold, 1 Har. & G. (Md.) 27; Diffenderfer v. Winder, 3 G. & J. (Md.) 347; Jones v. Stockett, 2 Bland (Md.), 417; Chase v. Lockerman, 11 G. & J. (Md.) 185; Compton v. Barnes, 4 Gill. (Md.) 57; Green v. Pitney, 1 Md. Ch. 267; *Ex parte* Young, 8 Gill (Md.), 287; Northern R. Co. v. Keighler, 29 Md. 572; Smart v. Fisher, 7 Mo. 581; O'Neill v. Donnell, 9 Ala. 738; Magee v. Cowperthwaite, 10 Ala. 968; Wright's Adms. v. Wilkerson, 41 Ala. 267; Booker v. Armstrong (Mo.), 4 S. W. Rep. 727.

Under 2 Ind. R. S. 1876, p. 545, § 148, the court may allow such compensation as it may deem best. Collins v. Tilton, 58 Ind. 374, 376.

An agreement made in good faith with the *cestui que trust*, as to compensation, will determine the amount. Bowker v. Pierce, 130 Mass. 262; College of Charleston v. Willingham, 13 Rich. Eq. (S. C.) 195; Biscoe v. State, 23 Ark. 592. *Contra*, Griffin v. Barney, 2 Comst. (N. Y.) 372.

A promise by a person, afterwards appointed administrator, not to charge for

his services, made to the person otherwise entitled to administer, is binding. *Re* Davis, 65 Cal. 309. See Widener v. Fay, 51 Md. 273; Bate v. Bate, 11 Bush (Ky.), 639; *Re* Hopkins, 32 Hun (N. Y.), 618.

Where a will directs a six per cent commission upon "all moneys collected," this means "collections" merely, and does not embrace the entire estate. Ireland v. Corse, 67 N. Y. 343.

A trust annexed to his office does not entitle the executor to double commissions, first in his character of executor, and again in his character of trustee. Valentine v. Valentine, 2 Barb. Ch. (N. Y.) 430; Holley v. Sur. Gen., 4 Edw. Ch. (N. Y.) 284; Miller v. Congdon, 14 Gray (Mass.), 114, 118; Stevenson's Estate, 1 Parsons, Eq. (Pa.) 19; Aston's Estate, 5 Wh. (Pa.) 241. See Blake v. Pegram, 101 Mass. 592; White v. Bullock, 20 Barb. (N. Y.) 99; Kellogg's Case, 7 Paige (N. Y.), 267; Hosack v. Rogers, 9 Paige (N. Y.), 468; Jones's Case, 4 Sandf. Ch. (N. Y.) 616; Ward v. Ford, 4 Redf. (N. Y.) 34; Hepburn's Est., 11 Phila. (Pa.) 80; Everson v. Pitney, 40 N. J. Eq. 539; Bruere v. Gulick, 41 N. J. Eq. 280; Johnson v. Lawrence, 95 N. Y. 154; *Re* Starr, 2 Dem. (N. Y.) 141.

But where the duties imposed on the executors are separable from those imposed on them as trustees, double commissions may, in a proper case, be awarded. Blake v. Blake, 30 Hun (N. Y.), 469. But see *Re* McKie, 3 Dem. (N. Y.) 380; *Re* Leinkauf, 4 Dem. (N. Y.) 1; Bacon v. Bacon, 4 Dem. (N. Y.) 5.

One dealing with the same fund as trustee under one will, and executor under another, may receive commissions for services in each capacity. Clermontel's Estate, 13 Phila. (Pa.) 235.

Executors are entitled to commissions as executors and also as trustees, where, their duties as executors having ended, they take the estate as trustees, and afterwards act solely in that capacity. Baker v. Johnston, 39 N. J. Eq. 493. In such case commissions should be calculated on the *corpus* of the estate, in each capacity, at such rate as will yield a reasonable compensation for the service in each of such respective offices. Pitney v. Everson (N. J.), 7 A. 860.

An executor, who is also the surviving partner of the testator, is not entitled to any commissions for settling the business of the firm. Such services are entirely distinct from his duties as executor, for which he should be awarded due compensation. McMenamin's Estate, 15 Phila. (Pa.) 510; Terrell v. Rowland (Ky.), 4 S. W. Rep. 825.

Commissions will not be allowed on re-investments. — Barton's Estate, 1 Pars. Eq. (Pa.) 29; Trustees of Hemphill, 1 Pars. Eq. (Pa.) 31, note; Hemphill's Appeal, 6 Harris (18 Pa. St.), 303, — nor interest on commissions. Callaghan v. Hall, 1 S. & R. (Pa.) 241; Say v. Barnes, 4 S. & R. (Pa.) 116; Armstrong's Est. 6 Watts

(Pa.), 236. *Compare* Drake v. Drake, 82 N. C. 446.

As to allowing commissions on the amount of the inventory in Louisiana, see Boyer's Succession, 36 La. An. 506.

The court has declined to allow commissions upon the value of a specific legacy. Gordon v. West, 8 N. H. 444. *Contra*, McMenamin's Estate, 15 Phila. (Pa.) 510. See McCauseland's Appeal, 38 Pa. St. 466; Luken's Appeal, 47 Pa. St. 356; Hall v. Tryon, 1 Dem. (N. Y.) 296.

Re-investment is not essential to the right to commissions. *Re* Morgan, 3 Dem. (N. Y.) 289; s. c., 15 Abb. (N. Y.) N. Cas. 198. See *Re* Eiseman, 3 Dem. (N. Y.) 72; De Waldo's Estate, 13 Phila. (Pa.) 251; Luken's Appeal, 47 Pa. St. 356.

An executrix is not entitled to commissions on a debt due her testator, and by him specifically bequeathed to her. Handy v. Collins, 60 Md. 229; s. c., 45 Am. Rep. 725. Nor on receipts and disbursements having only a constructive existence. Hill v. Nelson, 1 Dem. (N. Y.) 357. See Metcalf v. Colles (N. J.), 10 Atl. Rep. 804.

An executor, continuing the business of the testator, is not entitled to commissions on money paid out for goods, and on money received from the sale of goods so bought. In such a case, the proper compensation is a reasonable allowance for the time and labor bestowed in carrying on the business. Dwyer v. Kaltayer (Tex.), 5 S. W. 75.

Commissions on credits or a set-off, where a claim is adjusted, are not favored; the commission should be computed on the balance; commissions on a debt due to or from the representative should be disallowed. Bedell's Appeal, 85 Pa. St. 398; Brown v. Walker, 38 Tex. 109; Moffatt v. Loughridge, 51 Miss. 211.

On sales of real estate, a commission of more than two and one-half per cent is rarely allowed. Clark's Est., 11 Phila. (Pa.) 53; Eshleman's Estate, 74 Pa. St. 42; Carrier's Appeal, 79 Pa. St. 230; Snyder's Appeal, 54 Pa. St. 69; Robb's Appeal, 41 Pa. St. 49.

Five per cent was allowed in Stein v. Huesmann, 38 N. J. Eq. 405.

An executor, authorized by the will to sell real estate at discretion, is entitled to reasonable compensation for the care of the property, although no sale is actually made, but not to commissions *as such*. Twaddell's Appeal, 81* Pa. St. 221. See McCloskey's Appeal, 13 Phila. (Pa.) 254.

In the administration of an estate, the debts were paid from the personal estate, and the division of the real estate was surrendered to the devisees thereof, which division was accomplished by an agreement followed by conveyances in which the executor joined as legatee, and declared, as executor, that it was not necessary to sell real estate in order to carry out the provisions of the will. *Held*, that the real estate did not come to the hands of the executor,

so as to entitle him to commissions thereon Metcalfe v. Colles (N. J.), 10 A. 804.

Under a bill to compel a settlement of an administrator's accounts and a distribution of the estate, and to enforce a vendor's lien on lands sold by a preceding administrator under a probate decree, the land being sold pending suit, and the proceeds brought into court for distribution, but without the agency of the administrator, *held*, that he was not entitled to a commission on such proceeds. Moore v. Randolph, 70 Ala. 575.

As to construction of Ohio Rev. Sts. §§ 61, 65, 6188, see Stone v. Strong, 42 Ohio St. 53.

Where the executor sells real estate subject to mortgages existing at the testator's death, or free from the incumbrance, paying it off from the proceeds of the sale, he is only entitled to commissions upon the amount actually received for the equity of redemption, and cannot charge them also upon the amount of the mortgages on the property sold. Baucus v. Stover, 4 Hun (N. Y.), 110. See Watt v. Downs, 36 Tex. 116; Reynolds v. Canal & Bkg. Co., 30 Ark. 520; Stone v. Strong, 42 Ohio St. 53.

Effect of Gift of Legacy, or Provision in Will.—A bequest to an executor, in the absence of language showing it to be a specific compensation for his services, does not deprive him of the right to charge commissions. *Re* Mason, 98 N. Y. 527; Oden v. Windley, 2 Jones, Eq. (N. C.) 445; Campbell v. MacKie, 1 Dem. (N. Y.) 185.

Where provisions of a will may be construed as depriving the executor of a right to compensation, or may be construed otherwise with equal reason, the executor will be deemed entitled to compensation. *Re* Marshall, 3 Demarest (N. Y.), 173.

Where a testator appoints certain parties executors and trustees, and also makes his wife, to whom he gives in trust the larger portion of the income from his estate for her life, executrix, and provides that the executors and trustees other than his wife shall receive full legal commissions, the wife is not entitled to commissions, though she takes part in the settlement and management of the estate. *In re* Kernochan (N. Y.), 11 N. E. 149; *Re* Gerard, 1 Dem. (N. Y.) 244.

In some States, nothing in the will can affect the statutory commissions. Handy v. Collins, 60 Md. 229; *In re* Marshall's Estate, 67 How. Pr. (N. Y.) 519.

Although a statute, permitting executors to elect between the commissions fixed by law and a testamentary provision in lieu thereof, names no time within which such election must be exercised, it must be exercised promptly, or it will be lost by laches. Arthur v. Nelson, 1 Demarest (N. Y.), 337.

Effect of Misconduct.—To justify the court in withholding all compensation from the executor or administrator on the ground of misconduct, the default must be wilful or the negligence gross, causing actual loss to the estate. Pearson v. Darrington, 32

In addition to the ordinary commissions, a moderate charge may be allowed for professional or personal services (other than

Ala. 231; *Powell v. Powell*, 10 Ala. 900, 914; *Donaldson v. Pusey*, 13 Ala. 752; *Hall v. Wilson*, 14 Ala. 295; *Gould v. Hayes*, 19 Ala. 438; s. c., 25 Ala. 432; *Lyon v. Forscue*, 60 Ala. 468; *Walker v. Walker*, 9 Wall. (U. S.) 743; *Blake v. Pegram*, 109 Mass. 541, 557; *Hermstead's Appeal*, 60 Pa. St. 423; *Norris's Appeal*, 71 Pa. St. 106; *Carrier's Appeal*, 79 Pa. St. 230; *Clauser's Estate*, 84 Pa. St. 51; *Unruh's Estate*, 13 Phila. (Pa.) 337; *Grant v. Reese*, 94 N. C. 720. See also *Aston's Estate*, 4 Wh. (Pa.) 240; *Dyott's Estate*, 2 W. & S. (Pa.) 557; *Bredin v. Kingland*, 4 Watts (Pa.), 420; *Stattswalter's Acct.*, 4 Watts (Pa.), 77; *Stehman's Appeal*, 5 Pa. St. 414; *McCahan's Appeal*, 7 Pa. St. 59; *Berryhit's Appeal*, 35 Pa. St. 245; *Brown v. McCall*, 3 Hill (N. Y.), 335; *Hapgood v. Jennison*, 2 Vt. 294; *Moore v. Zabriskie*, 3 Green (N. J.), 51; *Tanzanne's Succession*, 36 La. An. 420; *Eppinger v. Canepa*, 20 Fla. 262.

An executor who has discharged his duties faithfully, and with advantage to the estate, does not forfeit his commissions by merely keeping on hand larger amounts than the necessities of the estate required, or by placing a wrong construction upon the will, and thereby compelling persons interested to proceed against him to obtain their rights. *Foster v. Denman*, 41 N. J. Eq. 47; *Miller's Appeal* (Pa.), 8 Atl. Rep. 864.

Where an administrator holds a bill of sale upon personal property belonging to the deceased, and sells the property thereunder, and appropriates the proceeds to the satisfaction of his own debt, although, as against creditors of the estate which is insolvent, such bill of sale is invalid, he is entitled to his commissions so long as the sale is made advantageously, and the estate suffers no injury thereby, and he acts under a *bona fide*, though mistaken, belief as to his rights under the bill of sale. *Heft's Appeal* (Pa.), 9 A. 87.

An executor's commissions should not be cut down in order that counsel, properly employed, may be fairly compensated, even though a part of the services rendered by counsel might, perhaps, have been performed by the executor. *Lancaster's Estate*, 14 Phila. (Pa.) 237. Compare *Cahill's Estate*, id. 309. But commissions cannot be awarded to an executor who has rendered no service. *Re Manier*, 31 Hun (N. Y.), 119.

Where no account has ever been reported by the trustee for allowance, and where the trust funds have been retained in his hands without distinct and separate investment, no commission will be allowed. *McKnight v. Walsh*, 24 N. J. Eq. 498, 506, 507; *Warbass v. Armstrong*, 2 Stockt. (N. J.) 263; *Frey v. Frey*, 2 C. E. Greene (N. J.), 71;

Jackson v. Jackson, 2 Green (N. J.), Ch. 113. See *Holman's Appeal*, 24 Pa. St. 174; *Witman & Geisinger's Appeal*, 28 Pa. St. 376; *Robinett's Appeal*, 36 Pa. St. 191; *Stearley's Appeal*, 38 Pa. St. 525; *Smith's Appeal*, 47 Pa. St. 424; *Blake v. Pegram*, 109 Mass. 541; *Frost v. Denman*, 41 N. J. Eq. 217.

In some States the omission to file annual accounts, as required by statute, is a forfeiture of all commissions. *Benson v. Bruce*, 4 Dev. (N. C.) 464; *Edmonds v. Crenshaw, Harp.* (S. C.) 233; *Frazier v. Vaux, 1 Hill* (S. C.), Ch. 203; *Wright v. Wright*, 2 McCord, Ch. (S. C.) 196; *Black v. Blakeley*, 2 McCord (S. C.), Ch. 8; *McDowell v. Caldwell*, 2 McCord, Ch. (S. C.) 59; *Lay v. Lay*, 10 S. C. 208; *Fall v. Simons*, 6 Ga. 274; *Kenan v. Paul*, 8 Ga. 417. *Contra*, *Gould v. Hayes*, 19 Ala. 439; *Re Barcalow*, 29 N. J. Eq. 282. See *Grant v. Reese*, 94 N. C. 720; *Tompkins v. Tompkins*, 18 S. C. 1.

Under a statute providing that a personal representative who fails to lay before the proper commissioner a statement of his receipts for any year for six months after its expiration, shall forfeit his compensation, but the court may, nevertheless, in its discretion, allow to him compensation, such discretion must be reasonably exercised, and is subject to review. It is incumbent upon a delinquent fiduciary, who asks the court to exercise its discretion in his favor, to give a reasonable excuse for his delay. *Trevelyan's Admr. v. Lofft* (Va.), 1 S. E. 901.

Commissions have been allowed although the trustees have been charged with compound interest. *Peyton v. Smith*, 2 Dev. & B. (N. C.) 325; *Thompson v. McDonald*, 2 Dev. & B. (N. C.) 471. But see *Arnold v. Bayard*, 2 Dev. Eq. (N. C.) 4; *Finch v. Raynard*, 2 Dev. Eq. (N. C.) 141.

A mistake in judgment will not deprive an executor of his commission. *Meyer's Appeal*, 62 Pa. St. 109.

Unfaithful administration will not deprive an executor or administrator of the right to compensation for his services, so far as they have been beneficial to the persons interested in the estate. *Jennison v. Hapgood*, 10 Pick. (Mass.) 77, 112. See *Tiner v. Christian*, 27 Ark. 306; *Blake v. Pegram*, 109 Mass. 541, 557; *Moore v. Zabriskie*, 3 Green (N. J.), 51; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495; *McKnight v. Walsh*, 24 N. J. Eq. 136; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Singleton v. Lowndes*, 9 S. C. 465; *Belknap v. Belknap*, 5 Allen (Mass.), 472; *Miller's Appeal* (Pa.), 8 Atl. Rep. 864.

Mode and Time of Deducting Commissions.

— A trustee may deduct his compensation as of the day of receiving and paying out;

those included in the ordinary functions of his office) rendered by the personal representative, and required by the estate.¹

the residue of the sum received constituting the proper charge, and the sum paid increased by the commissions, the proper credit. The same practical result is reached by deducting commissions from both principal and interest ascertained on the final settlement. *Drake v. Drake*, 82 N. C. 443, 446.

Unless a contrary intent appear, executors who are directed by the will to invest one-third of the residue of the estate, and pay the interest to the widow for life, are entitled to deduct their compensation for managing the fund out of such income. *Spangler's Estate*, 9 Harris (Pa.), 335. See *Woodruff v. Lounsberry* (N. J.), 11 Atl. Rep. 113.

Under N. Y. R. S. (6th ed.) p. 101, § 71, executors and administrators cannot deduct their commissions until awarded by the surrogate, although not bound to part with the control of funds necessary to meet them until their claim has been determined. *Wheelwright v. Wheelwright*, 2 Redf. (N. Y.) 501; *Re Harris*, 4 Dem. (N. Y.) 463. See *Collins v. Tilton*, 58 Ind. 374; *Clarke v. Blount*, 2 Dev. Eq. (N. C.) 54.

Commissions should be paid for services actually rendered, without anticipating what may be done in future. *Walker's Estate*, 9 S. & R. (Pa.) 223, 226.

The fact that the trustee has rendered informal semi-annual accounts to the *cestui que trust* without deducting commissions, will not estop him from claiming them in his final account. *Wister's Appeal*, 86 Pa. St. 160.

Co-Executors and Co-Administrators.—The number of executors or administrators does not affect the rate of commission. *Walker's Estate*, 9 S. & R. (Pa.) 223. But see *Re Welling*, 3 Dem. (N. Y.) 511.

Where one of two executors is not entitled to his commission, because he is a legatee, the other executor should receive only one-half of the two and one-half per cent commission. *Edward's Succession*, 34 La. An. 216.

Where both executors seem to have been willing to do, and to have done whatever was required, the commissions should be divided. *Squier v. Squier*, 30 N. J. Eq. 627; *Pomeroy v. Mills*, 40 N. J. Eq. 517.

If their trouble is unequal, a share of the commission ought to be assigned to each proportioned to his trouble. *Walker's Estate*, 9 S. & R. (Pa.) 223; *Stevenson's Estate*, 1 Pars. Eq. (Pa.) 19; *Waddill v. Martin*, 3 Ired. Eq. (N. C.) 562; *Grant v. Pride*, 1 Dev. Ch. (N. C.) 269; *Hodge v. Hawkins*, 1 Dev. & B. (N. C.) Eq. 564; *Hill v. Nelson*, 1 Dem. (N. Y.) 357; *Re Harris*, 4 Dem. (N. Y.) 463. But see *White v. Bullock*, 4 Abb. App. Dec. (N. Y.) 578.

They may arrange with one another as

to duties and compensation. *White v. Bullock*, 4 Abb. App. Dec. (N. Y.) 578; *Brown v. Stewart*, 4 Md. Ch. 368; *Bassett v. Miller*, 8 Md. 548.

An Executor de son Tort is not entitled to commissions. *Haglar v. McCombs*, 66 N. C. 345.

A public administrator who seeks an appointment, knowing that by law he is not entitled, can claim no recompense. *Succession of Miller*, 27 La. An. 574.

Special Administrators are not usually entitled to full commissions. *Wright v. Wilkerson*, 41 Ala. 267; *Hawkins v. Cunningham*, 67 Mo. 415.

As to commissions of administrator *de bonis non*, see *Estate of Marvin*, Myr. Prob. (Cal.) 163.

1. *Lowrie's Appeal*, 1 Grant (Pa.), 373; *Wendell v. French*, 19 N. H. 210; *McCloskey's Estate*, 11 Phila. (Pa.) 95; s. c., 86 Pa. St. 346; *Emerson, Appellant*, 32 Me. 159; *Evarts v. Nason*, 11 Vt. 122; *Clark v. Platt*, 30 Conn. 282; *Roach v. Jelks*, 40 Miss. 754. See *Clark v. Knox*, 70 Ala. 607; s. c., 45 Am. Rep. 93; *Lent v. Howard*, 89 N. Y. 169. Compare *Campbell v. Mackie*, 1 Dem. (N. Y.) 185; *Pullman v. Willets*, 4 Dem. (N. Y.) 536.

It devolves upon the representative to show that the special service was necessary or required, not within the line of his official duty, beneficial to the estate, and the amount charged reasonable and proper. *McCloskey's Estate*, 11 Phila. (Pa.) 95; s. c., 86 Pa. St. 346.

Compensation will not be allowed if the necessity for the service was caused by his own wrong. *Stearly's Appeal*, 38 Pa. St. 525.

Extra compensation for professional or other special services has been refused in some States on the ground that to allow them might enable the executor to derive an improper profit from his office, although, had such services been performed by an agent employed by the executor, the compensation and expenses of such agent would have been allowed. *Hough v. Harvey*, 71 Ill. 72, 76; *Gamble v. Gibson*, 59 Mo. 585, 594; *Mayer v. Galluchet*, 6 Rich. Eq. (S. C.) 2. But see *Re Handfield*, 16 Mo. App. 332.

Under this principle it is also held an executor cannot receive credit for attorney's fees incurred by him, and paid to a firm of which he is a member. *Taylor v. Wright*, 93 Ind. 121.

For services rendered during decedent's lifetime as apparently gratuitous, no compensation is allowed. *Egerton v. Egerton*, 17 N. J. Eq. 419. See *Willson v. Willson*, 2 Dem. (N. Y.) 462.

Lien for Commissions and Expenses.—**Status of Representative's Claim.**—Executors and administrators ought to be

6. *Conclusiveness of Settlement. — Distinction between Partial and Final Accounting. — Perpetuating Evidence of Distribution. — Procuring Final Discharge. — Liability of Representative after Discharge.* — The final settlement of an administration account in the probate court, upon due citation,¹ is conclusive as to all matters which came directly before the court, and, unless impeached for fraud or manifest error, can only be called in question by a direct proceeding, as an appeal or writ of error.² A partial or annual

allowed all reasonable charges and disbursements for the benefit of the estate they represent, and a reasonable recompense for their trouble in preference to any creditor of the deceased. *Nimmo v. Commonwealth*, 4 H. & M. (Va.) 57; *Edelen v. Edelen*, or 30 Conn. 7 11 Md. 415; *Clarke v. Blount*, 2 Dev. Eq. (N. C.) 51; *Whitted v. Webb*, 2 Dev. & B. (N. C.) 442; *Pearson v. Darrington*, 32 Ala. 227; *Williamson v. Williamson*, 6 Paige (N. Y.), 298; *Glover v. Halley*, 2 Bradf. Sur. (N. Y.) 291; *Wheelwright v. Wheelwright*, 2 Redf. (N. Y.) 501; *Re Wilson*, 2 Pa. St. 325. See *Underwood v. Milligan*, 10 Ark. 254; *McEldery v. McKenzie*, 2 Port. (Ala.) 33; *Jones v. Jenkins*, 2 McCord (S. C.), 494; *Sims v. Stilwell*, 4 Miss. 176; *Miller v. Williamson*, 5 Md. 219; *Nicholas v. Jones*, 3 A. K. Marsh. (Ky.) 385; *Allen v. Graffius*, 8 Watts (Pa.), 397; *DEBTS OF DECEDENTS*, § 2, p. 251. But an administrator who voluntarily pays a debt secured by a trust deed, under the mistake that there are sufficient personal assets to reimburse him, will not be subrogated to the rights of the trust-deed creditor. *Evans v. Halleck*, 83 Mo. 376.

Under Ohio Rev. St. § 6165, providing that the money arising from the sale of real estate to pay decedent's debts shall be applied first "to discharge the costs and expenses of the sale, and the per centum and charges of the executor or administrator thereon, for his administration of the same," held, that the administrator was entitled to payment before mortgagees or other lienors. *Stone v. Strong*, 42 Ohio St. 53.

Where an executor has, by retainer, satisfied his own claim against the estate, the Orphans' Court, in passing his account, has jurisdiction to inquire into the validity of the claim, and the legality of his action in retaining therefor. *Kinnan v. Wight*, 39 N. J. Eq. 501.

As to right of retainer, see *Chaffe v. Farmer*, 36 La. An. 813; § XIV.

As to plea of retainer, see § XVI.

1. See § XVII. 1, n. See *Edwards v. Edwards*, 1 Dem. (N. Y.) 132; *Trawick v. Trawick*, 67 Ala. 271; *McMullen v. Brazelton* (Ala.), 1 So. Rep. 778; *Echols v. Almon* (Ga.), 1 S. E. Rep. 269; *Clerre v. Clerre* (Ala.), 3 So. Rep. 107; *Grant v. Hughes*, 94 N. C. 231. The accounting will be presumed to have been on proper notice. *Sparhawk v. Buell's Adm'r*, 9 Vt.

77; *Sever v. Russell*, 4 Cush. (Mass.) 513; *Crawford v. Redus*, 54 Miss. 700.

As to creating decree on an executor's accounting because of the infancy of an interested party, see *Re Tilden*, 98 N. Y. 434.

A settlement of an executor's account is binding upon a party interested, although the notice consisted of a citation left with the person in charge of his house (he being in England) two months before the entry of the decree, if the surrogate is satisfied, under N. Y. Code, § 2520, "that the copy came to his knowledge in time for him to attend." *Re Morrell*, 3 Demarest (N. Y.), 577.

If an administrator's account is allowed in his absence, he failing to appear as required, he cannot complain on error that he was not allowed any commissions. *May v. Carlisle*, 68 Ala. 135.

2. *Austin v. Alexander*, 23 Miss. 189; *Caldwell v. Lockridge*, 9 Mo. 362; *Barton v. Barton*, 35 Mo. 158; *Brick's Estate*, 15 Abb. (N. Y.) Pr. 12; *Smith's Prob. Pract.* 183; *Smith v. Davis*, 49 Md. 470; *Williams v. Petticrew*, 62 Mo. 460; *Pierce v. Irish*, 31 Me. 254; *Gregg v. Gregg*, 15 N. H. 190; *Matter of Stott*, 52 Cal. 403; *Burd v. McGregor*, 2 Grant (Pa.), 353; *Wright v. Trustees of M. E. Church*, 1 Hoffm. (N. Y.) 202; *Cooper v. Burton*, 7 Bax. (Tenn.) 406. See *Mayo v. Clancy*, 57 Miss. 674; *Musick v. Beebe*, 17 Kan. 47; *Seawell v. Buckley*, 54 Ala. 592; *Sanders v. Loy*, 61 Ind. 298; *Carver v. Lewis*, 104 Ind. 438; *Parcher v. Russell*, 11 Cush. (Mass.) 107; *Arnold v. Mower*, 49 Me. 561; *Harlow v. Harlow*, 65 Me. 448; *Bunting's Appeal*, 4 W. & S. (Pa.) 460; *Grimstead v. Huggins*, 13 Lea (Tenn.), 728; *Tobelman v. Hilderbrand* (Cal.), 14 Pac. Rep. 20. Compare *University v. Hughes*, 90 N. C. 537.

As to the analogous case of guardianship accounts, see *Diaper v. Anderson*, 37 Barb. (N. Y.) 160; *Manning v. Baker*, 8 Md. 44; *Lynch v. Rotan*, 39 Ill. 14; *Stevenson's Appeal*, 32 Pa. St. 318; *Yeager's Appeal*, 34 Pa. St. 173; *Seaman v. Duryea*, 1 Kern. 324; *Brent v. Grace*, 30 Mo. 253; *Holland v. State*, 48 Ind. 391; *Cummings v. Cummings*, 128 Mass. 532; *State v. Strange*, 1 Cart. 538; *Reynolds v. Walker*, 29 Miss. 250; *Allman v. Owen*, 31 Ala. 167; *Foust v. Chamblee*, 51 Ala. 75.

"A decree of the probate court, settling an executor's or administrator's account, is undoubtedly in the nature of a final judg-

account is only a judgment *de bene esse*, often rendered *ex parte*,

ment, and conclusive of all matters involved in it. But it is not conclusive upon the executor or administrator of a *money demand* or liability; and the rule applicable to a judgment for a money demand cannot be applied to it. It concludes the executor or administrator as to the balance found in his hands for distribution, and as to the items on the schedules of which that balance is composed, but does not preclude him from showing that any particular item supposed to have been part of the estate has in fact been lost or destroyed, or subsequently taken from him by title paramount. *Sellew's Appeal*, 36 Conn. 186, 193. But see *McDonald v. McDonald*, 50 Ala. 26.

The decree is only conclusive upon those matters *directly* passed upon by the court, and not upon any matter only collaterally in issue. The object of the accounting is to ascertain how much the accountants have received, and how much remains after payment of debts and expenses. Creditors have no interest beyond the amount of assets. Payments made to, or releases given by, distributees can have no place in it. It settles nothing but the basis on which a distribution may be subsequently made. *Sparhawk v. Buell*, 9 Vt. 41, 77; *Rix v. Smith*, 8 Vt. 365; *Adams v. Adams*, 21 Vt. 162; *Ake's Appeal*, 21 Pa. St. 320, 322.

Hence the decree or order settling the account is conclusive upon both the representative and the estate as to the amount received and paid out, and the balance found to be in his hands for distribution, and with which he is then chargeable. *Burd v. McGregor*, 2 Grant (Pa.), 353; *Estate of Stott*, 52 Cal. 403. See *Seller's Appeal*, 36 Conn. 186, 193; *McDonald v. McDonald*, 50 Ala. 26; *Johnson v. Richards*, 5 N. Y. Sup. 654; *Cooper v. Burton*, 7 Bax. (Tenn.) 406; *Austin v. Lamar*, 23 Miss. 189; *Hall v. Grover*, 25 Mich. 428; *Hopkins's Est.* 11 Phila. (Pa.) 43.

But the rights of legatees and distributees, as between each other, are not affected. *Ake's Appeal*, 21 Pa. St. 320; *Johnson v. Richards*, 5 N. Y. Sup. 654. See *Granger v. Bassett*, 98 Mass. 462, 469; *Cowdin v. Perry*, 11 Pick. (Mass.) 503, 511, 512; *Smith v. Lambert*, 30 Me. 137, 145; *Williams v. Cushing*, 34 Me. 370, 375; *Arnold v. Smith*, 14 R. I. 217.

A plea by an administrator, setting up a settlement of his account in the Orphans' Court, is no defence to a bill by a legatee praying discovery as to the character of the security in which her legacy is invested, and for such action as will protect her interests therein. *Carpenter v. Gray*, 37 N. J. Eq. 389.

The final settlement does not preclude further inquiry in regard to assets of the estate in the hands of the representative not accounted for or passed upon. *McAfee v. Phillips*, 25 Ohio St. 374; *Brown*

v. Brown, 53 Barb. (N. Y.) 217; *Flanders v. Lane*, 54 N. H. 390.

A settlement of an account in the probate court by an administrator, in which he does not charge himself with interest on moneys received by him, does not preclude a subsequent inquiry as to the propriety of charging him with interest, if the question of interest was not a subject of examination when the account was passed. *Saxton v. Chamberlain*, 6 Pick. (Mass.) 422; *Boynton v. Dyer*, 18 Pick. (Mass.) 1. *Contra*, *Estate of Stott*, 52 Cal. 403; *James v. Mathews*, 5 Ired. (N. C.) Eq. 28; *Burton v. Dickinson*, 3 Yerg. (Tenn.) 112.

But if, when the account was settled, the probate court inquired into the liability to pay interest, and decided against it, the settlement, unless obtained by fraud, is conclusive against the liability. *Saxton v. Chamberlain*, 6 Pick. (Mass.) 422.

An executor included in his inventory a note due to his testator from the estate of a deceased debtor who was domiciled in another State, secured by a mortgage on land in that State. He took out administration in that State, sold the note and mortgage, and rendered a final account in that State, which was there allowed. *Held*, that such allowance of the disposition made by him of the proceeds of the note was conclusive in the settlement of his administration account in the probate court of the domicile, but that the probate court of the domicile could inquire into the good faith of the sale, and if it should find that the sale was fraudulent, and the executor the real purchaser of the note, could compel him to account for the excess of its value above what he actually paid. *Clark v. Blackington*, 110 Mass. 369.

A final accounting does not bar proceedings for a distinct trust. *Fulton v. Whitney*, 5 Hun (N. Y.), 16; *Whitney v. Phoenix*, 4 Redf. (N. Y.) 180; *Re Hood*, 98 N. Y. 363.

Ex Parte Settlement is to be taken as *prima facie* true on a bill by legatees or distributees for a new settlement. *McCall v. Peachy*, 3 Munf. (Va.) 288; *Newton v. Poole*, 12 Leigh (Va.), 112.

Such account may be surcharged and falsified by proof. *Cavendish v. Fleming*, 3 Munf. (Va.) 198; *Mountjoy v. Lowry*, 4 Hen. & M. (Va.) 428; *Shearman v. Christian*, 9 Leigh (Va.), 571; *Manion v. Tittsworth*, 18 B. Mon. (Ky.) 582. See *Oldham v. Trimble*, 15 Mo. 225.

Fraud and Mistake.—Opening, revising, and setting aside.—In case of fraud or mistake, the settlement may be set aside, or the account corrected by the probate court on petition, and on its refusal by the appellate court on appeal. Errors on a partial account may be corrected in a subsequent account. *Jennison v. Hapgood*, 7 Pick. (Mass.) 11; *Stetson v. Bass*,

and only *prima facie* correct. On final settlement it may be

9 Pick. (Mass.) 27; Davis v. Cowdin, 20 Pick. (Mass.) 510; Sipperly v. Baucus, 24 N. Y. 46; Arnold v. Mower, 49 Me. 561; *In re Herteman* (Cal.), 15 Pac. Rep. 121; Coburn v. Loomis, 49 Me. 406; Decker v. Elwood, 3 Thomp. & C. (N. Y.) 48; Brick's Estate, 15 Abb. Pr. (N. Y.) 12; Githens v. Goodwin, 32 N. J. Eq. 286; Buchanan v. Grimes, 52 Miss. 82; Adams v. Adams, 21 Vt. 162, 166; Mix's Appeal, 35 Conn. 121; Selew's Appeal, 36 Conn. 186, 193; Sherman v. Chace, 9 R. I. 166; Scott v. Fox, 14 Md. 388; Blake v. Ward, 137 Mass. 94; Brandon v. Brown, 106 Ill. 519.

If, at the time the mistake is discovered, the party has a right to appeal, the account may be corrected in the appellate court; but if the account has been allowed, and no appeal taken, and no motion made in the probate court to have the mistake corrected, it cannot be corrected on an appeal from a subsequent account. Stetson v. Bass, 9 Pick. (Mass.) 30; Davis v. Cowden, 20 Pick. (Mass.) 512; Coburn v. Loomis, 49 Me. 406; Arnold v. Mower, 49 Me. 561; Smith v. Dutton, 16 Me. 308.

The power of the probate court to correct errors in the account is confined to manifest mistakes on the face of the account, and does not extend to opening or reversing the final sentence or decree on the ground that it had erred as to the law, or decided erroneously as to the facts. Brick's Estate, 15 Abb. Pr. (N. Y.) 12; Johnson v. Eicke, 12 N. J. L. (7 Hals.) 316; Stevenson v. Hart, 7 N. J. Eq. (3 Hals.) 471.

A final account cannot be opened by the Orphans' Court to review a matter in its own discretion, as the allowance or division of commission. Stevenson v. Phillips, 21 N. J. L. 70.

If the proceedings in the probate court were absolutely void through fraud, the executor or administrator may be cited to account there anew. Davis v. Cowden, 20 Pick. (Mass.) 510; Decker v. Elwood, 1 Thomp. & C. (N. Y.) 48.

In some States, a final account of an executor, allowed by the probate court, cannot subsequently be set aside on petition, except for fraud. Irregularity or error in the allowance can only be corrected by writ of error and appeal. Smith v. Hurd, 8 Miss. (7 How.) 188. *Compare* Harper v. Archer, 17 Miss. 71; Searles v. Scott, 22 Miss. 94; Fowte v. McDonald, 27 Miss. 610; Buchanan v. Grimes, 52 Miss. 82; Strong v. Wilkson, 14 Mo. 116; Dyer v. Jacoway, 42 Ark. 186; Dickson v. Hitt, 98 Ill. 300.

The Pennsylvania orphans' courts have no power, under act of Oct. 13, 1840, § 1, to open decrees confirming the accounts of executors, administrators, and guardians, and to re-examine said accounts, where the balance thereby found to be due

has, in the mean time, been actually paid and discharged. And a petition for such opening, etc., will not be entertained unless it sets forth all the facts necessary to give the court jurisdiction, and, among others, the fact of the non-payment of such balance. Lehr's Appeal, 98 Pa. St. 25. But this act is no bar to proceedings when the object is to effect a surcharge. See Redmond v. Ely, 2 Bradf. (N. Y.) 175.

In some States, only a court of equity, and not a court of probate, can open a settled account. Harris v. Stilwell, 4 S. C. 19. *Compare* Watt v. Watt, 37 Ala. 543; Stewart v. Stewart, 31 Ala. 207; Catterlin v. Morgan, 50 Ala. 501; Black v. Whittall, 9 N. J. Eq. (1 Stockt.) 572; Osborne v. Graham, 30 Ark. 66; Mock v. Pleasants, 34 Ark. 63; Williams v. Rhodes, 81 Ill. 571; State v. Stephenson, 12 Mo. 178; Strong v. Wilkson, 14 Mo. 116.

In Massachusetts, the Supreme Court, as a court of chancery, has no jurisdiction. Sever v. Russell, 4 Cush. (Mass.) 513. See Miller v. Steele, 64 Ind. 79; Capers v. McCao, 41 Miss. 479; Fowte v. McDonald, 27 Miss. 610; Brandon v. Brown, 106 Ill. 519.

As to opening, revising, or setting aside probate settlements in a court of chancery, on the ground of fraud or mistake, see Pearce v. Savage, 51 Me. 410; Owens v. Collinson, 3 Gill & J. (Md.) 25; Scott v. Fox, 14 Md. 388; State v. Stephenson, 12 Mo. 178; Black v. Whittall, 9 N. J. Eq. (1 Stockt.) 572; Morrow v. Allison, 39 Ala. 70; Akins v. Hill, 7 Ga. 573; Ray v. Doughty, 4 Blackf. (Ind.) 115; Brackenridge v. Holland, 2 Blackf. (Ind.) 377; Harkins v. Layne (Ark.), 3 S. W. Rep. 821; Conover v. Conover, 1 N. J. Eq. (Sax.) 403; Evertson v. Tappen, 5 John. (N. Y.) Ch. 497; Beatty v. Universalist Soc., 39 N. J. Eq. 452; Brown v. Wickliffe, 1 A. K. Marsh. (Ky.) 337; Green v. Creighton, 18 Miss. 159; Price v. Mitchell, 18 Miss. 179; McLachlan v. Staples, 13 Wis. 448; Sorrells v. Trantham, 3 S. W. Rep. 198.

A decree of the Orphans' Court will not be opened in equity when impeached for fraud, on proof of error or mistake only. Cowan v. Jones, 27 Ala. 317; Stevenson v. Phillips, 15 N. J. Eq. 236.

Where the executor and legatee honestly misconstrue the will, and have a settlement in full based upon such misconstruction, the settlement will not be opened merely because of such misconstruction. Keitt v. Andrews, 4 Rich. (S. C.) Eq. 349.

Equity will not set aside a settlement because of illegal allowances to the representative where there is no proof that they were obtained by fraud or misrepresentation. Mock v. Pleasants, 34 Ark. 63; Lewis v. Williams, 54 Mo. 200; Miller v. Major, 67 Mo. 247.

The party who seeks to open the settlement must show, not only error, but error

opened to correct errors due to fraud or mistake, although the error

resulting from accident or mistake, or the fraud of the opposite party: errors known to both sides at the time of the settlement cannot be made a ground for opening it, nor can the fact that a return made of that settlement shows a larger balance due the complainants than they actually received. *Walker v. Wootten*, 18 Ga. 119. See *Murrel v. Murrel*, 2 Strobb. (S. C.) Eq. 148; *Redmond v. Ely*, 2 Bradf. (N. Y.) 175; *Hyer v. Morehouse*, 20 N. J. L. (Spen.) 125; *Engle v. Crombie*, 21 N. J. L. (1 Zab.) 614.

The fact that the petition of review does not specify any errors in the original decree is sufficient ground to refuse to open the account. *Kachlein's Appeal*, 5 Pa. St. 95.

The petition must also state facts which negative negligence on the part of the petitioner. *Hazlett v. Burge*, 22 Iowa, 531; *Williams v. Price*, 11 Cal. 212.

It is improper, on opening an account for fraud or mistake, to enter the order by mutilating the original account or decree. *Stevenson v. Phillips*, 1 Zab. (N. J.) 70.

See further, as to setting aside and re-statement, *State v. Mayhew*, 9 N. J. L. 70; *Clark v. Clark*, Penn. (N. J. L.) star page 112; *Drysdale's Appeal*, 14 Pa. St. 531.

Returning a false inventory is such a fraud as will cause the final settlement to be set aside. *West v. Reavis*, 13 Ind. 294.

So is a wilful omission to charge himself with assets come to hand. *Houts v. Shepherd*, 79 Mo. 141.

As to the effect of lapse of time upon the plaintiff's right to have the account re-opened or set aside, in the absence of express legislation no definite period can be said to operate as an absolute bar. Where no fraud was alleged, the court has refused to disturb a settlement after twenty years. *Child's Appeal*, 23 N. H. 225.

Otherwise where the settlement was affected with fraud. *Davis v. Cowden*, 20 Pick. (Mass.) 510. Compare *James v. Mathews*, 5 Ired. (N. C.) Eq. 28; *Burton v. Dickinson*, 3 Yerg. (Tenn.) 112; *Sippery v. Baucus*, 24 N. Y. 46; *Keitt v. Andrews*, 4 Rich. (S. C.) Eq. 349; *Patterson v. Bell*, 25 Iowa, 149; *Brown v. Wickliffe*, 1 A. K. Marsh. (Ky.) 337; *Ridenour v. Keller*, 2 Gill (Md.), 134; *Pierce v. Irish*, 31 Me. 254; *Smith v. Davis*, 49 Md. 470; *Gregg v. Gregg*, 15 N. H. 190; *Williams v. Petticrew*, 62 Mo. 460; *State Bank v. Williams*, 6 Ark. 156; *Taylor v. Benhan*, 5 How. 233; *Williams v. Rhodes*, 81 Ill. 572; *Montgomery v. Cloud* (S. C.), 3 S. E. Rep. 196; *Riley v. Norman*, 39 Ark. 158; *Re Deyo*, 36 Hun (N. Y.), 512; *Duryea v. Granger's Est.* (Mch.), 3 N. W. 730; *Bradley v. Bradley's Adm.* (Va.), 1 S. E. 477; *Nelson v. Kownslar*, 79 Va. 468; *Re Wyckoff*, 3 Demarest (N. Y.), 75.

The representative may be cited at any time to account for assets not included in his settled accounts, especially if they

come to hand at a later date. *McAfee v. Phillips*, 25 Ohio St. 374. See *James v. Mathews*, 5 Ired. (N. C.) Eq. 28; *Burton v. Dickinson*, 3 Yerg. (Tenn.) 112.

In Pennsylvania by statute a final account, unappealed from for five years after its settlement, is conclusive upon all the world, and cannot be afterwards opened. *Bunting's Appeal*, 4 W. & S. (Pa.) 469.

All parties interested in the distribution of the estate are entitled to notice of an application to revise or set aside the settlement. *Stone v. Peasley*, 28 Vt. 716; *Thomas v. Dumas*, 30 Ala. 83.

As to who may maintain an application to re-open or revise an account. *Murphey v. Menard*, 11 Tex. 673; *Hefflefinger v. George*, 14 Tex. 569; *Ponton v. Bellows*, 22 Tex. 681.

A former administrator, or his representatives, may be called upon by a new administrator. *Crombie v. Engle*, 19 N. J. L. 83. But see *Murphey v. Menard*, 11 Tex. 673.

One cannot impeach a final settlement on the ground of a mistake in his own favor. *Griffith v. Verner*, 5 How. (Miss.) 736. See *Williams v. Rhodes*, 81 Ill. 572.

Where several persons are interested in an estate, and one of them institutes proceedings to revise an administration account, whatever is recovered enures to the benefit of all others interested. *Hefflefinger v. George*, 14 Tex. 569.

Surcharging and Falsifying.—Where a creditor excepts to an administrator's account, and it is surcharged, the surcharge does not belong to the creditor alone who excepted, but must be distributed among all. *Martin's Appeal*, 33 Pa. St. 395.

On a bill to surcharge and falsify an administration account, although the plaintiff is required to specify the items of surcharge and falsification, it is always competent for him to show that the account is erroneous on its face, and, without controverting the items, that they have been so stated as to produce a result injurious to him. *Garrett v. Carr*, 3 Leigh (Va.), 407. See further, as to surcharging and falsifying, *Moore v. Felkel*, 7 Fla. 44; *Shorter v. Hargroves*, 11 Ga. 658; *Manion v. Titsworth*, 18 B. Mon. (Ky.) 582; *Miller v. Womack*, 1 Freem. (Miss.) Ch. 486; *McCullom v. Box*, 16 Miss. 619; *Oldham v. Trimble*, 15 Mo. 225; *Elrod v. Lancaster*, 2 Head (Tenn.), 571; *Wyllie v. Venable*, 4 Munf. (Va.) 369; *Smith v. Britton*, 2 Pat. & H. (Va.) 124; *Garrett v. Carr*, 3 Leigh (Va.), 407.

Bill of Review.—There are but two cases in which a review of an account settled and confirmed in the Orphans' Court can be claimed as a matter of right: (1) For error of law apparent on the face of the record; (2) For new matter which has arisen

was not excepted to or appealed from when the partial account was rendered.¹ After the final balance has been ascertained by

since the decree. As a matter of grace, a review may be granted for new proof which has come to light since the decree, and could not have been used at the hearing. *Hartman's Appeal*, 36 Pa. St. 70. See further, *Hartz's Appeal*, 2 Grant (Pa. St.), 83; *Kachlein's Appeal*, 5 Pa. St. 95; *Weiting v. Nissley*, 6 Pa. St. 141; *Bishop's Estate*, 10 Pa. St. 469; *Baggs's Appeal*, 43 Pa. St. 512; *Calvert v. Holland*, 9 B. Mon. (Ky.) 458; *Cameron v. Gibson*, 1 Miss. (Walker's R.) 500; *Bowers v. Williams*, 34 Miss. 324; *Meeker v. Vanderveer*, 15 N. J. L. 392.

Appeals. — Exceptions. — Objections. — See *Hearne v. Harbison*, 9 Ala. 731; *Steele v. Knox*, 10 Ala. 608; *Savage v. Benham*, 11 Ala. 49; *Petty v. Wafford*, 11 Ala. 143; *Long v. Easley*, 13 Ala. 239; *Jones v. Dyer*, 20 Ala. 373; *Thomas v. Dumas*, 30 Ala. 83; *Parker v. Parker*, 33 Ala. 459; *Bowling v. Cobb*, 6 B. Mon. (Ky.) 356; *Slaughter v. Slaughter*, 8 B. Mon. (Ky.) 482; *Goodrich v. Thompson*, 4 Day (Conn.), 215; *Booth v. Booth*, 2 Harr. (Del.) 54; *Beard v. First Presbyterian Church*, 15 Ind. 490; *Arnold v. Mower*, 49 Me. 561; *Hesson v. Hesson*, 14 Md. 8; *Baker v. Runkle*, 41 Mo. 392; *Leavitt v. Wooster*, 14 N. H. 550; *Child's Appeal*, 23 N. H. 225; *Holcomb v. Holcomb*, 11 N. J. Eq. 281; *Banks v. Taylor*, 10 Abb. Pr. (N. Y.) 199; *Wentworth v. Wentworth*, 12 Vt. 244; *Light's Appeal*, 22 Pa. St. 445; *Succession of Sullivan*, 15 La. An. 200; *Lake v. Albert* (Minn.), 35 N. W. 177; *In re Sanderson* (Cal.), 15 P. 753; *Thompson v. Mott*, 2 Demarest (N. Y.), 154; *Clement's Appeal*, 49 Conn. 519; *Bloom's Appeal*, 106 Pa. St. 493; *Conger v. Babcock*, 87 Ind. 497; *Millard v. Harris* (Ill.), 10 N. E. 387.

Matters passed upon in a former account from which no appeal was taken are not subject to revision upon an appeal from the allowance of a later account in which the same question was not before the probate judge for consideration. *McLoon v. Spaulding*, 62 Me. 315. See *Sturtevant v. Tallman*, 27 Me. 78; *Coburn v. Loomis*, 49 Me. 406. But see *Blake v. Pegram*, 109 Mass. 541; *Williams v. Petticrew*, 62 Mo. 460; *Seymour v. Seymour*, 67 Mo. 303; *Sherman v. Chace*, 9 R. I. 166; *Light's Appeal*, 22 Pa. St. 445; *Leslie's Appeal*, 63 Pa. St. 365.

Exceptions to an executor's account current, that do not point out any error therein, but simply charge that the will has not been carried out in all its parts, constitute no objection. *Christie v. Wade*, 87 Ind. 294.

An objection to an administrator's account because part of a certain credit was barred by limitation, is not good if addressed generally to the whole account, and not to that particular part. *Robertson v. Black*, 74 Ala. 322.

Where, in a proceeding to surcharge and falsify an executor's account once settled, the averments of the pleadings are so general as to be open to objection, if no objection is made, and the parties go to trial, the appellate court will consider the accountant's right to certain credits relied on by him as made out by the pleadings. *Terrell v. Rowland* (Ky.), 4 S. W. 825.

Where a probate court discharged an administrator upon his filing the receipt of his successors for the balance in his hands, *held*, that, having received the benefit of this order, they could not appeal therefrom. *Robards v. Lamb*, 76 Mo. 192.

1. *Coburn v. Loomis*, 49 Me. 406; *Cavendish v. Fleming*, 3 Munf. (Va.) 198; *Picot v. Biddle*, 35 Mo. 29; *Sheetz v. Kirtley*, 62 Mo. 417; *Liddell v. McVickar*, 6 Hals. (N. J.) 44; *Musick v. Beebe*, 17 Kan. 47; *Snodgrass v. Snodgrass*, 57 Tenn. 157; *Goodwin v. Goodwin*, 48 Ind. 584; *State v. Wilson*, 51 Ind. 96; *Collins v. Tilton*, 58 Ind. 374; *Clark v. Cress*, 20 Iowa, 50; *Mix's Appeal*, 35 Conn. 121; *Brazeale v. Brazeale*, 9 Ala. 491; *Bantz v. Bantz*, 52 Md. 686. See *Saxton v. Chamberlain*, 6 Pick. (Mass.) 422; *Longley v. Hall*, 11 Pick. (Mass.) 120; *Heath's Estate*, 58 Iowa, 36; *West v. West*, 75 Mo. 204.

Former partial accounts in many States may be opened to correct errors due to fraud or mistake, upon the filing of a later partial account. *Re Stayner*, 33 Ohio St. 481. See *Mix's Appeal*, 35 Conn. 121; *Stephenson v. Stephenson*, 3 Hayw. Tenn. 123; *Sumrall v. Sumrall*, 24 Miss. 258; *Stearns v. Stearns*, 1 Pick. (Mass.) 157; *Shepley, J., in Sturtevant v. Tallman*, 27 Me. 85.

In Pennsylvania, by statute, all partial accounts, confirmed on due consideration, and unappealed, are final and conclusive of all matters which they contain, but not of any item omitted which has been, or ought to have been, accounted for. *McLellan's Appeal*, 76 Pa. St. 231; *Shindel's Appeal*, 57 Pa. St. 43; *Rhoad's Appeal*, 39 Pa. St. 186; *Fross's Appeal*, 105 Pa. St. 258.

A similar statute exists in Massachusetts. Mass. Pub. Sts. c. 144, § 9. See *Smith v. Dutton*, 4 Shepley (Me.), 308; *Wiggin v. Swett*, 6 Met. (Mass.) 194; *Saxton v. Chamberlain*, 6 Pick. (Mass.) 422; *Waters v. Stickney*, 12 Allen (Mass.), 1; *Granger v. Bassett*, 98 Mass. 462; *Blake v. Pegram*, 101 Mass. 592; s. c., 109 Mass. 541; *Cummings v. Cummings*, 128 Mass. 532; *Glover v. Holley*, 2 Bradf. (N. Y.) 291; *Sherman v. Chace*, 9 R. I. 166; *Crawford v. Redus*, 54 Miss. 700; *Watts v. Watts*, 38 Ohio St. 480; *Reynolds v. Jackson*, 36 N. J. Eq. 515; *Clement's Appeal*, 49 Conn. 519; *Hirschfeld v. Cross*, 67 Cal. 661; *Re Singer*, 3 Demarest (N. Y.), 589; *Griggs v.*

the accounting, a decree of distribution is regularly in order by which the persons entitled to share in the estate, and the amount payable to each, are expressly designated.¹ This decree, when made after due notice to interested parties, protects the representative in making the payments directed,² but is not conclusive of the fact of payment.³ Hence, in many States it is the practice

Shaw (N. J.), 9 A. 578; Succession of Triche (La.), 2 So. 52.

To give the settlement of a partial account the force and character of *res adjudicata* as to any particular item, it must appear that the item was in issue, or in some form submitted to the court for determination. Blake v. Pegram, 101 Mass. 592, 598, 599; Saxton v. Chamberlain, 6 Pick. (Mass.) 422; Wiggin v. Swett, 6 Met. (Mass.) 194; Field v. Hitchcock, 14 Pick. (Mass.) 405; Leslie's Appeal, 63 Pa. St. 355. See Sherman v. Chace, 9 R. I. 166.

It seems also to be essential that the account should be allowed after due citation, appearance, or waiver of notice by parties in interest, and no appeal taken. Mass. Pub. Sts. c. 144, § 9; Crawford v. Redus, 54 Miss. 700. See Kellet v. Rathbun, 4 Paige (N. Y.), 102; Semoice v. Semoice, 35 Ala. 295; Roberts v. Roberts, 34 Miss. 322; Glover v. Holley, 2 Bradf. (N. Y.) 291.

1. Johnson v. Richards, 5 Thomp. & C. (N. Y.) 654; The Ordinary v. Smith's Exrs., 15 N. J. L. 92; Cooper v. Burton, 7 Baxter (Tenn.), 406; Loring v. Steineman, 1 Met. (Mass.) 204; Smith, Prob. Pract. 196; Badeaux v. Heirs, 19 La. An. 97. See Davis v. Brookins, 53 Ga. 282; McCracken v. Graham, 14 Pa. St. 209; Cousins v. Jackson, 49 Ala. 236; Oakes v. Buckley, 49 Wis. 592; Long v. Thompson, 60 Ill. 27.

But under the term "final settlement" in section 116 of the Indiana statute for settlement of decedent's estate, the distribution of the balance and closing of the trust are comprehended. Dufour v. Dufour, 28 Ind. 421.

An administrator who makes distribution without judicial direction is personally liable to distributees of whose existence he had no knowledge. Lawrason v. Davenport, 2 Call (Va.), 95.

The decree should not direct the administrator to apply the distributee's share to a debt due to himself personally. Bradshaw's Appeal, 3 Grant (Pa.), 109; Kidd v. Porter, 13 Ala. 91; Standley v. Langley, 25 Miss. 252. Nor to make deduction from the share of any one on account of a debt he owes the estate. Procter v. Newhall, 17 Mass. 81. But such equities may be regarded in the course of compliance with the decree. Allen v. Smitherman, 6 Ired. Eq. (N. C.) 341; Smith v. Kearney, 2 Barb. Ch. (N. Y.) 533; Springer's Appeal, 29 Pa. St. 208; Tinkham v. Smith, 56 Vt. 187.

A legatee is entitled to a rehearing where the executor's account has been audited without his knowledge, or without

knowledge of the filing of the account, and errors apparent on the record are shown. Costigan's Estate, 13 Phila. (Pa.) 264.

2. Loring v. Steineman, 1 Met. (Mass.) 204. See Parcher v. Bussell, 11 Cush. (Mass.) 107; Harlow v. Harlow, 65 Me. 448; Sanders v. Loy, 61 Ind. 298; Burd v. McGregor, 2 Grant (Pa.), 353; Wright v. M. E. Church, 1 Hoffm. Ch. (N. Y.) 202; Sparhawk v. Buell's Admr., 9 Vt. 41.

To protect the administrator, notice is essential, and should be such as is prescribed by statute; or if no statute require notice, it should be such as the court in its discretion may think proper. Loring v. Steineman, 1 Met. (Mass.) 204; Oakes v. Buckley, 49 Wis. 592; Long v. Thompson, 60 Ill. 27.

It is no valid objection to a decree of distribution, that it was made, on its face, in favor of parties who were not applicants for the decree, or whose shares had been satisfied or released. Sayre v. Sayre, 16 N. J. Eq. 505.

A *bona fide* payment made under the decree of distribution to the attorney in fact, or actual assignee, of the distributee named therein, is a compliance with the order. Marshall v. Hitchcock, 3 Redf. (N. Y.) 461.

But the probate court has no authority to make an order for distribution to the assignee of a distributee's share. Knowlton v. Johnson, 46 Me. 489; Holcomb v. Sherwood, 29 Conn. 418; Portevant v. Neylaus, 38 Miss. 104.

In the absence of some enabling act, "the question to whom, or at what time, a legacy or distributive portion under a will is to be paid by an executor, is one of which the judge of probate has no jurisdiction. Any decree directing to pay or not to pay a legacy to any particular person, or at what time a legacy should be paid whether made upon or without notice, would be extra-judicial, and would afford the executor no protection." A subsequent ratification or allowance of a payment already made can have no greater force. Shaw, C. J., in Cowdin v. Perry, 11 Pick. (Mass.) 503, 511, 512; Smith v. Lambert, 30 Me. 137, 145. See Williams v. Cushing, 34 Me. 370, 375.

In many States, statutes enlarging the powers of the probate court affect this question. Sanford v. Thorp, 45 Conn. 241; Wright v. Trustees of M. E. Church, 1 Hoffm. Ch. (N. Y.) 202.

3. Pollock v. Buie, 43 Miss. 140; Sparhawk v. Buell's Admr., 9 Vt. 41. See McCracken v. Graham, 14 Pa. St. 209.

EXECUTORS, ETC.—EXEMPLARY DAMAGES.

of the probate court, upon satisfactory proof that distribution has been made as ordered, to enter a formal judgment of dismissal by which the representative is discharged from all liability.¹

XVIII. Resignation and Removal.—See PROBATE AND LETTERS OF ADMINISTRATION.

EXECUTOR DE SON TORT.—See EXECUTORS AND ADMINISTRATORS.

EXECUTORY CONTRACTS.—See CONTRACTS.

EXECUTORY DEVISE.—See LEGACIES AND DEVISES.

EXECUTORY ESTATES.—See ESTATES.

EXECUTORY TRUSTS.—See TRUSTS.

EXEMPLARY DAMAGES.

- I. Definition, 448.
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3. *Action for Death*, 479.
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I. Definition.—Exemplary damages is the money given to the plaintiff by a jury as the compensation for the injury inflicted by the defendant on the mental feelings of the injured person,—such as his shame, degradation, loss of social position, and the like, resulting from the tort for which the action is brought.²

It is not a payment so as to discharge the executor or administrator; nor is it a payment so as to exonerate the fund distributable. The decree gives to the distributee a remedy against the executor or administrator personally, for his proportion of the fund found to be in his hands; but this does not impair his remedy against the fund itself. Nothing short of actual payment, or some act of the distributee to its prejudice, will exonerate the trust fund from the distributee's claim. *Brown, J., in Clapp v. Meserva*, 38 Barb. (N. Y.) 661. See *Pollock v. Buie*, 43 Miss. 140; *McCracken v. Graham*, 14 Pa. St. 140.

1. *Jacobs v. Poor*, 18 Ga. 346; *Camper v. Hayeth*, 10 Ind. 528; *Sanders v. Loy*, 61 Ind. 298. Compare *Wright v. M. E. Church*, 1 Hoffm. Ch. (N. Y.) 202; *Smiley v. Smiley's Exrs. (Mo.)*, 4 S. W. 443; *Eatman v. Eatman (Ala.)*, 2 So. 729; *Arnold v. Spates*, 65 Iowa, 570; *Roberts v. Johns*, 16 S. C. 171; *Carver v. Lewis*, 104 Ind. 438; *Ridenbaugh v. Burns*, 14 Fed. Rep. 93; *McCormick's Appeal*, 104 Pa. St. 146; *Re Hood*, 98 N. Y. 363.

Mass. Pub. Stats. c. 144, § 12, provides that an executor or administrator may perpetrate the evidence of his payments and distribution, by presenting to the court, within a year after the decree is made, an account of such payments or delivery,

which being proved to the satisfaction of the court, and verified by the oath of the party, shall be allowed as a final discharge, and ordered to be recorded. Such discharge shall forever exonerate the party and his sureties from all liability under the decree, unless his account is impeached for fraud or manifest error.

An order of discharge upon a final account will not be regarded as a final settlement if the probate records show property undisposed of, and debts unpaid. *Crossan v. McCrary*, 37 Iowa, 684.

A settlement out of court after a partial account in court, is conclusive upon the parties as to all matters which would have been embraced in a final account with the court. *Piatt v. Longworth*, 27 Ohio St. 160.

If a settlement is re-opened, all concerned may have the benefit. *Gibbons v. Jones*, 56 Ga. 297.

2. Definition of Damages generally.—To comprehend what is to be said about exemplary damages, a few preliminary remarks must be made as to damages generally.

The definition of damages is according to Webster as follows. The word "damage" is derived from the Latin *damnum*, and its primary meaning is "any permanent injury or harm to person, property, or reputation; an inflicted loss of value."

II. Determinate Loss.—That is, pecuniary loss, which from its nature can be estimated with entire or approximate accuracy,—such, for instance, as, first, the pecuniary value of property destroyed, or the pecuniary value of the diminution in the value of property, caused directly by its being injured; or, secondly, such pecuniary loss consequentially sustained as the proximate and natural results of the injury sustained; as for instance, the pecuniary value of the time lost by the plaintiff, necessarily, from the injury inflicted on his person, and the expenses incurred by him, as the natural consequence of such injury, such as the value of medicine purchased whilst sick or disabled from such injury, the payment of physician's bills for attendance, and board whilst so disabled.¹

III. Indeterminate Loss.—That is, such loss as, from its nature, is incapable of any accurate, or approximately accurate, estimate.²

But the word "damages" is most generally used in a secondary sense in the law, which is thus given by Webster. "The estimated reparation in money for detriment or injury sustained; a compensation, recompense, or satisfaction to one party, for a wrong or injury actually done to him by another." And this definition corresponds substantially with that given by the text-writers generally. Thus Rutherford defines it, "Every loss or diminution of what is a man's own occasioned by the faults of another." See Ruth. Inst. (Balt. ed. 1832) bk. 1, ch. 17, sect. 1. This corresponds with Webster's primary definition; while the definition given by Blackstone corresponds with Webster's secondary meaning, and is as follows. See Blackstone, Comm. p. 438. "The money given to a man by a jury as a compensation for some injury sustained." Substantially the same definition is given by Comyn, see 3d Comyns' Digest, "Damages;" Grotius, see Grot. De J. B. bk. 2, ch. 17, ii. 204; Domat, see 1st Dom. Civil Law, pp. 258–264; Coke, see Inst.

The Civil Code of California has substantially adopted these definitions. See vol. 2d, 384, sect. 3281, where it uses this language: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor, in money which is called damages." It is true that some modern text-writers have given a broader meaning to the word "damages," and include in it not only what is given by a jury as a compensation for some injury sustained, but also such additional sum, as the jury, in its discretion, gives as a punishment for the wrong inflicted, when it has been inflicted with a vicious or malicious purpose. But for reasons which will be hereinafter stated, I do not think that

such additional damages, as a punishment for the defendant, can ever be legally given. The proper definition, therefore, of "damages" is, "*The money given to the plaintiff by a jury as a compensation for some injury inflicted by the defendant on the person, property, reputation, or feelings of the plaintiff.*"

Exemplary, punitive, punitory, or vindictive damages, or smart money, are synonymous terms, so called, not because they are awarded as a punishment to the defendant for his public offence, but by way of distinction from determinate pecuniary damages, and operate as a punishment for the wrong he has inflicted on the plaintiff only. See *Chiles v. Drake*, 2 Metc. (Ky.) 146.

1. This first class of damages, *determinate loss*, is often, but inappropriately, designated as *actual loss*, or as *reminorative or compensatory damages*. There is no doubt that all determinate pecuniary loss is actual damages, or *compensatory damages*. But such designation of determinate damages is inappropriate, as such damages are no more actual, and no more compensatory damages, than all other losses, though they be from their nature indeterminate. As all damage is actual or compensatory, such designation ought not to be used in reference to this first class only, as it implies then that there is some other class of damages which is not compensatory or actual.

2. Bodily or mental pain—there is, however, a marked difference between physical and mental suffering—are instances of indeterminate loss. The physical suffering from the breaking of a limb is the same whether it be broken accidentally or with malice; but the mental suffering has no existence when the limb is broken accidentally, but it may be very great when it has been broken maliciously.

IV. When Exemplary Damages may be awarded. — Exemplary damages may be awarded whenever the tort is accompanied by fraud, malice, oppression, or gross negligence, amounting to a reckless disregard of the plaintiff's rights. Exemplary damages, like all other damages, are given as a compensation for injury inflicted on the plaintiff by the defendant. Eminent judges and text-writers insist that in such cases the damages which may be inflicted upon the defendant are not simply to compensate the plaintiff, by giving him all the determinate pecuniary damages, as well as all the indeterminate damages, such as for wounded feelings, bodily pain, and the like, which he has suffered, but, going still farther, they insist that the jury may inflict damages on the defendant for his intentionally vicious act, that society may be protected; in this manner punishing the wrong-doer, and deterring others from doing like wrongs. The propriety of allowing damages to be given by way of punishment, under any circumstances, has been strenuously denied in some cases, and the question has given rise in modern times to extensive discussion. The weight of reason, however, is clearly with those who deny that such punitive damages ought ever to be given. The amount to be paid in order to protect society, and deter others from like offence, is clearly a matter which ought to be left for the criminal courts; and the fine inflicted on the offender, in order to protect society, and deter the commission of like crimes, should go to the State, and not to the party against whom the wrong is committed. All he

by one who ought to have been a friend. When any injury has been done to our character or our person or our property, with a malicious or vicious intent, it must be followed by mental suffering; and a jury, in estimating the damages sustained from such injury, can consider the mental suffering which it directly caused; and, as in most cases of this character, where an injury is inflicted maliciously or with vicious intent, the party may be punished criminally. It has become almost universal to call the damages awarded on account of the mental suffering resulting from a malicious injury, "punitive damages," or "exemplary damages," "vindictive damages," or "smart money." These are very inappropriate appellations, as they suggest that these damages may be awarded in such cases as a punishment of the party for committing the malicious injury, whereas they are awarded as a compensation for the wounded feelings of the party who has suffered the malicious wrong. But these indeterminate losses from mental suffering can have no existence unless the injury has been committed with vicious intent, or with wanton and wilful disregard of the rights and feelings of the party injured; but, on the other hand, determinate pecuniary loss is neither increased nor dimin-

ished by the intent with which the injury was committed, and hence such determinate pecuniary damages may be recovered against the wrong-doer when he did not intend to commit the injury, or even when, because of his mental condition, he was incapable of being actuated by a vicious intent, as, for instance, when the wrong-doer was *non compos mentis*, or an infant. See Dillon, J., in *Behrens v. McKenzie*, 23 Iowa, 333; *Sutton v. Clark*, 6 Taunt. 44; *Filliter v. Phippard*, 11 Adolph. & E. (N. S.) 347; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; *Morse v. Crawford*, 17 Vt. 499. But a child or person *non compos mentis* might, perhaps, not be held responsible for an injury where another might be in cases where the right of action arose from the negligence of the wrong-doer; as that would not be regarded as negligence in a child or one *non compos mentis* which might be regarded as such in another.

The Division of Damages into two classes of "determinate loss" and "indeterminate loss," made in the text, is a division not to be found in the law-books, but the division and names given to different sorts of damages by the judges and text-writers have been productive of great confusion and uncertainty as to what is really meant by the term "exemplary damages."

can ask is, to be fully compensated for the wrong done, and that such compensation should include not only what are called determinate pecuniary loss, but also all indeterminate damages, such as for mental suffering, wounded feelings, bodily pain, and the like. When he has recovered this, he has recovered all possible damage sustained by him, according to any meaning which by the law-books or decisions has ever been attached to the word "damages;" and it is unjust to give him more by further mulcting the defendant, who may be at the same time or afterwards indicted, and again punished for the same offence. This double punishment of a defendant for a felony or misdemeanor is contrary to the Constitution, and our sense of right, and ought in no case to be permitted.¹

1. These "punitive damages" have, however, certainly been countenanced by many judges, and it has only been recently that either text-writers or judges have vigorously assailed the allowing of such "punitive damages;" but since the discussion of this question, there would be no question, it seems to me, but that the courts would, very generally, perhaps universally, hold that such "punitive damages" ought in no case to be allowed, were they not controlled by the doctrine of *stare decisis*; but many of the courts have felt themselves bound to follow the decisions heretofore rendered on this subject. An examination of the authorities would seem to show that the decided weight of authority has been in favor of allowing the awarding of such punitive damages in certain cases. An examination of these cases will show, that, where the courts have rendered such decisions, they were almost all rendered without any discussion, and with apparently very little consideration; while in a large number of cases, what has been said by some judge, in delivering an opinion, which either expressly or by implication countenanced the propriety, in certain cases, of awarding such punitive damages, was really a mere *obiter dictum*, uttered without much consideration.

The Greenleaf-Sedgwick Controversy. — This question appears never to have been fully discussed, and that consideration given to it which its importance demands, until within the last half-century, when the controversy on this subject between Greenleaf in his work on Evidence (see his lengthy note to sect. 253, vol. ii. p. 235, 13th ed.), and Sedgwick in his work on "The Measure of Damages" (see vol. ii. (7th ed. 323), and the voluminous notes, called the attention of the profession to the importance of this question. Greenleaf in his text (sect. 253) thus states the law: "Damages are given as a compensation or satisfaction to the plaintiff for an

injury actually received by him from the defendant. They should be precisely commensurate with the injury, — neither more nor less, — and this whether it be to his person or estate." If this be law, it, of course, excludes the idea, that, in addition to the full compensatory damages, the plaintiff could in any case still legally recover more of the defendant, that this might operate on him as a punishment for the protection of society generally, and to deter others from doing like wrongs with vicious intents.

Sedgwick's Argument. — Sedgwick, in his work on "The Measure of Damages," takes direct issue with Greenleaf on this question. See vol. i. top page 53, side page 38 (7th ed.). Under the heading of "Exemplary Damages," he says, "Thus far we have been speaking of the great class of cases where no question of fraud, malice, gross negligence, or oppression intervene. When either of these elements mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms 'punitive, vindictive, or exemplary damages;' in other words, blend together the interests of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer, but to punish the offender. This rule, we shall see hereafter more at large, seems settled in England, and in the general jurisprudence of this country." And in vol. ii. top page 323, side page 456, of this edition, under the heading, "In Some Cases Punishment of the Defendant is added or substituted for Compensation to the Plaintiff," he says, "It might be said, however, that the malicious or insolent intention does, in fact, increase the injury, and the doctrine of exemplary damages might thus be reconciled with the strict notion of compensation; but it will appear from the cases we now proceed to examine, that the

idea of compensation is abandoned, and that of punishment introduced."

He then proceeds in the text to examine the following cases, which he considers to sustain his views. *Huckle v. Money*, 2 Wils. 205; *Tullidge v. Wade*, 3 Wils. 18; *Mesert v. Harvey*, 5 Taunt. 442; *Sears v. Lyon*, 2 Stark. N. P. 317; *Doe v. Filliter*, 13 Mees. & W. 47; *Rogers v. Spence*, Id. 571; *Walker v. Smith*, 1 Wash. C. C. 152; *Tillotson v. Cheatham*, 3 Johns. (N. Y.) 56; *Wort v. Jenkins*, 14 Johns. (N. Y.) 352; *Manufacturing Co. v. Fiske*, 2 Mason (U. S.), 120; *Whipple v. Walpole*, 10 N. H. 130; *Linsley v. Bushnell*, 15 Conn. 225; *Pastorins v. Fisher*, 1 Rawle (Pa.), 27; *Tracy v. Swartwout*, 10 Pet. (U. S.) 81; *Story, J.*, in the *Amiable Nancy*, 3 Wheat. (U. S.) 546; *Merrills v. Manufacturing Co.*, 10 Conn. 384; *Phillips v. Lawrence*, 6 Watts & S. (Pa.) 150; *King v. Root*, 4 Wend. (N. Y.) 113-119; *Cook v. Ellis*, 6 Hills (N. Y.), 466; *Burr v. Burr*, 7 Hills (N. Y.), 207-217; *McBride v. McLaughlin*, 5 Watts (Pa.), 375; *Amer v. Longstreth*, 10 Pa. St. 145; *Grable v. Margrave*, 4 Ill. (3 Scam.) 372; *Mitchell v. Billingsley*, 17 Ala. 391; *Spikes v. English*, 4 Strob. (S. Car.) 34; *Johnson v. Hannahan*, 3 Strob. (S. Car.) 425; *Ripley v. Miller*, 11 Ired. (N. Car.) 247.

Greenleaf's Argument. — Greenleaf, in a note to sect. 253 of the 13th edition, after quoting what has been heretofore quoted from Sedgwick, says, speaking of the view of Sedgwick, that in certain cases a jury may give damages, not only to recompense the sufferer, but to punish the offender. "However this view may appear to be justified by the general language of some judges, and by remarks gratuitously made in delivering judgment on other questions, it does not seem supported to that extent by any express decision on the point, and is deemed at variance, not only with adjudged cases, but with settled principles of law. This will appear from an examination of authorities, on which the learned author relies." He then takes up such of the above cases as had then been cited by Sedgwick in his text, omitting, however, some inserted in the text in subsequent editions, and reviews them severally, stating generally the exact character of the case in detail, when Sedgwick had failed to do more than quote from the opinion of the judge in the case. His conclusion from the first two old English cases reported in Wilson is, that they only decided what is laid down by Greenleaf (vol. ii. sect. 272), which is, "Where an evil intent has manifested itself in acts and circumstances accompanying the principal transaction, they constitute a part of the injury, and, if properly alleged, may be proved like any other facts material to the issue."

The only other English case there cited by Sedgwick (*Doe v. Filliter*, 13 Mees. & W. 47) was an action of trespass for mesne profits; and the inference drawn by Sedgwick was that the jury could give damages, beyond what was compensatory, as a punishment to the defendant, from the remark of *Pollock, C. B.*: "In actions for malicious injuries, juries have been allowed to give what are called 'vindictive damages,' and take all the circumstances into consideration." The only question before the court, says Greenleaf, was, Whether the plaintiff should be confined to estimating his damages to the legal cost of the ejectment suit, or could recover also the fees he had paid his attorney. Greenleaf properly concludes, that, in determining this question, the judge meant simply to say, that, as the taking of the profits was malicious, the jury would consider all the circumstances, and include in their verdict for damages either the legal costs or the actual costs of the judgment suit, as they thought proper. There was nothing here intimating that damages could be given in addition to the plaintiff's actual loss, in order to punish the defendant; though, for want of a better word, the judge did use the word "vindictive." This language was used by *Washington, J.*, in *Walker v. Smith*, 1 Wash. C. C. 152, in which he uses the word "vindictive" damages. He is shown to have had no idea of damages given to punish the defendant beyond what would compensate the plaintiff; as the question for consideration for the jury, with reference to which they were charged by the judge as quoted by Sedgwick, was really, Whether they were bound to give the plaintiff the full amount of his actual loss, or could give him less, because of mitigating circumstances, which accompanied the act of the defendant, the subject of the complaint; the judge meaning, Greenleaf concludes, that, in actions sounding in damages, the court had no control over the jury, but, as this was an action not sounding in damages, they should obey the instructions of the court. The remarks quoted by Sedgwick really were merely thrown in by the judge, and were not pertinent to the case before him, and did not mean what they had been assumed to mean. What was really said by *Kent, C. J.*, in *Tillotson v. Cheatham*, 3 Johns. (N. Y.) 56, in refusing to grant a new trial in a libel suit, is, Greenleaf insists, in perfect accordance with his views. The instruction given the jury was perfectly right. It was, "that the charge contained in the libel was calculated, not only to injure the feelings of the plaintiff, but also to destroy all confidence in him as a public officer, and, in his opinion, demanded from the jury exemplary damages." It is true, he added, that

the jury ought not punish the defendant in a civil suit for the pernicious effects which a publication of the kind was calculated to produce in society. "Here the grounds of damages, positively stated to the jury, were expressly limited to the degree of injury to the plaintiff, either in his feelings or character as a public officer. The 'not' is mere negative;" and he farther in his comment says, "All damages in actions *ex delicto* may be said to be exemplary, as having a tendency to deter others from committing like injuries." He thinks that Chief Justice Kent, in saying what is quoted by Sedgwick from him, — "The actual pecuniary damages in actions for defamation, as well as in other actions for tort, can easily be computed, and are never the sole rule of assessment," — probably meant no more than this: that the jury were at liberty to consider all the damages accruing to the plaintiff from the wrong done, without being confined to those which were susceptible of arithmetical calculation.

If Greenleaf had used the terms above suggested, he would say that the plaintiff in such a suit was entitled to recover, not only his determinate pecuniary damages, but also indeterminate damages, which is entirely in accord with my views. Greenleaf says the remarks of *Spencer, J.*, in the case quoted by Sedgwick beyond this, were extra-judicial. In reference to the case of *Wort v. Jenkins*, 14 Johns. (N. Y.) 352, Greenleaf says, "It was trespass for beating the plaintiff's horse to death, with circumstances of great barbarity. The jury were told they had a right to give 'smart-money;' by which nothing more seems to have been meant than that they might take into consideration the circumstances of the cruel act as enhancing the injury of the plaintiff by the laceration of his feelings." In *Manufacturing Co. v. Fiske*, 2 Mason (U. S.), 120, the only matter relied on is, that Story speaks in it of exemplary damages. The only question in the case was, Whether, in a case for infringing a patent, the plaintiff might recover, as a part of his actual damages, the fees paid to the counsel for vindicating his rights in that action.

I need not say any thing in reference to the New Hampshire Court of Appeals, as will be hereinafter shown. Greenleaf reviews the case of *Linsley v. Bushnell* pretty fully, and reaches the conclusion that in the quotation of Sedgwick from *Church, J.*, by the language used in it, "vindictive damages" and "smart money," he had reference only to the jury's making an allowance in such a case for the trouble and expense that the plaintiff incurred in the suit. This inference is drawn from the connection in which this language is found, and the authorities referred to by the judge.

He reviews the case of *Tracy v. Swartwout*, 10 Pet. (U. S.) 80, and concludes that the question, Whether in any case damages could be given by way of punishment alone never seems to have crossed the minds of the judges or the counsel in this case, though Sedgwick regarded this case as fully adopting his views. What was said in the "*Amiable*" case supposed to bear on the question under discussion, Greenleaf regards as amounting to very little, and even that little was foreign to the matter before the court. "The decision in the case of *Gratte v. Margrave*, 3 Scam. (Ill.) 373," Greenleaf says, "was in perfect accord with his views; and when the judge said, 'In vindictive damages the jury are always permitted to give damages for the double purpose of setting an example, and punishing the wrong-doer,' it was uncalled for by the case before the court, and cannot be imputed to the court."

These were all the cases which were originally cited by Sedgwick in his text to support his views. After reviewing them all in detail, Greenleaf says, "It is manifest that his position has no countenance from any express decision upon the point, though it has the apparent support of several," *obiter dicta*, "and may seem justified by the terms 'exemplary damages,' 'vindictive damages,' 'smart money,' and the like, not unfrequently used by judges, but seldom defined. But taken in the connection in which these terms have been used, they seem to be intended to designate in general those damages only which in measurement are incapable of any fixed rule, and lie in the discretion of the jury, — such as damages for mental anguish or personal indignity and disgrace, bodily pain, etc., — and then so far as the sufferer is himself affected. If more than this is intended, how is the party to be protected from a double punishment? for, after the jury shall have considered the injury to the public in assessing damages for an aggravated assault, or for obtaining goods by false pretences, or the like, the wrongdoers are still liable for indictment for the same offence. See *Austin v. Wilson*, 4 Cush. (Mass.) 273."

Greenleaf then reviews and cites the following cases, as sustaining his views: *Smith, J.*, in *Churchill v. Watson*, 5 Day (Conn.), 144; *Treat v. Barber*, 7 Conn. 274; *Edwards v. Beach*, 3 Day (Conn.), 447; *Denison v. Hyde*, 6 Conn. 508; *Merrills v. Manufacturing Co.*, 10 Conn. 384; *Lord Abinger, C. B.*, in *Brewer v. Dew*, 11 Mees. & W. 625. Of this case he says, "Might not the jury then give vindictive damages for such an injury beyond the mere value of the goods?" This phrase shows clearly by "vindictive damages," the judge intended only damages which

the plaintiff had sustained beyond the value of his goods, and not those for a supposed injury to the public at large. What *Justice Story* says in *Whittemore v. Cutter*, 1 Gall. 478, shows that he used the term "exemplary damages" to mean "mental anxiety, public degradation, and wounded sensibilities, which honorable men feel at violation of the sacredness of their persons and characters."

Greenleaf also refers to *Williams, C. J.*, in *Bateman v. Goodyear*, 12 Conn. 580; *Bracegirdle v. Orford*, 2 Maule & S. 77; *Coppin v. Braithwaite*, 8 Jur. 875; *Hall v. Steamboat Co.*, 13 Conn. 320; *Southard v. Rexford*, 6 Cow. 254; *Major v. Pulliam*, 3 Dana (Ky.), 582; *Rockwood v. Allen*, 7 Mass. 254. Greenleaf says, "In all these cases, there were circumstances of misconduct and gross demerit richly deserving punishment in the shape of a pecuniary mulct, and fairly affording a case for damages on that ground alone, and yet in none of them does the court intimate to the jury that they may assess damages for the plaintiff to any amount more than commensurate with the injury he sustained." He refers also to *Matthews v. Bliss*, 22 Pick. (Mass.) 48.

Greenleaf then proceeds to show that his views on the subject have met the approval of the most approved text-writers, and refers, as sustaining his views, to 2 Bl. Comm. 438; *Ham. W. P.* 43-48; 3 Com. Dig. tit. "Damages," 3; *Ruth. Inst.* (Phila. ed. 1799) bk. 1, c. 17, sect. 1, p. 385, and 2d, bk. 1, c. 18, sect. 4, p. 434; *Gro. De J. B.* bk. 2, c. 17, sect. 2. He says *Lord Denham* was of the same opinion. *Filliter v. Phippard*, 12 Jur. 202, 204. He undertakes to show in *Mesert v. Harvey*, 5 Taunt. 442, that *Lord Kenyon* has been misrepresented, and that he entertained Greenleaf's views on this subject. As showing this, he refers to 2 Ersk. Speech. 9. The same views were entertained by *Lord Chief Justice Dallas*. See *Gunter v. Astor*, 4 Moore, 12. To same effect, see *Williams v. Currie*, 1 Man. G. & S. 841. This was the same in the Roman civil law. 1 Dom. Civil Law, pp. 426, 427, bk. 3, tit. 5, sect. 2, No. 8 and notes; *Wood, Civil Law*, bk. 3, c. 7, pp. 258, 264.

Greenleaf then says, "The broad doctrine stated by Mr. Sedgwick finds more countenance from the bench of Pennsylvania than in any other quarter; and even there it can hardly be said to have been adjudged to be the law, as may be seen by the cases decided. He then cites, as the strongest cases sustaining, or tending to sustain, Sedgwick's views, *Sommer v. Will*, 4 Serg. & R. (Pa.) 18; *Stimpson v. The Railroads*, 1 Wall. Jr. (U. S.) 164, 170; and comments on them, insisting that what is, principally relied on as sustaining the views of Sedgwick was extra-judicial. The

strongest case that he has found sustaining these views of Sedgwick is *McBride v. McLaughlin*, 5 Watts (Pa.), 375, which he criticises at length. He asserts that the grounds of the action for seduction were recently examined in England, in *Grinnell v. Wells*, 7 Man. & G. 1033, and damages explicitly admitted to be given as compensatory; and he further asserts that the case of *Benson v. Frederick*, 3 Burrows, 1845, cited in this Pennsylvania case, was not a case of damages given for the sake of example. He also comments on the case of *Wyner v. Allard*, 5 Watts & S. (Pa.) 524, and *Rose v. Story*, 1 Pa. St. 190-197. Greenleaf then relies on, as sustaining his views, when properly understood, the doctrine in *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1-21; *Rodgers v. Morrill*, 11 Jur. 1039; *Clark v. Newsam*, 1 Exch. 131; *Whitney v. Hitchcock*, 4 Denio (N. Y.), 461; *Cushing, J.*, in *Meads v. Cushing*, in the court of common pleas of Boston, 10 Law Rep. 238. In *Austin v. Wilson*, 4 Cush. (Mass.) 273, the court expressly declines to express any opinion on this point. It is decided in this case, that if such punitive damages are ever recoverable, they are clearly not recoverable in an action for an injury which is also punishable by indictment as libel, and assault and battery. "If they could be, the defendant could be punished twice for the same act. We decide the present case on this single ground. See *Morley v. Lord Kerry*, 4 Taunt. 355; *Whitney v. Hitchcock*, 4 Denio (N. Y.), 461; *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1, 22." Greenleaf then says, "The obscurity in which this subject has become involved, has arisen chiefly from want of care in the use of terms, and from a reliance on casual expressions and *obiter dicta* of judges as deliberate expositions of the law, instead of looking only to the point in judgment. In most of the cases in which the terms 'vindictive damages,' 'exemplary damages,' and 'smart money,' have been employed, they will be found to refer to the circumstances which actually accompanied the wrongful act, and were part of the *res gestæ*, and which, therefore, though not of themselves alone constituting a substantive ground of action, were proper subjects for the consideration of the jury, because injurious to the plaintiff. When the language used by judges in this connection is laid out of the case, as it ought to be, the position that criminal punishment may be inflicted in a civil action by giving the plaintiff a compensation for an injury he never received, and which he does not ask for, will prove to have little countenance from any judicial decision. The contrary is better supported, both by the principle of many decisions and the analogies of the law."

Chubb v. Gsell, 34 Pa. St. 114, is referred to by Greenleaf. It is admitted by him that a majority of the court *held* and decided that the views of Sedgwick were correct in *Taylor v. Church*, 8 N. Y. 452, 460. And this decision was approved in *Hunt v. Bennett*, 19 N. Y. 174, the court considering that the point was finally settled in unreported cases, the last of which, *Kuyler v. Thompson*, was decided in December, 1857. In *Fay v. Parker*, 53 N. H. 342, the whole subject of exemplary damages, and especially the question in controversy between Greenleaf and Sedgwick, is very ably and elaborately discussed by *Foster, J.*, who approved of the views of Greenleaf. The court decided that punitive damages cannot be recovered for a tort which may be punished criminally.

Sedgwick's Reply.—This is briefly the substance of Greenleaf's argument, and the language of the edition of his book since his death. The argument of Sedgwick in reply, found in his note at foot 2 *Sedg. Dam.* (17th ed.) marg. p. 466, top p. 345, is in substance as follows: "Greenleaf says (vol. ii. p. 209) that 'damages should be precisely commensurate with the injury, — neither more nor less.' This language is certainly in direct conflict with the whole system of damages, in cases of contract, and I apprehend the denial of the right of vindictive damages is equally untenable. In addition to the authorities I have cited (which have heretofore been named), how is it possible to be reconciled with the uniform language of the courts, on motions for new trials, that they will not interfere unless the verdict be evidently the result of corruption, prejudice, or passion? The bench has uniformly refused to limit the damages to their own idea of compensation. There is a crowd of cases going to show conclusively, though the courts are entirely satisfied that the damages are excessive, and altogether beyond a compensation for the actual loss sustained, they will, on motion for a new trial, interfere with the finding unless the verdict is so extravagant as to bear evident marks of prejudice, passion, or corruption. *Sharpe v. Brice*, 2 W. Bl. 942; *Benson v. Frederick*, 3 Burrows, 1845; *Duberley v. Gunning*, 4 Term. R. 651; *Sargent v. —*, 5 Cow. (N. Y.) 106; 1 *Grah. New Trials*, 410, 509; *Bull. N. P.* 327.

In *Thurston v. Martin*, 5 Mason (N. Y.), 497, on the Rhode Island circuit, when a motion was made for a new trial on the ground of excessive damages, *Story, J.*, said, 'The damages are certainly higher than what I, had I been sitting on the jury, would have been disposed to give, and I should now be better satisfied if the amount had been less; but on the ground that nothing appeared inconsistent with an honest

exercise of judgment, the motion was denied.' See *Wiggin v. Coffin*, 3 Story (U. S.), 11, and *Fisher v. Patterson*, 14 Ohio, 418. Again Mr. Greenleaf admits (p. 224) 'that when an evil intent has manifested itself in acts and circumstances accompanying the principal transaction, they constitute a part of the injury, and (p. 221) that the defendant's wealth may be given in evidence.' To admit testimony of this kind, to deny the power of the court to adjust the verdict accordingly to the principles of compensation, and still to insist that the jury were bound to give a verdict strictly commensurate with the injury, seems to me practically incompatible and inconsistent propositions. Nor, I confess, do I understand the wisdom of the proposed rule. In cases of tort, the suit at law appears to have public as well as private ends in view. I can see no reason why the defendant should not, in a civil suit, be punished for his act of fraud, malice, or oppression, nor why the pecuniary mulct which constitutes the punishment should not go in the pockets of the plaintiff instead of the coffers of the State. A strong analogy will be found in *qui tam* actions. Any attempt to limit the inquiry of the jury, in cases of this description, to a strict measure of compensation, will be, I think, to institute an investigation of a character distressingly metaphysical and utterly impracticable. Mr. Chancellor Kent, in his *Commentary* (7th ed. 1851, vol. i. pt. 4, p. 618, sec. 24), thus reviews and decides this controversy: 'In the Law Reporter, 1847, there is an elaborate review of the cases in matters of tort on the subject of exemplary damages, endeavoring to show that the decisions do not, on a strict examination and construction of the language of them, amount to authorities for going beyond compensatory damages. On this subject it appears to me that the conclusions in Mr. Sedgwick's treatise are well warranted by the decisions, and do not, on a strict examination and construction of the language of them, amount to authorities for going beyond compensatory damages. On this subject it appears to me that the conclusions in Mr. Sedgwick's treatise are well warranted by the decisions, and that the attempt to exclude all consideration of the malice and wickedness and wantonness of the tort, in estimating a proper compensation to the victim, is impracticable, visionary, and repugnant to just feelings of social sympathy.' I take pleasure in recording the approbation of an eminent man." This note then concludes with a just eulogy of Kent.

Refutation of Sedgwick's Arguments.—

It strikes me that these arguments of Sedgwick all admit of easy refutation. He says, first, that Greenleaf errs when he

says "that the damages should be precisely commensurate with the injury,—neither more nor less." "This language," Sedgwick says, "is in direct conflict with the whole system of damages in cases of contract." I confess my inability to see such direct conflict. Thus Sedgwick himself says, in his work on the "Measure of Damages" (vol. i. marg. p. 210, top p. 430, 17th ed.), to which all my reference will be made, "On the contrary, it has been held in many cases, that, in actions for breach of contract, the measure of damages is not the price stipulated to be paid in full performance, but the actual injury sustained in consequence of the defendant's fault; for the rule that the contract furnishes the measure of damages is subject to the other rule already stated, that compensation is only to be given for actual loss." I see no direct, or, indeed, any, conflict. It is true that in the efforts of courts, in breaches of contract, to lay down rules whereby the damages allowed shall be made commensurate with the loss sustained, they have necessarily laid down general rules, which, when applied, may not, in certain cases, make the damages allowed commensurate with the loss sustained. This it would be impossible to do. And it may be that the rules thus laid down having this object in view may, with reference to particular sorts of contracts, fail to effect justice. But this only shows that it is impossible by any law to prevent a failure of justice in many cases. This furnishes, however, no reason why the law should not endeavor by general rule to do justice. To lay down no rules, but to leave the whole matter in dispute, and the measure of damages to the arbitrary discretion of a jury, would obviously result in far more injustice to parties than to prescribe general rules with reference to the measure of damages, though such rules may be necessarily imperfect. With reference to this subject (p. 234, side p. 201), Sedgwick says, "It is, in truth, but slowly, and in a comparatively recent period, that a jury has relinquished its control over actions, even of contract, and that any approach has been made to a fixed and legal measure of damages. But by degrees the salutary principle has been recognized, and is now well settled, that, in all actions of contract subject to exceptions already noticed, and in all cases of tort where no evil motive is charged, the amount of compensation is to be regulated by the direction of the court; and the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down." This salutary principle is applicable, as I understand the law, in all cases, whether of contracts or torts, and whether the torts are accompanied with evil motives or not. It is true, when the tort is a malicious one, the di-

rection of the court will, from the necessity of the case, be more general and indefinite than in matters of contracts, or ordinary torts; and because, from the nature of the case, this must be so, it does not follow that we should fall back on the old exploded rule that the jury could, by its arbitrary discretion, fix damages in any case entirely unaided from any direction of the court. The direction of the court in very many cases of actions on contract, as well as ordinary torts unaccompanied by malice, necessarily leaves a very large discretion to the jury in fixing the amount of damages, and doubtless a much larger discretion must necessarily be allowed them in fixing damages for a malicious tort. But this seems to me no reason for retrograding to semi-barbarous times, and abandoning the effort on the part of the courts, by directions in all cases, to aid and assist the jury in reaching just and legal conclusions as to the amount of damages to be given in any and all cases.

Same.—Sedgwick's Point as to Non-Interference of Courts with Verdicts.—Sedgwick asks, "How is the position of Greenleaf, that damages should be commensurate with the injury sustained by the plaintiff, to be reconciled with the uniform language of the courts on motions for new trials, that they will not interfere unless the verdict be evidently the result of prejudice, corruption, or passion? The bench has uniformly refused to limit the damages to its own idea of compensation." And to prove this, he cites a number of cases. This is unquestionably the law, and it is universally admitted. Greenleaf, and no one else, controverts this to be the law. But I can see no sort of difficulty in reconciling this action of the courts, in refusing to grant new trials in such cases, with the law as it is contended to be by Greenleaf; for while he does not say that "damages are given as a compensation, recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant," "they should be precisely commensurate with the injury, neither more nor less; and this, whether it be to his person or estate." 2 Greenl. Ev. 13th edition, sect. 253, top page 235. But, as he is careful to explain, the injury resulting to a person from an accidental blow in the face, and one designed to insult and degrade, are very different. In the one case, the actual injury sustained being very trifling, if the jury gave heavy damages, a court would grant a new trial, because the damages given were obviously not commensurate with the injury which in such case the court, or any one else, could clearly see, without undertaking to weigh nicely the evidence, or in any way usurp the power of the jury. But in the other case, the jury, as it is

insisted by Greenleaf, and admitted by Sedgwick, should, in estimating the injury inflicted on the plaintiff by his spitting in his face, with the view of insulting and degrading him, have a clear right to consider the injury the plaintiff had thus sustained by the wounding of his feelings, and by degradation; and as there can be no accurate pecuniary measurement of this sort of injuries, but they must depend on all the circumstances of time, place, and persons, it is obvious that the court could not set aside a verdict, simply, as Judge Story says, because the damages were certainly larger than what he, if sitting on the jury, would have been disposed to give. To do so would be an obvious usurpation by the court of the province of the jury; for, in the contemplation of the law, the twelve jurors were regarded as more competent to assess the correct amount of damages for the injury by the wounding of his feelings, and by the disgrace which the plaintiff had sustained, than the judge. It was a question of fact, and not of law; and if there "appeared nothing, on the part of the jury, inconsistent with an honest exercise of judgment," as Judge Story said, their verdict ought not to be set aside. But why such a refusal to set aside such a verdict should, as Sedgwick argues, show that the jury had a right, not only to fully compensate the plaintiff for all injury he had sustained in person, or in the wounding of his feelings, but also, in addition, add to the plaintiff's damages a further sum as a punishment to the defendant, I confess I cannot see. The jury's verdict could not, on well-known legal principles, be set aside in either case, merely because it was deemed very exorbitant. The failure or refusal of the court, therefore, to set aside such verdicts, does not even help to prove that the jury had a right to inflict damages on the defendant as a punishment for his offence.

Same. — Sedgwick's Point as to giving Defendant's Wealth in Evidence. — Mr. Sedgwick, in his note, says, "Again, Mr. Greenleaf admits (p. 224) 'that, when an evil intent had manifested itself in acts and circumstances accompanying the principal transaction, they constitute a part of the injury;' and (p. 221) 'that the defendant's wealth may be given in evidence.' To admit estimation of this kind, to deny the power of the courts to adjust the verdict according to the principle of compensation, and still to insist that the jury are bound to give a verdict strictly commensurate with the injury, seems to be practically incompatible and inconsistent propositions." I have been unable to find the last of the passages above quoted from Greenleaf, because Mr. Sedgwick, while he states they are on p. 224 and p. 221, fails to state what edition of Greenleaf he was

using when he referred to these passages of Greenleaf. As it must have been top-paging, as no side-paging has been preserved in Greenleaf's work, and as these top pages change with each edition, this designation of the pages where found, without telling the edition of Greenleaf which he was using, serve as no guide. The edition of Greenleaf before me is the thirteenth; and I have been unable to find these quotations, either in the text, or in the long note from which I have heretofore copied so largely. I have sought specially for the quotation, "The defendant's wealth may be given in evidence," quoted from p. 221, and therefore unconnected with the previous quotation from p. 224, which I have found, being in sect. 272, p. 285. I have sought this quotation because, from the manner it is inserted by Sedgwick, I suppose it was qualified by what preceded or followed. But I have been unable to find it. I have succeeded, however, in finding, in the edition before me, what Greenleaf does say about the defendant's wealth being given in evidence; and I find nothing but this on the subject, in the edition of Greenleaf before me. What he does say constitutes the whole of sect. 269, vol. ii. p. 263. It is as follows: "Sect. 269. The character of the parties is immaterial, except in actions for slander, or seduction, or the like, when it is necessarily involved in the nature of the action. It is no matter how bad a man the defendant is, if the plaintiff's injury is not on that account the greater; nor how good he is, if that circumstance enhanced the wrong. Nor are damages to be assessed because of the defendant's ability to pay; for, whether the payment of the amount due to the plaintiff as compensation for the injury will or will not be convenient to the defendant, does not at all affect the question as to the extent of injury done, which is the only question to be determined. The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to receive. See Lord Mansfield's allusion to Wilford v. Berkeley, Lofft. 772. See also Stout & Prall, 1 N. J. Eq. 80; Coryell v. Colbaugh, 1 N. J. Eq. 77, 78; Treat v. Barker, 7 Conn. 274. And the plaintiff's rank and condition in life are also admissible on the question of damages. Klumph v. Dunn, 66 Pa. St. 141; Gandy v. Humphries, 35 Ala. 617. So are his earnings and expenses, and his surroundings generally. Welch v. Ware, 32 Mich. 77. But, so far as the defendant's rank and influence in society, and therefore the extent of the injury, are increased by his wealth, evidence of the fact is pertinent to the issue. See Bennett v. Hyde, 6 Conn. 24; Shute v. Bassett, 7 Pick. (Mass.) 869, *per* Parker, C. J.; Grable v. Margrave, 3 Scam. (Ill.)

372; *Reed v. Davis*, 4 Pick. (Mass.) 216; *McNamara v. King*, 2 Gilman (Ill.), 432; *McAlmont v. McClelland*, 14 Serg. & R. (Pa.) 359; *Larned v. Buffinton*, 3 Mass. 546; *Stanwood v. Whitmore*, 63 Me. 209."

To admit this sort of testimony seems to be perfectly compatible and consistent with holding that the plaintiff can recover only damages commensurate with his injury; meaning thereby, not only his determinate pecuniary damages, but also his damages resulting from physical suffering, permanent deformity or disability, or disfiguring; for mental anguish, loss of honor, and sense of shame and degradation; and injury to himself, reputation, social standing, and the like, if claimed in the declaration.

Same.—Punishment of Defendant in Civil Suit.—Mr. Sedgwick, in his note on which I am commenting, says, "I can see no reason why the defendant should not, in a civil suit, be punished for his act of fraud, malice, or oppression, nor why the pecuniary mulct, which constitutes that punishment, should not go into the pockets of the defendant, instead of the coffers of the State. A strong analogy will be found in *quidam* actions. An attempt to limit the inquiry of the jury in cases of this description to a strict measure of compensation will be, I think, to institute an investigation of a character distressingly metaphysical and utterly impracticable." It seems to me, on the contrary, that of the reasons why the defendant in such civil suit should not be punished for his public offence or misdemeanor, and why the jury should not, in such civil suit, be permitted to impose on him a fine, in addition to all kinds of damages, either of a determinate pecuniary character, or for mental anguish, degradation, and the like, for his public misdemeanor, which should also go into the pockets of the defendants, the first and most obvious reason is that the infliction of such fine by a jury in a civil suit would be in most obvious violation of the fundamental principles of all free governments. One of these principles is, that no person shall be punished twice for the same misdemeanor: and as no one has ever asserted that such a civil suit, when the offence of the defendant was a misdemeanor, would bar a public prosecution of the defendant for such misdemeanor; and as no one has ever asserted that such a civil suit, when the offence of the defendant was a misdemeanor, would bar a public prosecution of the defendant for such misdemeanor, though he had been mulcted for it by a jury in such a civil suit,—it is obvious that this would be a punishment of the defendant twice for the same misdemeanor, if the jury were allowed to punish him for such misdemeanor in a civil suit by including what they regarded as a proper fine for his public

offence with the damages of the plaintiff. But what is still worse, though, for many such misdemeanors the statutes of West Virginia, as well as the statutes, I suppose, in all the States, limit the amount for which a party may be mulcted or fined for such offences; yet, if the recovery of such fine could be had in a civil suit, there is absolutely no limit to its amount. Thus in the State of West Virginia a rioter, unless he pull down or destroy a dwelling-house in whole or in part, cannot be fined exceeding \$100. If a person throw in my well or spring, maliciously, any offensive water, it is a misdemeanor; but his fine cannot exceed \$100. If he poison my horse worth less than \$20, it is a misdemeanor; but he cannot be fined more than \$50. If he maliciously deface my property, it is a misdemeanor; but he cannot be fined over \$100. Yet Sedgwick can see no reason why, if a civil suit be brought for the commission of these and a multitude of other offences, when the fine is limited the jury may not mulct the offender to any amount by adding to the plaintiff's damages as a punishment of the offence whatever they deem proper.

Then, for most misdemeanors, the statute law, except in a few specified cases, bars any proceeding to enforce the fine after a very short time. But for a vast number of misdemeanors, personal actions of trespass, or trespass on the case, may be brought within five years by the party specially injured; and in those made in violation of law, the defendant may be punished after the plaintiff has been allowed damages for every species of injury he has suffered by adding thereto a fine for the offence against the public in direct opposition to such statute law. Again, the fine for a misdemeanor, when not fixed by statute law, is usually fixed by the court, unless otherwise provided, in many States, as, for instance, West Virginia. But this law is disregarded when it is *held* that the punishment for most misdemeanors may be fixed by a jury, whenever a civil suit is brought by the person specially injured, as can be done in most cases. And then, again, if the fine for a misdemeanor exceed a certain sum, the accused must usually be presented by a grand jury. Of what value to a person charged with an offence are all these and many other provisions if the offender may be punished for such offence, in disregard of all the safeguards, when the party injured brings against him a civil suit for the damages he has sustained? These and other provisions of statute law were passed as safeguards for persons accused of misdemeanors. There are doubtless similar safeguards thrown around the accused by statute law in every State. They lie at the very foundation of every free

government. And yet Sedgwick sees no reason why the accused may not properly be deprived of them all!

There is also another objection to this doctrine. The plaintiff, when he has received damages for all the injuries of every sort which he has received,—not only all his determinate damages for his physical suffering, but also damages for his mental anguish, loss of honor, sense of shame, injury to his business reputation, social standing, and all other damages he has sustained,—has certainly received all he is entitled to recover; and he can have no right, in addition to all this, to receive a further amount, falsely called damages, to be inflicted on the defendant as a punishment for his public offence, even if the public did not have also a right to inflict a fine on the defendant for his public offence.

Same.—Analogy found in Qui Tam Actions.—But Sedgwick says, “A strong analogy to this will be found in *qui tam* actions.” But I am unable to see this strong analogy. Some States have thought proper, in a few cases of misdemeanors, to give the whole or a part of the fine inflicted for the offence to the prosecutor, as a mode of detecting and punishing offences which, from their nature, it was supposed would be apt to escape punishment, if this inducement was not held out by the State to get witnesses to appear against an offender, and aid the public in his prosecution. There never were many sorts of misdemeanors which could be thus prosecuted, and none except those which the legislature thought proper to permit to be so prosecuted. The number has constantly diminished as civilization has advanced. And, so far as I know, there is no misdemeanor which can be prosecuted *qui tam* in some of the States,—West Virginia, for example,—it being very generally regarded that it was better that such misdemeanors should occasionally go unpunished, than that the public morals should be lowered by inducing witnesses, who themselves had engaged with accused, for a compensation, to break good faith with him, and appear as his prosecutors. But while such a policy would now be generally condemned, there never was a time when it could have been adopted by the courts, unless it was expressly authorized in particular cases by the legislature. But I confess I am not able to see, even if it had been a policy adopted by the courts in particular cases, why it should be regarded as analogous to permitting a defendant in a civil action, without being in any way called upon by the State to assist in a prosecution, to recover a fine in all cases of misdemeanors where he suffered a special wrong for which he was allowed to bring a suit. In the one case for the supposed public good,

and to induce him to appear as a witness, the State has thought proper to offer him a reward, to be paid, in effect, out of the public treasury if the accused be found guilty and fined. But how does this justify the courts in permitting him, in cases where the State has no sort of difficulty in procuring witnesses, and prosecuting successfully the defendant for a misdemeanor, to instruct a jury that the fine they thought proper to award as a punishment may be added to the plaintiff's damages, and thus go into the plaintiff's pocket, instead of to the public treasury? This supposed analogy is further destroyed by the fact that after this is done, the State may again fine him for the same offence, and put this second fine in the treasury; or, if a *qui tam* prosecution, into the plaintiff's pocket.

Same.—Practicability of limiting Jury to Compensatory Damages.—But Sedgwick, in his note above quoted, says he thinks an attempt to separate the fine imposed for the public offence from the damages awarded the plaintiff for his individual injury, would, if law, “institute an investigation of a character distressingly metaphysical and utterly unpracticable.” There may be some difficulty in making this separation, just as there is difficulty in fixing a proper fine for most misdemeanors, and just as there is difficulty in assessing the damages the plaintiff has sustained from physical pain, mental anguish, loss of honor, degradation, and the like. But I cannot see how the difficulty of ascertaining damages of this character is in any degree lessened by instructing the jury, after they have found them, to add to them what they think should be the fine for the public offence. I can only say, that, as far as I know, no civilized nation, ancient or modern, except some of the States of this Union, has regarded it as unpracticable and distressingly metaphysical to exclude from the tribunal, which was to assess a plaintiff's damages, any consideration of the punishment or fine which should be imposed on the defendant for his crime, and to confine itself to what damages the plaintiff had sustained, physically or mentally. Sedgwick himself, in this very note, in a part of it which I have quoted, admits that the Roman law excluded all consideration of punishment for the crime against the public when the plaintiff was claiming damages for the injuries sustained by him by the wrongful act of the defendant. He also admits that this is the law of Scotland. To show this I quote the language of Lord Chief Commissioner Adams, one of the most eminent judges of this century, as I find it in this note of Sedgwick. He says, “In all cases of damages, a fair, unprejudiced discussion (avoiding, in civil cases, the converting compensation for a civil in-

jury into a matter of punishment) will lead to a rational, conscientious, and fair compromise of your different opinions, and bring you to fix one sum." And to this the reporter adds, "In all cases of this sort, his lordship has been in the habit of repeating this." *Hyslop v. Staig*, 1 Nurr. 15. And, as we have seen, this was the law as laid down by Rutherford and by Domat. If this is the law as generally administered in the civilized world, I do not see why it should be regarded as too metaphysical or unpracticable to be administered by us. The justice and propriety of it appear self-evident, and I do not perceive that the difficulty of administering will be at all enhanced by following the obvious dictates of justice and right. On the contrary, it does seem to me that a much nearer approximation to what is just will be reached by keeping before the eyes of the jury that it is the plaintiff's damages they are to assess, taking care to explain to them all that may be properly considered in estimating his damages, and that with the punishment of the defendant for his public offence they have nothing whatever to do.

Same. — Kent's Opinions. — Sedgwick concludes his note upon which I have been commenting, by quoting a passage from Kent's Commentaries (ed. 1851), which he regards as a decision of this controversy with Greenleaf in his favor. But as I understand the passage, Kent expresses an opinion which rather countenances the views of Greenleaf than Sedgwick. This opinion, to use his own language, is, "that the attempt to exclude all consideration of the malice and wickedness and wantonness of the tort is impracticable;" and this must be considered by a jury in estimating a proper compensation to the plaintiff for damages he has sustained through mental anguish, loss of honor, and sense of shame, the sense of wrong inflicted, and degradation felt. And yet all these things, it is insisted by Greenleaf as well as Sedgwick, are sources of damages which the jury must consider in estimating the damages the plaintiff may receive. The difference between them is, that, after the jury have estimated the plaintiff's damages, both determinate, pecuniary, and indeterminate, such as mental anguish, loss of honor, etc., Sedgwick insists they may still increase the damages, by adding to this proper compensation of the plaintiff a further sum as punishment for the defendant's public offence or misdemeanor. Kent does not intimate that in this he concurs with Sedgwick. On the contrary, his saying that the malice of the defendant should be considered by the jury in estimating a proper compensation to the plaintiff, without adding thereto, "and for the further purpose of punishing the defendant," seems to me to indicate

that he concurred with Greenleaf in this matter of controversy. He only concurs with Sedgwick so far as I have shown he concurred with Greenleaf, and he concurred with him in opposition to some writer in "The Law Reporter," April, 1847, who insisted that they could not go beyond compensatory damages. To make this first part of what Kent says agree with the conclusion he reaches, we must suppose by compensatory damages a proper compensation to the plaintiff for wounded feelings and the like. The deduction I would draw from this passage from Kent is, that it is very important to use more clear and definite terms by which to designate different sorts of damages. Kent would seem in this passage to consider compensatory damages as something different from proper compensative damages. To my mind they meant the same thing; and in neither case, if the meaning of the words are such as any dictionary would define, could they include a sum added by the jury as a punishment for the public offence which the defendant had committed. Whether Kent supposed that proper compensative damages did include this fine for the defendant's public offence, but compensatory damages did not, all that I can say from this paragraph taken from his Commentaries is, that if this was his meaning, he has expressed himself very obscurely.

Review of Authorities. — United States Supreme Court. — I will now review all the authorities, either in the text or note of Sedgwick, cited to support his first position, that "the idea of compensation is abandoned, and that of punishment introduced," from a marginal page (456) of the second volume of his Treatise on the Measure of Damages, and top page 323 of his seventh edition.

The decision of the Supreme Court of the United States referred to by him is the case of *Railroad Co. v. Arms*, 91 U. S. 492, and he quotes as follows from *Justice Davis's* opinion: "It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for the wrong suffered is a great departure from the principle on which damages in civil suits are awarded. But though, as a general rule, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled to be shaken that exemplary damages may be assessed. As the question of intention is always material in actions of tort, and as the circumstances which characterize the transaction are therefore proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea that compensation alone is the true measure of redress. But juries have chosen to

place this doctrine on the ground, not that the sufferer is to be reimbursed, but the offender is to be punished; and although some text-writers and courts have questioned its soundness, it has been accepted as the general rule in England, and in most of the States of this country. 1 Redf. R. R. 576; Sedg. Dam. (4th ed.) c. 18, and note, where the cases are collected and reviewed. It has also received the sanction of this court. Discussed and recognized in *Day v. Woodworth*, 13 How. (U. S.) 371, it was more accurately stated in *Phila., etc., R. Co. v. Quigley*, 21 How. (U. S.) 213." But, as the court in that case held it was clearly one in which exemplary damages would not be given, the above remarks I have quoted ought rather to be regarded as the views of Justice Davis, and not necessarily the views of the court. These remarks seem to be an *obiter dictum*. We will, therefore, examine the two cases to which he refers, and which are also relied on by Sedgwick to sustain his views in his note before referred to.

The case of *Day v. Woodworth*, 13 How. (U. S.) 363, has an action *quare clausum fregit*. The question of controversy was, whether if the jury found for the plaintiff, and their verdict was based on the ground that the defendant had committed the trespass under circumstances that in law would make the trespass malicious, the jury ought, or ought not, to include in their verdict for damages not only the costs of restoring the dam pulled down by the defendant, and compensation for the necessary delay of the plaintiff's mill, but also, if they thought proper, a sum sufficient to pay the fees of counsel, and other costs he might incur in the prosecution of this suit.

The court below instructed the jury that they might include the necessary counsel's fees and costs, if the act was done in the view of the law maliciously; otherwise they could not. The jury by their verdict found that the act was not done in a manner that rendered it malicious, and, excluding the counsel's fees and costs, rendered a verdict for the plaintiff for two hundred dollars. The Supreme Court affirmed this judgment. This was clearly right; and that, too, whether the jury could, or could not, when the defendant's tort was malicious, add to this verdict any sum as a punishment to the defendant, beyond the sum necessary to compensate the plaintiff. So that the remarks of Judge Grier, that when the tort was malicious, the jury might render their verdict for damages beyond what was necessary to compensate the plaintiff, in order to punish the defendant, was an *obiter dictum*, as the verdict of the jury was in effect, as the court held, that the act was not done maliciously. These remarks should be regarded merely as the

views of Judge Grier, — views which, his opinion shows, were expressed without much consideration of the subject, as he refers to no authority to support them, but seems to think that there would be no dispute upon this question. He says, "It is a well-established principle of the common law, that in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of this defence, rather than the measure of compensation to the plaintiff." He cites no authority for this position. The opinion was delivered in 1851, before there had been much discussion of the point involved. He simply says, "We are aware that the propriety of the doctrine has been questioned by some writers; but if repeated judicial decisions, for more than a century, are to be received as the best exposition of what the law is, the question will not admit of argument." But he cites none of these judicial decisions.

The case of *Phila., etc., R. Co. v. Quigley*, 21 How. (U. S.) 202, was a suit for libel; but the only libel for which the defendant could have been held responsible, was for a publication which took place after the suit was brought. The court instructed the jury that "the defendant might be responsible for this libel;" and in a second instruction told them that "they were not restricted in giving damages to the actual positive injury sustained by the plaintiff, but might give exemplary damages, if any, as in their opinion, were called for as justified in view of all the circumstances in this case to render reparation to plaintiff, and not as an adequate punishment to the defendant."

The jury rendered a verdict for the plaintiff on which judgment was rendered; but this judgment was reversed, because both these instructions were wrong, — first, because the publication was made after the suit was brought; and secondly, even if it had been before the suit was brought, there was no proof of such malice as would justify the giving of exemplary damages. Justice Campbell, in giving the opinion of the court, does say on p. 214, "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to an ascertainment of a simple compensation for the wrong committed against the aggrieved person." But this was obviously an *obiter dictum*. It seems to me, therefore, that these three decisions do not decide the question we are discussing, and that the Supreme Court of the United States, without violating the doctrine of *stare decisis*, may adopt the view which it is evident Justice Davis inclined to consider as the

sounder in principle, that the measure of damages in all actions of tort is a just compensation to the plaintiff for the wrong to the plaintiff, in estimating which the evil intent of the defendant, and all the circumstances characterizing the act, the subject of complaint, may be properly considered by the jury, but they cannot add to the plaintiff's just compensation a sum given to punish the defendant for his malicious conduct.

Justice Davis thought that this had been adjudicated by the Supreme Court of the United States; but we have seen no such adjudication had been made by that court, and the question was, and is now, an open question before that court.

Other Authorities.—It will be impossible to review in detail the numerous decisions rendered by the supreme appellate tribunal in the various States of the Union, cited by *Sedgwick* in his text or notes to sustain his position, or the numerous cases cited by *Greenleaf* in his text and note to refute the position of *Sedgwick*. I have, however, examined nearly all these decisions, and also a large number of other decisions, some of which have already been referred to. I will arrange these cases I have examined below so as to put the cases decided in each State together, and will give my views of their character generally, and as to what amount of weight we should attach to them as authorities, and will select from this great body of cases the comparative few in which this question has really been discussed, and state in detail the views of the judges in these selected cases, using their own language. The following are the cases which bear in some measure on the question in discussion, and which I have examined: *Mitchell v. Bilingsby*, 17 Ala. 394; *Ivey v. McQueen*, 17 Ala. 410; *Parker v. Mise*, 27 Ala. 483; *Clark v. Bales*, 15 Ark. 452-458; *Walker v. Fuller*, 29 Ark. 448; *Wilson v. Middleton*, 2 Cal. 56; *Dorsey v. Manlove*, 14 Cal. 553; *Wade v. Thayer*, 40 Cal. 578; *Merrill v. Manufacturing Co.*, 10 Conn. 388; *Linsley v. Bushnell*, 15 Conn. 225, 236; *Huntley v. Bacon*, 15 Conn. 267, 273; *Jefferson v. Adams*, 4 Har. (Del.) 321; *Cummins v. Spruance*, 4 Har. (Del.) 315; *Robinson v. Burton*, 5 Har. (Del.) 340; *Bonsall v. McKay*, 1 Houst. (Del.) 520; *Smith v. Overby*, 30 Ga. 248; *Johnson v. Weedman*, 4 Scam. (Ill.) 495; *Grable v. Margrave*, 3 Scam. (Ill.) 373; *Hawk v. Ridgway*, 33 Ill. 473; *Reeder v. Purdy*, 48 Ill. 261; *Reno v. Wilson*, 49 Ill. 95; *Roth v. Smith*, 54 Ill. 431; *Farwell v. Warren*, 70 Ill. 28; *Becker v. Dupree*, 75 Ill. 167; *Drohn v. Brewer*, 77 Ill. 280; *Foote v. Nichols*, 28 Ill. 486; *Chicago, etc., R. Co. v. Fears*, 53 Ill. 115; *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Smalley v. Smalley*,

81 Ill. 70; *Clevenger v. Dunaway*, 84 Ill. 367; *Kolb v. O'Brien*, 86 Ill. 210; *McNamara v. King*, 2 Gilm. (Ill.) 432; *Anthony v. Gilbert*, 4 Blackf. (Ind.) 348; *Taber v. Hutson*, 5 Ind. 322; *Guard v. Risk*, 11 Ind. 156; *Butler v. Mercer*, 14 Ind. 479; *Millison v. Hoch*, 17 Ind. 227; *Little v. Fingle*, 26 Ind. 168; *Stewart v. Maddox*, 63 Ind. 51; *Stevenson v. Belknap*, 6 Clark (Iowa), 98; *Plummer v. Harbut*, 5 Iowa, 308; *Cochran v. Miller*, 13 Iowa, 128; *Denslow v. Van Horn*, 16 Iowa, 476; *Williamson v. Stage Co.*, 24 Iowa, 171; *Hendrickson v. Kingsbury*, 21 Iowa, 379; *Garland v. Wholeham*, 26 Iowa, 185; *Slater v. Sherman*, 5 Bush (Ky.), 206; *Louisville R. Co. v. Smith*, 2 Duv. (Ky.) 557; *Bronson v. Green*, 2 Duv. 234; *Chiles v. Drake*, 2 Metc. (Ky.) 146; *Jennings v. Maddox*, 8 B. Mon. (Ky.) 430; *Wiley v. Keokuk*, 6 Kan. 107; *Wiley v. Man-a-to-wah*, 6 Kan. 111; *Gaulden v. McPhaul*, 4 La. Ann. 79; *Young v. Mertens*, 27 Md. 115; *Baltimore, etc., R. Co. v. Blocker*, 27 Md. 277; *Baltimore, etc., R. Co. v. Breinig*, 25 Md. 378; *Turnpike Road v. Boone*, 45 Md. 353; *Phila., etc., R. Co. v. Larkin*, 47 Md. 161; *Austin v. Wilson*, 4 Cush. (Mass.) 273; *Richards v. Farnham*, 13 Pick. (Mass.) 457; *Bonnard v. Poor*, 21 Pick. (Mass.) 378; *Stowe v. Heywood*, 7 Allen (Mass.), 123; *Weid v. Bartlett*, 10 Mass. 470; *Smith v. Holcomb*, 99 Mass. 554; *Hawes v. Knowles*, 114 Mass. 518; *Fox v. Stevens*, 13 Minn. 252 (Gil. 252); *Jones v. Rahilly*, 16 Minn. 320 (Gil. 283); *Milburn v. Beach*, 14 Mo. 104; *Stoneseifer v. Stuble*, 31 Mo. 243; *McKeon v. Railway Co.*, 42 Mo. 87; *Green v. Craig*, 47 Mo. 90; *Buckley v. Knapp*, 48 Mo. 162; *Klingman v. Holmes*, 54 Mo. 304; *Graham v. Railroad Co.*, 66 Mo. 536, 541; *New Orleans, etc., R. Co. v. Allbritton*, 38 Miss. 242; *Whitfield v. Whitfield*, 40 Miss. 352; *Briscoe v. McElween*, 43 Miss. 569; *Jamison v. Moon*, 43 Miss. 602; *Storm v. Green*, 51 Miss. 103; *Sinclair v. Tarbox*, 2 N. H. 135; *Whipple v. Walpole*, 10 N. H. 130; *Perkins v. Towle*, 43 N. H. 220; *Fay v. Parker*, 53 N. H. 342; *Bixby v. Dunlap*, 56 N. H. 456; *Magee v. Holland*, 27 N. J. Law, 86; *Ackerson v. Railway Co.*, 32 N. J. Law, 24; *Tillotson v. Cheetham*, 3 Johns. (N. Y.) 56; *Wort v. Jenkins*, 14 Johns. (N. Y.) 352; *Morse v. Railroad Co.*, 10 Barb. (N. Y.) 621; *Cook v. Ellis*, 6 Hill (N. Y.), 466; *Tift v. Culver*, 3 Hill (N. Y.), 180; *Hamilton v. Railroad Co.*, 53 N. Y. 25; *Voltz v. Blackmar*, 64 N. Y. 440; *Hunt v. Bennett*, 19 N. Y. 173; *Taylor v. Church*, 8 N. Y. 460; *Brizsee v. Maybie*, 21 Wend. (N. Y.) 144; *King v. Root*, 4 Wend. (N. Y.) 113; *Kendall v. Stone*, 5 N. Y. 14; *Walker v. Wilson*, 8 Bosw. (N. Y.) 586; *Wylie v. Smitherman*, 8 Ired. (N. Car.) 236; *Gilreath v. Allen*, 10 Ired. (N. Car.) 67; *Roberts v. Mason*, 10 Ohio St. 277; *Atlantic, etc., R.*

Co. v. Dunn, 19 Ohio St. 162; Sommer v. Wilt, 4 Serg. & R. (Pa.) 19; Kuhn v. North, 10 Serg. & R. (Pa.) 399, 411; Nagle v. Mullison, 34 Pa. St. 48; Hodgson v. Millward, 3 Grant, Cas. (Pa.) 406; Johnson v. Hannahan, 3 Strob. (S. Car.) 425; Spikes v. English, 4 Strob. (S. Car.) 34; Greenville, etc., R. Co. v. Pastlow, 14 Rich. Law (N. Car.), 237; Byram v. McGuire, 3 Head (Tenn.), 530; Jones v. Turpin, 6 Heisk. (Tenn.) 181; Smith v. Sherwood, 2 Tex. 460; Cook v. Garza, 9 Tex. 358; Gordon v. Jones, 27 Tex. 620; Bradshaw v. Buchanan, 50 Tex. 492; Joynes, J., in Peshine v. Shepperdan, 17 Joatt. (Va.) 487; Nye v. Merriam, 35 Vt. 438; Earl v. Tupper, 45 Vt. 275; Hoadley v. Watson, 45 Vt. 289; Sweeney v. Baker, 13 W. Va. 158; Vinal v. Core, 18 W. Va. 49; Riddle v. McGinnis, 22 W. Va. 253; Ogg v. Murdock, 25 W. Va. 139; Downey v. Railroad Company, 28 W. Va. 733; Pickett v. Crook, 20 Wis. 358; Klewin v. Banman, 53 Wis. 244; Lavery v. Crooke, 52 Wis. 612.

These authorities have all been referred to by text-writers or by judges as sustaining or as denying the proposition, that, in actions of tort, accompanied by insult, oppression, malice, etc., the jury may properly give damages sufficient to compensate plaintiff for any loss, including that resulting from wounded feelings, sense of degradation, and the like, and may add thereto a further sum as a punishment of the defendant for his misconduct, and as an example to deter others from committing like offences. With but comparatively a few exceptions, something may be found in all these cases, which, if they be not critically examined, apparently countenance the position that in certain cases of tort, damages may be given by the jury, as a punishment of the defendant for his malicious tort, and not simply as a compensation to the plaintiff for the injuries he has received, whether in estate or person, and whether physically or mentally; but upon a careful examination it will be found that by far the greater part of what has been said on this subject by judges, in delivering their opinion, were *obiter dicta*, and some of these expressions of views on this subject were quite uncalled for by any thing in the case before them for decision; and, even as *obiter dicta*, they are, many of them, entitled to less than usual weight given to *obiter*, because, from an examination of the case in which they appear, it will be seen they are qualified and explained by other expressions used in the same opinion, or are greatly restrained in their meaning by the facts of the case.

In almost every case, too, where the tort was accompanied by such malice and oppression as would cause the jury to give exemplary or punitive damages as pun-

ishment of the defendant, there would be some insult to the plaintiff's feelings, so that damages ought to be given, not only for the determinate pecuniary loss of the plaintiff, but for the plaintiff's loss resulting from wounded feelings and a sense of degradation. And damages for losses of this kind cannot, of course, be assessed by any definite rule, but are necessarily indeterminate in their character; and in particular cases, it is therefore often difficult to show whether the damages the jury actually allowed did, in fact, include any sum beyond the amount of the pecuniary loss sustained by plaintiff, including what would compensate him for injuries to his person, and to his feelings. So that in comparatively few of these cases can it be said that any damages have been awarded against the defendant as a punishment to him for his offence, and not as a compensation simply of the plaintiff. This, however, does not appear to have been done in some of these cases by observing that the jury was instructed that they might award such damages as a punishment of the defendant. Even in the comparatively few of those cases where it is claimed that under the direction of the court, damages have been awarded against the defendant, not to compensate the plaintiff, but to punish the defendant, it cannot be verily said, with any sort of certainty, that the court gave any such instruction to the jury, or expressed really any such opinion.

In most of these cases, the court has simply said that the plaintiff, in the suit for the vicious tort of the defendant, might be awarded by the jury vindictive damages, or exemplary damages, or punitive damages, or that the jury could, in such a case, give smart money. All these decisions in which such language was used in rendering the decision, have been claimed as decisions that, in actions of tort, when the tort committed by the defendant was accompanied by actual malice or vicious intent, the jury could, in addition to what would compensate the plaintiff for every loss of estate, and every loss both physical and mental, add, at their discretion, a further sum as a punishment of the defendant for his malicious tort. Unless the court has added something to its instruction, or explained what it meant by these phrases, "punitive damages," "exemplary damages," "vindictive damages," "smart money," we are not justified in concluding that it means to hold more than that, in cases of such malicious tort, the jury were not confined, in assessing damages, to the determinate pecuniary loss of the plaintiff, but might add thereto a further sum for the loss resulting to the plaintiff from his mental suffering, which being indefinite and indeterminate, and having had no legal desig-

nation especially appropriate to it, has been called "exemplary damages," "vindictive damages," "punitive damages," and "smart money." But these phrases do not necessarily, as has been frequently thought, carry with them the idea that damages can be given for the purpose of making an example of the defendant so as to deter others from committing like torts, or as a punishment of the defendant for his malicious wrong, or as damages to satisfy the vindictive feelings of the plaintiff produced by the defendant's malicious tort, or as such mulcting of the defendant as would make him smart for his malicious tort.

On the contrary, as has been shown in many of these and other cases, these phrases may properly be interpreted as meaning simply indeterminate damages, governed by no definite rule for mental anguish, and the like, and, therefore, because of being so indefinite, likely to deter from the commission of malicious torts. Such damages, though not given as a punishment for the malicious tort, would, while they compensate the plaintiff, operate incidentally as a punishment for the defendant for his malicious tort, and so it might happen, and has for this reason happened, that such damages have been called punitive and vindictive damages, as they incidentally tended to gratify any vindictive feelings entertained by the defendant towards the plaintiff from his malicious tort. But it would be unfair to the court, who has simply, in deciding a case, used these phrases, saying the jury could award vindictive, exemplary, or punitive damages, or give smart money, to infer that damages could be given for the purpose of punishing the defendant, or for the purpose of gratifying the plaintiff's vindictive feelings, or for the purpose of making an example of the defendant so as to deter others from like offences. These results must follow the awarding of indeterminate damages for mental anguish inflicted on the plaintiff; but if these phrases are unexplained, they do not mean damages awarded for the purpose of punishment of the defendant. Every tariff, though it were laid strictly to raise revenue, and with no purpose of protecting or aiding home manufactures, would nevertheless operate incidentally to afford such protection, and it might be thus tersely called a protective tariff. And in just this sense can indeterminate damages, awarded the plaintiff because of his mental suffering, be called punitive damages, exemplary damages, vindictive damages, and smart money.

Nothing definite can now be learned from the simple use of these phrases, unexplained by the context in any other way. But some few of these cases may be re-

garded as positive adjudications that the law, in certain cases of malicious torts, permits the awarding of damages beyond what would compensate the plaintiff for all losses of every sort, on the ground that such additional damages may be given for the purpose of punishing the defendant for his malicious torts. But in my judgment, the decided weight of reason, as deduced from these decisions, is opposed to the allowance to the plaintiff in any case of any but compensatory damages, and that in no case should any damages be awarded the plaintiff, not as compensation to him, but as a punishment of the defendant. In most of the cases above cited, the courts have not reasoned at all on the subject, but they have simply announced views of the law; and the language used by them has very generally been so indefinite as really to furnish no conclusion as to what was thought by the court of the question we are discussing.

Smith v. Overby (Ga.) examined. — I will select among the numerous cases above cited all such cases as contain anything like elaborate reason by the court, or any of the judges on the question under discussion, and the reasoning will be given substantially in the language of the court, or judge, so that we may fairly judge of the weight of the reasons on each side of this mooted question. The first of these cases to which I would thus specially refer is *Smith v. Overby*, 30 Ga. 248. In that case, decided in 1860, the point we are considering was not so involved as to render it necessary to decide it; but the opposing views of Sedgwick and of Greenleaf were brought to the special attention of the court, and discussed; and *Lumplin, J.*, in delivering the opinion of the court, considered them carefully, and thus expresses himself on the subject (p. 248): "We apprehend that in most of the cases when carefully examined, it will be found that, whether the injury be done to person or estate, the measure of damages is, after all, the actual injury inflicted neither more nor less. An assault and battery committed on the person by pulling the plaintiff's nose or spitting in his face, the object being to degrade him, what, I ask, is the actual injury. The mere bodily suffering? that is nothing. Men have a moral as well as a physical nature. Here the injury is done to his feelings, his honor, his pride, his social position. Suffer these to go unprotected, unredressed, and life is no longer tolerable. Hence the jury in such a case should render large damages, not as punishment, but to compensate the actual injury. They must put a price on this manhood of a free man, and mulct the defendant accordingly. Let this illustration suffice. Analyze the cases, and the

same solution applies to all. Courts and text-writers have not clearly comprehended this doctrine and the philosophy of it, otherwise there would be harmony instead of confusion and apparent contradiction on the subject." As the court *held*, this was not a case for exemplary damages, and damages would not be given in it for injury to the plaintiff's feelings. What we have quoted as Judge Lumpkin's opinion must be regarded as *obiter dictum*; but it is entitled greatly to more weight as a deliberate opinion of Judge Lumpkins after due consideration than are the large number of casual expressions of opinion on this subject without consideration in many cases I have cited.

Hendrickson v. Kingsbury (Iowa).—The next case to which I would specially refer is *Hendrickson v. Kingsbury*, 21 Iowa, 379. In this case, *Judge Cole*, on p. 385, uses this language: "The counsel for the appellant also insists that there was further error in the instruction as given by the court, and especially as far as it directed the jury to give such a verdict as would inflict some punishment upon the defendant for his unlawful act. The question has been discussed by counsel only to a limited extent, and that, too, in connection with the instruction that was refused, in which the court was asked to instruct the jury, that, since the assault and battery was punishable by criminal prosecution, they could not give a verdict against the defendant in this case for the purpose of punishing him. We propose to examine the question separately, and *first* as to the right of the jury to give damages by way of punishment. Without now stopping to review at any length the numerous cases in which this question has been discussed or decided by the courts of England and this country, we may state we have carefully examined over one hundred different cases, and find a majority of them decide (the necessity or propriety of the decision being involved in the determination of the case) that vindictive or punitive damages may be given when the element of fraud or oppression is shown; and 'the balance, with the exception of the cases hereinafter specified, and possibly three or four others, contain *dicta* recognizing the doctrine of vindictive or punitive damages; but the question was not involved in the case, or not controverted by counsel. He would be a bold jurist, who, in view of these authorities, should hold the doctrine of exemplary, vindictive, or punitive damages had no foundation in law. Since the time of the controversy between Professor Greenleaf and Mr. Sedgwick (1847) on this subject, a large majority of the appellate courts of this country have followed the doctrine associated by Mr. Sedgwick

in that controversy; and our own Supreme Court has expressly denied on the authorities the correctness of Professor Greenleaf's views (*Finch & Co.*, 4 G. Greene (Iowa), 555), and in the same case expressed the opinion that under certain circumstances exemplary damages should be entertained. In a case against a physician for malpractice, it was *held* by our court that the plaintiff was not restricted to actual damages (*Cochran v. Miller*, 13 Iowa, 128); and in other cases our court has indirectly recognized the same doctrine. *Thomas v. Isett*, 1 G. Greene (Iowa), 470; *Denslow v. Van Horn*, 16 Iowa, 476; *Kinyon v. Palmer*, 18 Iowa, 377. See also *Revision 1860*, §§ 3112, 3113, 3183.

"It seems that the terms 'exemplary,' 'vindictive,' 'punitive,' 'speculative,' and 'smart money,' are used in law as synonymous; and the first of these were expressly *held* in *Chiles v. Drake*, 2 Metc. (Ky.) 146, to be synonymous terms. While these words certainly have a critical or technical difference of signification, as defined by lexicographers, yet they have been too long used as synonymous by legal writers to now justify the making of any distinction in their meaning in construing the decisions or opinions of judges, or other law-writings, in which they are used. The controversy on this subject between Professor Greenleaf and Mr. Sedgwick may, perhaps, after all the attention and discussion it has excited, be found to be a controversy as to the terminology of the law rather than as to the extent of the right of recovery or the real measure of damages. Professor Greenleaf holds that while the plaintiff can only recover compensation, he is not confined to the proof of actual pecuniary loss, but the jury may take into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind, his quiet and sense of security in the enjoyment of his rights; in short, his happiness. But it must affect his happiness, — not his neighbors, — and therefore to this question alone the jury should be restricted. While Mr. Sedgwick holds that whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what is termed punitive, vindictive, or exemplary damages; in other words, blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender. *Sedg. Dam.* 623. The difference arises, not in the statement of the proposition, but in the restatement or construction which is put upon the rule stated. 'In short,'

says Professor Greenleaf, 'his happiness;' while Mr. Sedgwick says, 'in other words, blends together the interest of society and the aggrieved individual,' etc. But some of the courts which follow the rule as stated by Mr. Sedgwick place a construction upon it not all in antagonism to the rule as stated by Mr. Greenleaf.

"In *Chiles v. Drake*, 2 Metc. (Ky.) 146, the court says, 'Every recovery for personal injury with or without vindictive damages operates, in some degree, as a punishment; but it is a punishment which results from a private wrong, and does not therefore violate either the meaning or spirit of the constitution prohibiting more than one punishment for the same offence.' The damages are allowed for the loss sustained, but the jury are permitted to give exemplary damages on account of the nature of the injury. It is therefore the increase of the damages resulting from the character of the defendant's conduct that is denominated punitive or vindictive. Under the rule as stated by Mr. Greenleaf, this increase of damages resulting from the character of the defendant's conduct showing fraud, malice, or oppression, is given to the plaintiff as compensation for the invasion of his peace of mind, his quiet, and sense of security in the enjoyment of his rights; while under the rule as stated by Mr. Sedgwick, this increase is given as 'punitive, vindictive, or exemplary damages.' In either case, or under either rule, the amount given by the jury is imaginary, presumptive, or speculative with them; that is, the jury have not, and, in the nature of things, cannot have, in either case, any pecuniary standard by which to measure the amount of compensation or damages to which the plaintiff is entitled.

"It is, perhaps, true that the broad and general language of the rule, as stated by Mr. Sedgwick, tends more to convey to the jury the idea of their unlimited and unrestrained power, jurisdiction, or control over their verdict than the rule as stated by Mr. Greenleaf; and that, under that rule, jurors would more frequently return verdicts based more or less on their passions and prejudices than under the other rule. For instance, the instructions, as given in this case, would tend very strongly to convey to the jury the idea of complete control over the amount of their verdict unrestrained by any legal rule whatever. But suppose they had been instructed, that, in estimating the amount of the plaintiff's damages, they would ascertain and give, *first*, the actual pecuniary loss sustained, as the value of the clothing destroyed; *second*, the consequential pecuniary loss, as the value of the time lost by the plaintiff, the expense, if any, incurred for medicine, physician's bills, compensation to the attendant, and board

while sick, and the like; *third*, the physical suffering consequent upon the injury, including any temporary, protracted, or permanent deformity, disability, or disfiguring, as by scars and the like; *fourth*, the mental anguish, loss of honor, sense of shame, caused by the act of the defendant, as by the exposure of her naked person to the public, the sense of wrong inflicted, insult effected, the degradation felt, and the like; *fifth*, the injury to the business, reputation, social standing, and the like.

"It is not unreasonable to suppose that such an instruction would more certainly exclude passion and prejudice, and the jury would feel themselves more constrained to limit their verdict to the compensation to the plaintiff for the injuries inflicted by the defendant, and, at the same time, would render a verdict which would amply compensate for the injury in every phase and manner wherein it could operate. And indeed it seems to us, under such an instruction, the verdict would be far more likely to approximate to justice and to exclude passion and prejudice, than under the loose and general instruction as given by the court in this case, and justified by the rule laid down by Mr. Sedgwick, and sustained by the general amount of authorities.

"It must be remembered that the doctrine of giving damages for the malicious or oppressive act if construed as punishment, must be limited to cases where the act done is not punishable by the penal or criminal laws of the State; for it is a principle of the common law, and one which is embodied in many of the State constitutions, that no person shall be twice punished for the same cause, — *nemo lis vexati pro eodem causa*. And if the rule of giving damages as a punishment cannot be applied in cases where the act is punishable by the criminal laws of the State, then it cannot be a general rule, and would operate unequally. Take this case for illustration. If the petition contains a true statement of the acts of the defendant, the verdict is certainly little enough. But the statute limits the penalty for the crimes those acts constitute to a hundred dollars, and thirty days' imprisonment. Now, if no damages by way of punishment can be given, when the act is punishable by the criminal laws of the State, the penalty in this case would amount to a positive benefit to the criminal. The term 'punitive damages,' as contained in Mr. Sedgwick's rule, is construed in some States as punishment for the act; and the rule is therefore laid down in Massachusetts and Indiana, and perhaps other States, not to apply in cases where the act is punishable by the criminal laws of the State. *Austin v. Wilson*, 4 Cush. (Mass.) 273; *Taber v. Hutson*, 5 Ind. 322; *Butler v. Mercer*, 14 Ind. 479; *Norsaman*

v. Rickert, 18 Ind. 350. While in Kentucky the term 'punitive damages' is held and construed not to mean that damages were given as a punishment, but to remunerate for the loss sustained, and, therefore, in that State the rule would apply to all cases. In New York it has been held that punitive damages are given as a punishment, and may be given where the act is criminally punishable also; and that in such cases the remedy for the defendant is to procure a suspension of the judgment in the criminal case until the civil case is tried, and then avail himself of the verdict in the civil action, by way of mitigation of the penalty in the criminal case. *Cook v. Ellis*, 6 Hill (N. Y.), 466. See also *Cole v. Tucker*, 6 Tex. 266; *Wilson v. Middleton*, 2 Cal. 54; *Corwin v. Watson*, 18 Mo. 71. But the clear weight of authority is with the rule laid down in *Chiles v. Drake*, 2 Metc. (Ky.) 146, — in substance that the damages allowed in civil cases by way of punishment have no necessary relation to the penalty incurred for the wrong done the public, but are called punitive damages by way of distinction from pecuniary damages, and to characterize them as punishment for the wrong done the individual. In this view, the awarding of punitive damages can in no just sense be said to be in conflict with the constitutional or common law inhibition against inflicting two punishments for the same offence. The instruction as given in this case being fully sustained by the authorities, was not erroneous; nor was it error to refuse to give the second instruction (copied above) as asked by the defendant."

The inference I draw from this case is, that Cole, J., representing the Supreme Court of Iowa when it rendered this decision, felt himself bound, by previous decisions of the Supreme Court of Iowa, in which this subject had been but very slightly considered, to sustain the court below, when it instructed the jury that "they might inflict some punishment upon the defendant for his wrongful act." And in its refusal to instruct that as the assault and battery was punishable as a criminal offence, they could not "give a verdict against the defendant in this case for the purpose of punishing." For the court had in its action followed previous rather hasty decisions of the Supreme Court of Iowa. But after a thorough examination of the subject, the court was satisfied that, though its previous decisions were erroneous, they would have to be followed; it being in Iowa, so far as this point was concerned, too firmly settled by a number of decisions to be again re-opened.

Judge Cole, on behalf of the court, while really by his argument, though not formally,

admitting that in reason and justice this action of the court below could not be defended, and that Greenleaf's position throughout was unanswerable, in a very ingenious argument strove to show that the position of Sedgwick, on the point in controversy, was defensible, and that it was sustained by the overwhelming weight of authority outside the State of Iowa. But learned and ingenious as Judge Cole certainly showed himself to be, it was really more than he or any one else could do to reconcile the views of Sedgwick on the point in controversy either with reason or with perfectly well-settled principles of law. This I propose now, briefly, to show.

In the first place, the court below, following Sedgwick, held that the jury might inflict damages as a punishment on the defendant for an assault and battery on the plaintiff, though, this being a criminal offence, the defendant might be again punished for the same assault and battery by being indicted for it by a grand jury; and this, too, in the face of the fact that the Constitution, as well as the common law, forbids a person to be twice punished for the same offence. How can these two obviously inconsistent propositions be reconciled? Judge Cole endeavors to do so in this manner. He states that while "punitive damages" given in a civil suit are construed as a punishment for the defendant's act, the subject of complaint, as in New York, for instance, elsewhere, as in Kentucky, the term "punitive damages" is held and construed not to mean that damages were given as a punishment, but to remunerate for the loss sustained; and he shows that was held in *Chiles v. Drake*, 2 Metc. (Ky.) 146. He says, "The clear weight of authority is with the rule as laid in *Chiles v. Drake*. Of course, the conclusion from such premises is, that a court in a proper case may instruct a jury that it may give 'punitive damages,' it being understood that punitive damages does not mean punishment for the act committed by the defendant, — in this case assault and battery, — but only means 'compensatory damages,' that is, damages to compensate the plaintiff for every sort of loss, physical or mental, for, of course, the giving of such punitive damages when so understood would not be punishing the defendant for his assault and battery, but merely compensating the plaintiff for his loss which he had sustained." But the trouble is that the court below did not instruct the jury that they might give "punitive damages." Had it done so his action might have been sustained; as by "punitive damages," according to the clear weight of authority, according to Judge Cole, is not meant "damages given for the purpose of punishing the defendant," but merely compensatory damages for any

sort of loss of the plaintiff, physical or mental. But this was not the language of the court below. He did not instruct the jury that they might give "punitive damages" against the defendant; but he instructed them that they might "inflict some punishment on the defendant for his wrongful act," and he refused to instruct them that they could not "give a verdict against the defendant for the purpose of punishing." According to the reasoning of the Supreme Court, in its opinion rendered by Judge Cole, this action of the court was clearly prejudicial to the defendant; yet the court *held* it would not be erroneous. But they wisely closed their opinion on this point by saying that the instruction was sustained by the authorities. It was sustained, though contrary to sound reason, by previous Iowa decisions. The court may have felt, as it doubtless did feel, that it was bound to let these decisions stand, however erroneous, on the principle of *stare decisis*.

But this is not the only inconsistency into which the Supreme Court of Iowa, through Judge Cole, puts itself in this opinion. In one part of the opinion Judge Cole very properly says, "that the terms 'exemplary,' 'vindictive,' 'punitive,' 'imaginary,' 'presumptive,' 'speculative,' and 'smart money,' are used in law as synonymous, and therefore they all meant the same as punitive;" that is, to use Judge Cole's language elsewhere, "They must be construed not to mean that such damages were given as a punishment, but to remunerate for the loss sustained." If this were so, of course every decision in which the court simply held in general, without any explanation of its meaning, that the jury "might give vindictive, exemplary, or punitive damages in cases where the element of fraud or oppression is shown," would be a decision that in no case could damages be given as a punishment for the public offence done by committing the act complained of, but the jury were in all cases confined to remunerative damages sufficient to cover all the losses of the plaintiff, physical and mental.

I must say I do not think it would be right so to construe decisions of this sort, but they ought to be regarded simply as holding that the plaintiff in such cases was not confined to a recovery of his actual determinate pecuniary loss, but he was entitled to additional damages; the court wholly failing to define what was to constitute these additional damages, whether the wounding of the feelings of the plaintiff, his degradation and the like, or whether they supposed that included in these additional damages was a mulct to punish the defendant. They, in such cases, generally had no defined idea of what should be included in

the additional damages in such cases; their attention not having been called to such question, but only to the question when additional damages beyond the determinate pecuniary loss could properly be given. These vague additional damages were called indifferently exemplary damages, vindictive damages, punitive damages, imaginary damages, speculative damages, and smart money. I have examined more than one hundred cases, and in almost all of them there were either decisions or *dicta* to the effect that exemplary, vindictive, or punitive damages might be given in cases where malice, fraud, or oppression were shown, and in which the court deciding this proposition, or the judge expressing such a view, gave not the slightest intimation of what he regarded as the meaning of the phrase used, whether exemplary damages, vindictive damages, punitive damages, or smart money. We know that such text-writers as Greenleaf use the phrase "exemplary damages," and Rutherford in his "Institutes" the words "smart money," without intending to indicate that they thereby intended to include damages given for the purpose of punishing the defendant, for they elsewhere express themselves emphatically that in no case can this be done.

Now, Judge Cole in the beginning of the above quotation from his opinion, says, "We have carefully examined over one hundred different cases, and find that a majority of them decide that vindictive or pecuniary damages may be given in cases where the element of fraud or oppression is shown; and the balance, with the exception of the cases hereinafter specified, and possibly three or four others, contain *dicta* recognizing the doctrine of vindictive or punitive damages. And again, since the time of the controversy between Mr. Greenleaf and Mr. Sedgwick (1847) on this subject, a large majority of the appellate courts in this country have followed the doctrine advocated by Mr. Sedgwick in that controversy."

Now, while this first quotation no doubt states the facts correctly, taken in connection with what follows, it is almost certain to mislead. I have examined probably nearly all of the hundred cases which Judge Cole has examined; and while, as he states, they almost universally say that in certain cases, exemplary, punitive, or vindictive damages may be recovered, yet there is a very small number of cases to be found where the courts have in any sort of way intimated what they meant by these phrases, or that, by so deciding or saying, they had any idea of suggesting or deciding that any damages could ever be given for the purpose of punishing the defendant for the act complained of. And excluding such cases which really decide nothing, I do not find

that Sedgwick's views, as opposed to Greenleaf's, are supported by a large majority of the appellate courts by their decisions, either before or since 1847.

Judge Cole does not refer us to any of the hundred cases he has examined. In this I have not followed his example, but I have referred to those I have examined, or will do so in this article. And an examination of them will, I think, show that what I have above said is correct. I have not found the weight of authority in favor of Sedgwick's views, in opposition to those of Greenleaf. It is true that the mere number of cases which have held his views exceed those which have held Greenleaf's, but it is obvious that a large majority of the cases which show a careful examination of the point in controversy hold the views of Professor Greenleaf. This very Iowa case, while it decides the exact point according to the views of Sedgwick, yet all the reasoning in the case shows, I think, that the court is of opinion that it would have been better to adopt the views of Greenleaf rather than of Sedgwick; and they would have done this, except they were bound by previous decisions of their court, which had been rather hastily rendered. In a very large number of the cases which I have cited as relied upon by authors and by judges as authority upon this mooted point, there was really nothing actually decided in the case on this point, or the decision was a mere general decision by the court, that, in certain sorts of tort, the jury might give punitive, exemplary, or vindictive damages, or give smart money. But it would be impossible from the facts of the case, or from anything said in it by the court, or by anything said in any other part of the opinion, to ascertain what was meant by its being held that exemplary damages, vindictive damages, punitive damages, or smart money, might be properly awarded the plaintiff by the jury. For any thing which appears in the particular case as reported, the court may well have meant nothing more in such cases than the jury, in such cases of malicious tort, might give more damages than the actual pecuniary value of the property destroyed, or than the actual loss of the plaintiff capable of accurate ascertainment.

Of this character are the cases I have cited from Alabama, Connecticut, Illinois, Pennsylvania, and South Carolina, with a few exceptions only. The question in controversy does not appear to have been discussed or considered with any elaborateness in these as well as in many cases in other States; and the decisions in them being indefinite and vague, they, it seems to me, are entitled to but little weight. But it is just such decisions of this mooted question

—and such decisions constitute a majority of the fifty cases — which he has examined, and in which he thinks that the courts have held that damages in certain actions of tort might not only be given to remunerate or compensate the plaintiff, but also be increased for the purpose of inflicting punishment on the defendant.

Illinois Cases. — I would refer specially to the large number of Illinois cases which have been cited. These remarks are applicable to nearly all of them, though in three or four of them the court does go farther, and holds that, in actions for certain torts, the jury may increase the damages as a punishment for the public offence, and to deter others from committing such offences; but in none of the cases are any authorities cited to sustain such position. And this question does not seem to have been much discussed or considered in any Illinois case. In the most recent cases in Illinois, above cited, this is nevertheless held to be settled law in that State; but it is obvious that it would not be held to be law in that State except that the courts hold they are bound by their preceding decisions to so hold. And, rather inconsistently with such holdings, their courts hold that in an action based on an Illinois statute to recover damages of a liquor-seller for selling intoxicating liquors illegally to the plaintiff's husband, though the law expressly authorizes the awarding of exemplary damages in a proper case, yet these recent Illinois cases hold that in no case can damages in such a suit be awarded the plaintiff beyond what is compensatory as a punishment of the defendant, and that exemplary damages in this statute does not mean damages awarded for the purpose of punishing the defendant for his illegal sale of intoxicating liquors to the plaintiff's husband, because the same statute makes provisions for punishing such illegal sale as a misdemeanor. It is admitted in the most recent Illinois cases that exemplary damages, punitive damages, and vindictive damages, are all synonymous. And these decisions seem to me to be based on correct principles, to coincide with the views expressed by Greenleaf, and to be antagonistic to the views of Sedgwick, and are really irreconcilable with the previous decisions in Illinois that the jury could in any case add to the damages allowed the plaintiff to compensate for all kinds of injury a still further sum as a punishment to the defendant for the offence he had committed.

Indiana Cases. — I would likewise note what seems to be in conflict in the Indiana decisions before cited, which I cannot in principle reconcile. These Indiana cases show that when the tort of the defendant is mingled with the elements of fraud, malice, or gross negligence, if the tort was not

punishable by the criminal law of the land, the jury might add to the damages awarded the plaintiff as compensation a sum as a punishment of the defendant; but when the malicious tort is a criminal offence, no damages can be added as a punishment of the defendant in such civil suit. To allow this would be to punish twice for the same offence. But it seems to me that this attempted distinction between cases where the tort is a criminal offence, and where it is not, is entirely untenable. It strikes me, indeed, as a more dangerous infringement on the defendant's right to let a jury first arbitrarily make his conduct a criminal offence when the law had not made it a public offence, and having thus added a new offence to the penal law, they should arbitrarily attach to it whatever fine they pleased, and then give this fine for an imaginary public offence to the plaintiff in a civil suit, to whom they had already awarded all the damages necessary to fully compensate for every wrong he had sustained.

The Massachusetts Cases we have cited show that the rule adopted in Massachusetts has been to allow for any tort only compensatory damages, including damages for mental suffering and the like. And the same is the rule for the measure of damages in Minnesota in actions for all torts, according to the decisions we have cited from Minnesota. The reverse is apparently the law as laid down by the Missouri and Mississippi courts, where it seems to be deliberately held that in actions for certain sorts of torts the jury may add to the plaintiff's damages for the purpose of punishing the defendant. These views seem to have been adopted without discussion and with but little consideration.

And in Wisconsin and Kansas the cases we have cited show that in these States, with the conflicting views of Sedgwick and of Greenleaf before their courts, they, after consideration, adopted the views of Sedgwick. The Wisconsin case in which these views are adopted, as Judge Crawford says, "after the question was fully considered," refers, in support of these views, only to certain English and New York cases; and he concludes by saying, "that since the publication of Mr. Sedgwick's work, the rule as laid down by him is recognized in *Smith v. Sherwood*, 2 Tex. 460; in *Riphey v. Miller*, 11 Ired. (N. Car.) 247; in *Morse v. Railroad Co.*, 10 Barb. (N. Y.) 624, and in *Wilson v. Middleton*, 2 Cal. 54." It would be naturally inferred from this that in those cases cited that the controversy between Sedgwick and Greenleaf had been specially called to the attention of the court, and that each of these courts, after consideration of this point in controversy specially, had adopted the views of Sedgwick; but an examination of these cases will show

that this was not the case, but, on the contrary, there was no discussion of the point in controversy, and no reference to the controversy between Sedgwick and Greenleaf, and what was said was so vague and general as to be of little value as an authority.

The Kansas cases adopting Sedgwick's views were based entirely on the United States Supreme Court decisions which we have cited, and which are assumed to be decisions directly on the point in controversy, which was an error, as we have seen. What was said in these Supreme Court decisions were merely *obiter dictum*, entitled really to but little consideration as authority.

In New Hampshire, on the contrary, the cases we have cited will show that, after a most exhaustive consideration of the whole subject, the New Hampshire courts have reached the conclusion that, in no action for any sort of tort, can the plaintiff recover any thing but compensatory damages in its large sense, including, in a proper case, damages for wounded feelings, and the like; but that in no case can to these be added, after this full compensation of the plaintiff, a further sum as a punishment for the defendant for his malicious tort. In the case of *Fay v. Parker*, 53 N. H. 342, all the previous New Hampshire decisions on this subject, as well as many decisions elsewhere, are reviewed at length. There were twenty of these previous New Hampshire cases. *Whipple v. Walpole*, 10 N. H. 130, is spoken of as an exploded case. It was overruled in *Woodman v. Nottingham*, 49 N. H. 387. It is shown that *Perkins v. Towle*, 43 N. H. 220, simply decided that exemplary damages might be given in actions of *quare clausum fregit*; but what might be properly included in, and regarded as, exemplary damages, was not considered in that case. The case shows that this whole subject has been very fully discussed in that State, and that there was considerable conflict of authority on the subject, though the weight of the New Hampshire authorities has generally been rather in favor of compensatory damages as the correct rule in all cases.

As the opinion of the court delivered by *Foster, J.*, is one of great ability, and shows a very thorough investigation of the whole subject, I propose to give a brief summary of it. He admits that probably a majority of the cases indicate the views of courts to be opposed to his views; but he finds no case which treats of elements of damages such as are called vindictive, punitive, or exemplary, which might not properly be treated in estimating the compensatory damages which, under like circumstances, everybody concedes the injured party might justly receive. None of them go so far as to hold that the same elements of damages

might be twice considered, and damages twice awarded; much less, three times,—once to the plaintiff, as compensation for the damages actually sustained by him; a second time to the plaintiff, as a punishment of the defendant; and a third time to the State, by way of fine under the criminal law. He then shows, by the definitions of damages by Grotius and all others, it is inconsistent with the allowing any thing but compensatory damages, and that these were the views of Grotius, Puffendorf, Domat, and Rutherford. He sets out at length the character of the controversy between Greenleaf and Sedgwick. He shows that, what I surmised with reference to the citation from a late edition of Kent's Commentaries (the 11th), Kent had no idea of deciding, as Sedgwick seemed to think, this controversy in his favor, and that he only commends Sedgwick's views so far as they conflicted with that of the writer in "The Law Reporter," which was, that all considerations of the malice, wickedness, and wantonness of the tort should be ignored in estimating the plaintiff's proper damages; and with this view Greenleaf dissents: and, in fact, none could do otherwise than condemn the misrepresentations of the true rule of damages which characterizes this article in "The Law Reporter." Kent indignantly repudiated them; but he did not condemn those of Professor Greenleaf, or commend those of Sedgwick when he differed from Greenleaf, but rather the reverse. He says, undoubtedly, many of the cases relied on by Sedgwick to support his views do sustain them, but many of them fall far short of it; and proceeds to show that they are not sustained by these cases. *Tullidge v. Wade*, 3 Wils. 18 (decided in 1769); *Huckle v. Money*, 2 Wils. 205 (decided in 1763); *Mesert v. Harvey*, 5 Taunt. 442 (decided in 1814); *Sears v. Lyons*, 2 Stark. N. P. 317.

He well says that the full explanation of all that was said in any of these cases, is that, "in ancient days, if not in the present, a jury would not, perhaps, regard as the physical damage the injury to the plaintiff's person or property, unless their attention was directly called to the question whether the plaintiff's feelings were injured by the insult of the defendant's conduct." The cases—*Leith v. Pope*, 2 W. Bl. 1326, and *Bennett v. Abbott*, 2 Term R. 166 (decided in 1787)—indicate that the value of the injury done was the proper measure of damages in any sort of a case. The cases of *Pleydell v. Earl of Dorchester*, 7 Term R. 529 (decided in 1728); *Duberley v. Gunning*, 4 Term R. 651 (decided in 1792); *Wilford v. Berkeley*, 1 Burrows, 609 (decided in 1758); *James v. Biddington*, 6 Car. & P. 589 (decided in 1834); *Forde v. Skinner*, 4

Car. & P. 239,—all show that the judges who decided these cases never imagined that the plaintiff's damages could be increased by the jury adding to them something as a punishment for the defendant's offence; and most of them show affirmatively that the judges deemed the proper damages, in any case, were a compensation for all his injuries. He shows that in *Pearson v. Lemaitre*, 5 Man. & G. 700 (decided in 1843), always cited to sustain Sedgwick's views, *Lendell, C. J.*, said, "Upon principle, we think that the spirit and intention of a party publishing a libel are to be considered by a jury in estimating the injury done to the plaintiff." This case, properly understood, favors the views of Professor Greenleaf. It shows that the injury done to the plaintiff was what the jury was to estimate, and not how much the defendant should be punished by their verdict. His punishment resulting from their verdict was merely incidental, and not the object of the verdict.

He then shows from examination of the case that in *Embley v. Myers*, 6 Hurl. & N. 54 (decided in 1860), though the judges speak of the injury the "plaintiff had sustained" and "exemplary damages," they really meant only by "the injury sustained" the injury to his property, and by "exemplary damages" the injury to his feelings by the insult offered. In this tort case, *Pollock, C. B.*, said, "If you choose to call compensation for injuries done to the plaintiff's feelings by the defendant's manner of committing an act 'exemplary damages,' no harm results from the misnomer, provided juries and courts understand that 'exemplary damages' means compensation for injury to the plaintiff's feelings. The trouble is, that such language is persistently misunderstood." That case furnishes a number of examples of the use of careless language; for instance, *Bramwell, B.*, said, "Damages might be given for the insult as well as the actual injury," just as if injury to the feelings was not an actual injury. *Foster, J.*, well says, "But of what consequence is it whether damages given for insults and oppression are called compensatory or exemplary, liberal or sparing? Of none whatever, till fundamental constitutional rights are imperilled and overthrown by misconception of the meaning of words. Then it becomes high time to express ideas in language which cannot be misunderstood." The following modern cases relied on by Mr. Sedgwick, *Foster, J.*, in his opinion thinks not only fail to sustain, but, when properly understood, condemn his views. *Janess v. Campbell*, 5 Car. & P. 372 (decided in 1832); *Rogers v. Spence*, 13 Mees. & W. 571 (decided in 1844); *Doe v. Philliter*, Id. 47 (decided in 1846).

As showing that the English courts hold that compensatory damages are all that can be allowed in any case when it is understood to include wounded feelings and the like, he refers to *Andrews v. Askey*, 8 Car. & P. 7 (decided in 1837); *Edgell v. Francis*, 1 Man. & G. 222 (decided in 1840); *Williams v. Currie*, 1 Man. G. & S. 841, though this case is strangely relied on by Mr. Sedgwick; *Clissold v. Madrell*, 26 N. C. Q. B. 422 (decided *Anno*, 30 Vict.). *Richards, C. J.*, in that case said, "Though the defendant may deserve punishment, that is no reason why the plaintiff should reap a reward beyond a fair indemnity in consequence of the bad conduct of the former." *Foster, J.*, says, "This case manifests the sound sense of the administration of justice in the dominion."

Having reviewed all these English cases, *Foster, J.*, reviews the prominent American cases. And first he shows that the courts of Massachusetts have steadily adhered to the doctrine of compensation as affording the only true measure of damages. As showing this, he cites *Weld v. Bartlett*, 10 Mass. 470 (decided 1813); *Richards v. Farnham*, 13 Pick. (Mass.) 451 (decided 1833); *Barnard v. Poor*, 21 Pick. (Mass.) 378 (decided 1838); *Austin v. Wilson*, 4 Cush. (Mass.) 273 (decided in 1849). Yet Sedgwick seems to so far misunderstand these cases, plain as they are, as to suppose that some of them sustain his views. He then criticises the case of *Linsley v. Bushnell*, 15 Conn. 225. He shows that the case was correctly decided; but the appellate court seems to be unable to conceive of compensation otherwise than as a market value applied to material things, and proceeds to enlarge and explain, and, in so doing, speaks of "vindictive damages" and "smart money" in such a manner as might well confuse. In the case of *Huntley v. Bacon*, 15 Conn. 267, the charge of the court below was perfectly correct, and so held by the court above, who by the use of careless and inaccurate language has bred confusion. The same judge who delivered this confused opinion delivered also the opinion in *Linsley v. Bushnell*. But there is more senseless confusion and inaccuracy of language found in a single sentence in the opinion delivered in *Denison v. Hyde*, 6 Conn. 508, from which it would seem that wanton vexation was spoken of as if it was not direct damages, and therefore not compensatory. The sentence ends thus: "But the profitable and inevitable damages, and those which result from the aggravating circumstances attending the act, are proper to be estimated by the jury." *Foster, J.*, commenting on this, says, "The author of the present discourse finds such lucubrations as these both aggra-

vating and vexatious, and not remote but consequently direct, demanding compensation for the trouble of their consideration." In *Seger v. Barkhamsted*, 22 Conn. 290 (decided in 1853), correct views expressed in accurate language is shown by the opinion. But in 1857 the case of *Dibble v. Morris*, 26 Conn. 416, was decided; and in the case of *Platt v. Brown*, 30 Conn. 336 (decided in 1862), the court uses again such confused and contradictory language as to render it impossible to tell what were their views of the law.

Foster, J., then says the doctrine of exemplary damages, as understood by Sedgwick, is undoubtedly recognized in Illinois; but in *Yundt v. Hartrunft*, 41 Ill. 10; *Reeder v. Purdy*, 48 Ill. 261; and *Farwell v. Warren*, 51 Ill. 467, the term "exemplary damages" is unquestionably used for no other purpose or intention than to express damages beyond the mere pecuniary loss actually sustained; while in the case of *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, the idea of exemplary damages is expressed as something "in addition to the actual damages, for the indignity, vexation, and disgrace to which the party has been subjected." This is another illustration of the careless and indefinite use of language. The case of *Slater v. Sherman*, 5 Bush (Ky.), 206, and *Chiles v. Drake*, 2 Metc. (Ky.) 146, are referred to, and explain the conclusion that they both regard damages as always compensatory, though there is some confusion of language in the first case. But the case was correctly decided, and on correct grounds. The case of *Ellsworth v. Potter*, 41 Vt. 688, furnishes an illustration of the application of the terms "exemplary," "vindictive," and "punitive" damages to such as belong in fact to compensation merely. Such is also the case in *Bonsall v. McKay*, 1 Houst. (Del.) 520, though the doctrine of exemplary damages as understood by Sedgwick, is insisted upon. *Barnett v. Reed*, 51 Pa. St. 190, is another instance of the confusion which seems inseparable from the consideration of this matter; and like confusion in the language used, is pointed out in *Carey v. Bright*, 58 Pa. St. 70; Pa., etc., Canal Co. v. Graham, 63 Pa. St. 290; *Fox v. Stevens*, 13 Minn. 252 (Gil. 252), is shown to have been cited on the ground that the plaintiff was in no case entitled to any thing but compensatory damages; but the language used by the court shows that they thought that mental suffering and dishonor could not be actual damages, properly speaking. In *Bussy v. Donaldson*, 4 Dall. (U. S.) 207, a case of gross negligence, it is said, "As to the assessment of damages, it is a rational and legal principle that the compensation should be equivalent to the injury. There may be some occasional departure

from this principle, but I think it will be found safest to adhere to it in all cases proper for a legal indemnification in the shape of damages." In *Freidenheit v. Edmundson*, 36 Mo. 226, Holmes waived expressing any opinion on this part of the controversy; but in *McKeon v. Railway Co.*, 42 Mo. 79, he said his opinion was, that damages for punishment could not be given in any civil case. *Green v. Craig*, 47 Mo. 90, indorses the doctrine of damages in certain cases given as punishment of the defendant; but in that case, as in most cases of this sort, all the damages called exemplary might have been just as well awarded for compensation only. *Cook v. Ellis*, 6 Hill (N. Y.), 466, which sustains Sedgwick's views, is based on *Jack v. Bell*, 3 Car. & P. 316, which does not sustain it. In *Smithwick v. Ward*, 7 Jones (N. C.), L. 64, the views of Sedgwick on this question were adopted, though they were deemed wrong; and the only reason given for so doing was, that the circuit courts had long acted on this wrong principle, and the court of appeals thought best not to disturb it. The case of *Hendrickson v. Kingsbury*, 21 Iowa, 379, is criticised.

The last American case reviewed is *Post Co. v. McArthur*, 16 Mich. 447. The parts of the syllabus bearing on the subject of our discussion are these: "While those damages which depend on the sound discretion of a jury are not susceptible to any accurate regulation by the court, yet the jury should be prevented, by proper caution, from acting upon improper theories as to the legitimate elements to be considered in estimating them. The term 'exemplary' or 'vindictive' damages should not be used without such explanation as may prevent a jury from being misled by it. For voluntary wrongs, additional damages are allowed for injured feelings, which must be naturally aggravated or mitigated by the degree of malice actually existing; but nothing beyond individual grievances should be taken into account in estimating them." Mr. Justice Campbell, in delivering the opinion of the court, says, "While the term 'exemplary' or 'vindictive damages' has become so fixed in the law that it may be difficult to get rid of, yet it should not be allowed to be used so as to mislead, and we think the only proper application of damages beyond those to person, property, or reputation, is to make reparation for the injury to the feelings of the person injured. This is often the greatest wrong that can be inflicted, and injured pride or affection may, under some circumstances, justify very heavy damages."

After this review the conclusion drawn is that expressed in this opinion, "That the modern erroneous idea of exemplary damages originated in, and is in fact the same

thing as, damages for wounded feelings, as distinguished from damages for an injury to a person or property. Damages for lacerated sensibilities, insulted honor, tyrannical oppression, and so forth, being much emphasized, and often being the principal damages suffered by the plaintiff, the language being loosely used, and not preserving the true distinction carelessly or intemperately used in the heat of indignation, which judges often felt but could not repress, while contemplating an erroneous outrage, it finally came to be understood that damages might be given in a civil suit as a punishment of the offence against the public, — an idea which is plainly not disclosed in the early cases. I venture to say that in no case will be found, in ancient, or, indeed, in modern, reports in which a judge explicitly told a jury that they might, in an action for an assault and battery, give the plaintiff four damages: (1) For loss of property, as for injury to his apparel, loss of labor and time, expenses of surgical assistance, nursing, etc.; (2) for bodily pain; (3) for mental suffering; and (4) for punishment of the defendant's crime. But a critical examination of the cases will show, as I believe, that this fourth item is comprehended in the third, and has grown to become an additional item by inconsiderate, if not intemperate and angry, instructions given to the juries when the court was too much incensed by the exhibition of wanton malice, revenge, insult, and oppression to weigh with coolness and deliberation the meaning of language previously used by other judges. . . . Thus the doctrine of compensation for the plaintiff has become the doctrine of punishment for the defendant, imparting into civil suits that punishment which still remains in criminal procedure, and so unfairly, as well as unconstitutionally and illegally, punishing an offender twice for the same crime." He then proceeds to show that the frame of our writs in such suits shows clearly that compensation for damages suffered by the plaintiff is all that he demands. "What is a civil remedy but reparation for a wrong — compensation for damages sustained by the plaintiff? How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among the civil remedies? What kind of a civil remedy for the plaintiff is the punishment for the defendant? The idea is wrong. It is a monstrous heresy: it is an unsightly excrescence deforming the symmetry of the body. It germinates misconceptions and inadvertencies which were born of righteous indignation, and zealous eagerness to visit justice and punishment for wrong

upon a convicted offender by means of the first judicial process which might happen to bring his sin to light. . . . The truth is, this method of compensation is a modern and American invention resulting from a misunderstanding of the use of the loose and inaccurate forms of expression in the old English cases. . . . If compensation were now understood, as it formerly was, to be made for injuries to material substance only, and exemplary damages were now understood, as they were formerly, to refer to injuries to the spiritual or mental part of human nature, there would be no trouble or difficulty in the matter; but in the progress of time these definitions have changed. Compensatory damages now include injuries to the mental and spiritual part of mankind; and this change of definition leaving nothing for exemplary damages as formerly understood to operate upon and be applied to, by a very natural mistake the term 'exemplary' has been supposed to refer to criminal punishment for the sake of public example,—an idea which was not included in 'exemplary damages' as formerly understood."

Judge Foster then proceeds to point out how this doctrine violates fundamental and constitutional law, first by punishing twice for the same offence. He cites *Fox v. Ohio*, 5 How. (U. S.) 435, in which McLean, J., says "there is no principle better established by the common law, none more fully recognized in the federal and State constitutions, than that an individual should not be put in jeopardy twice for the same offence." He ridicules the decision in *Pendleton v. Davis*, 1 Jones (N. Car.), L. 98, and the reason given for this absurd conclusion that a plaintiff should be so punished twice, though they deemed it wrong; that reason being that the circuit court of North Carolina had generally acted upon this false principle. He then says, "Almost innumerable practical difficulties must be encountered, involving absurdities disgraceful to the administration of the science of law, destructive of the established rules of pleading, and in utter contempt of constitutional rights and time-honored principles of justice, in the attempt to evade, conceal, or harmonize the incongruities resulting from an effort to recover damages in a civil action of tort, beyond and distinct from compensation to the full extent of all the injury which a plaintiff has sustained." He then points out these absurdities and incongruities: (1) The plaintiff is awarded what he does not ask for in his writ or declaration; (2) the defendant is forbidden to plead or prove that he has paid, or been absolved from the payment of, his fine, which, though this be the case, the plaintiff gets without asking for it; (3) the defendant is punished criminally in a civil

suit, and thus deprived of his fundamental right of not being punished till he has been indicted by a grand jury; (4) the defendant may be compelled, in a civil suit, to testify against himself, though the law declares he shall never criminate himself; (5) he may have depositions read against him in the civil suit in which he may be fined, and he is thus deprived of his constitutional right, whenever charged with a crime, to meet the witnesses against him face to face; (6) he may thus be punished and convicted for a crime in a civil suit through the mere balance of the weight of evidence against him, though by the law he cannot be found guilty of a crime so long as the jury entertains a reasonable doubt of his guilt; (7) he loses his right entirely, given by the constitution, to be relieved from the fine for an offence if the governor thinks proper to pardon him.

He concludes this portion of his view with these remarks: "Where shall be the limit of the confusion and absurdity involved in the attempt to reconcile the doctrine of vindictive and punitive damages in a civil suit with the reason, the logic, the symmetry of the sense of jurisprudence? And what power can avail to stay the utter demolition of the constitutional safeguards from the arbitrary despotism which would impose upon them cruel, unjust, and oppressively accumulated punishments?" Again he says, "When it is asserted, as it has been, that the true principle is that judgments in both the civil and criminal courts should operate as mutual checks upon each other, thereby increasing or diminishing the punishment in this suit, it is said much too hastily; and if only a little more reflection and consideration had been given the matter, it would not have been said at all. See 7 American Law Rev. Jan. 1873, pp. 366-368. Such a theory is altogether too fanciful, visionary, and impracticable."

The difficulties of this attempt he then shows from the case of *Wells v. Abrahams*, L. R. 7 Q. B. 554. He then adds, "Now, why all this unnecessary trouble, confusion, and perplexity, when the course of procedure should be plain, straight, and uninterrupted? The true rule, simple and just, is to keep the criminal process and practice distinct and separate. Let the criminal law deal with the criminal, and administer judgment for the legitimate purpose and end of punishment,—namely, the reformation of the offender, and the safety of the people. Let the individual whose rights are infringed, and who has suffered unjustly, go to the civil courts, and there obtain full and ample reparation and compensation; and let him not thus appropriate the funds to which he is not entitled, and which belong to others. Why longer

tolerate a false doctrine, which, in its practical exemplification, deprives a defendant of his constitutional rights of indictment, or complaint on oath before being called into court, deprives him of the right of meeting the witness face to face, deprives him of the right of not being compelled to testify against himself, deprives him of the right of being acquitted unless the proof of his offence is established beyond all reasonable doubt, deprives him of the right of not being punished twice for the same offence? Punitive damages destroy every constitutional safeguard within their reach. And what is to be gained by this annihilation and obliteration of fundamental law? The sole object in its practical results seems to be to give a plaintiff something which he does not claim in his declaration. If justice to the plaintiff required the destruction of the constitution, there would be some pretext for wishing the constitution to be destroyed. But why demolish the plainest guaranties of that instrument, and explode the very foundation upon which constitutional guaranties are based, for no other purpose than to perpetuate false theories, and develop unwholesome fruits? Undoubtedly the pernicious doctrine has become so fixed in the law, to repeat the language of Mr. Justice Campbell of Michigan, 'that it may be difficult to get rid of it; but it is the business of the courts to deal with difficulties, and this heresy should be taken in hand without favor, firmly and fearlessly.' It was once said, 'If thy right eye offend thee, pluck it out; and if thy right hand offend thee, cut it off.' Wherefore not reluctantly should we apply the knife to this deformity concerning which every true member of the sound and healthy body of the law may well exclaim, 'I have no need of thee!' As to so much of the verdict as relates to exemplary or vindictive damages, it must be set aside."

Virginia Decisions.—We have cited, it will be observed, no authorities in some States. Very little, or nothing, has been said by the courts or judges in these States, on the subject under discussion; and what has been said, is entitled to but little consideration, as it has been very vague and indefinite. In Virginia, for instance, before the formation of the State of West Virginia, in 1863, no decisions touching the subject are found, and scarcely a mention of the subject. But since 1863, there have been in the cases cited some *dicta* in Virginia entitled to but little consideration in West Virginia or elsewhere.

In West Virginia the question, What is the true measure of damages where a defendant has committed on the plaintiff a tort, accompanied by fraud, malice, gross negligence, or a wilful disregard of the

plaintiff's right? has been several times presented to the Supreme Court of Appeals, and the decisions on this subject have not been uniform. The first case in which this question was called to the attention of the court in this State was *Sweeney v. Baker*, 13 W. Va. 158. This was an action on the case brought by the plaintiff for a libel of the defendant published in a newspaper of the defendant. Upon the subject we are considering, on pp. 217, 218, in delivering the opinion of the court, Judge Green says, "It is earnestly insisted by the appellant's counsel that the true and only measure of damages in a suit of this character is compensatory damages, and the jury cannot properly give vindictive damages as a punishment to the defendant; that is, punitive damages, damages beyond the injury actually sustained. For the sake of the example that such is not the law, we are earnestly invoked to disregard these often-expressed views that the plaintiff in such an action is only entitled to nominal damages, unless there be evidence of actual pecuniary injury, coupled with proof of malicious intent; yet highly respectable jurists have insisted that what is strictly called punitive damages ought, in no civil case, to be given; and damages awarded the plaintiff should be only the damages sustained by him through the defendant's wrong. But those who entertain these views are careful to say, that, by the damage sustained by the plaintiff, they do not mean the amount to which his estate has been diminished by the wrong,—that is, the pecuniary loss, as the phrase is generally understood,—but there is to be included in the damages sustained by the plaintiff full compensation for his mental and bodily suffering directly consequent on the wrong. And while the loss to his estate, his pecuniary loss, may be a mere trifle, the loss resulting from bodily suffering or mental agony may be very great. As the court gave no instruction to the jury in this case, it did deem it necessary to express any opinion as to which of these views expresses more correctly the measure of damages in such a case, as the verdict of the jury ought not to be set aside, and a new trial awarded by this court, because the damages allowed were excessive, whether we regard the one or the other as the proper rule for measuring damages."

But in *Vinal v. Core*, 18 W. Va. 49 *et seq.*, an action on the case for malicious prosecution, Judge Green, in delivering the opinion of the court, did express his views on this question, though there was no more necessity for so doing than there was in the case of *Sweeney v. Baker*, 13 W. Va. 158; for though there were, in the case, many instructions given by the court below, not one of them, either given or refused, had

any reference to the measure of damages in the case. And the verdict of the jury could not, in this case, any more than in the first case, have been set aside, and a new trial awarded by this court, "because the damages awarded by the jury were excessive, whether we regarded the one or the other as the proper measure of damages." The court ought, therefore, to have declined to express any opinion on this subject; but it did, nevertheless, and its views were in substance inserted in the seventeenth point of the syllabus, p. 3. These views were expressed thus (p. 49, etc.): "But if the defendant has been actuated by actual malice, or a design to injure the plaintiff, or fraud or oppression has entered into his conduct, the decided weight of authority, both English and American, holds that the jury may inflict on him exemplary damages as a punishment for his misconduct, and to hold up an example to the community. There have been a few very respectable courts and writers who have held that in no case can a jury inflict on a defendant punitive damages; but the overwhelming weight of authority, both English and American, is, that in certain cases, such punitive damages may be inflicted. I will only refer to a few cases in actions for malicious prosecution, and those which most resemble this action in the nature of the wrong inflicted,—such as libel and slander. See *Burnett v. Reed*, 51 Pa. St. 191; *Cooper v. Utterbach*, 37 Md. 284; *Fry v. Bennett*, 4 Duer (N. Y.), 247; *Gilreath v. Allen*, 10 Ired. (N. Car.) 69; *Hosley v. Brooks*, 20 Ill. 116."

Judge Green then states the substance of the first two of these cases, and the holding of the courts in those which he approves. It will be observed that this opinion is based upon the authority of decisions in other States solely; but the judge does not pretend to assign the reasons of the principles laid down in them, nor does he undertake to reconcile them with the fundamental principles of our government. If his attention had been called to this, we presume he would have looked into the matter more carefully. As it was given such an inadequate examination, this fact made it really unnecessary to express any opinion on the subject, as the judgment in the case would have been the same, whatever had been their views on this point. The truth is, the error into which this court, as well as a great many other courts, have fallen, was that of following decisions elsewhere rendered, without examining the reasons on which they were based, and without noticing that these cases they followed were based on other decisions *merely*, and not on reasoning.

This court had less difficulty in not following the views expressed in this case as

two or three years afterwards in *Riddle v. McGinnis*, 22 W. Va. 253: without referring to this case, it adopted principles at variance with these views. And the principles so adopted are in entire accord with the views hereinbefore expressed. The case was an action brought by a father for the seduction of his daughter, under circumstances of great aggravation. The fourth point in the syllabus (p. 253) is, "On the trial of an action brought by a father for the seduction of his daughter, evidence of the pecuniary condition of the defendant is admissible to show the extent of the injury caused to the plaintiff by the wrongful act of the defendant." It will be seen that the ground on which the pecuniary condition of the defendant (the seducer) is permitted to be proven in such an action, is, that it affects the extent of the injury the plaintiff (the father) has sustained. Judge Woods, in delivering the opinion of this court, on page 278, says, "The real measure of damages was the shame, mortification, disgrace, dishonor, and mental suffering inflicted upon the parent by the wrongful act of the seducer. *Fox v. Stevens*, 13 Minn. 252 (Gil. 252); 2 Greenl. §§ 269, 579; *Lipe v. Eiserlerd*, 32 N. Y. 229; *Knight v. Wilcox*, 18 Barb. (N. Y.) 212; *Lavery v. Crooke*, 52 Wis. 612, and numerous cases there cited. Upon this subject all the authorities agree; but whether the testimony showing the pecuniary circumstances of the defendant ought to be given to the jury, has been questioned by very respectable authorities who have been disposed to limit the inquiry to the amount the injured is entitled to receive, and not what the wrong-doer is able to pay. All the authorities, however, admit that the jury ought to consider, not only the circumstances attending the commission of the wrong, but also the situation of the parties in life (*Andrews v. Askey*, 8 Car. & P. 7; *Bennett v. Allcott*, 2 Term R. 166), and also the defendant's rank and influence in society, and therefore the extent of the injury, as the same is increased by his wealth. And testimony tending to show his pecuniary condition is pertinent to the issue. 2 Greenl. Ev. §§ 90, 269; *White v. Murland*, 71 Ill. 250. The logical deductions from these principles, as well as the weight of modern authorities, warrant the conclusion, that, in the action of seduction of a daughter, the pecuniary condition of the plaintiff and defendant are proper subjects for the consideration of a jury in making up their verdict." He then cites to sustain this view, *Lavery v. Crooke*, 52 Wis. 612; 9 N. W. Rep. 599; *Apple-gate v. Rouble*, 2 A. K. Marsh. (Ky.) 128; *Hewitt v. Prime*, 21 Wend. (N. Y.) 79; *Clem v. Holmes*, 33 Gratt. (Va.) 726, quoting portions of opinions delivered in these cases.

V. Recovery of Exemplary Damages by or against Personal Representatives. — 1. *Generally.* — At common law such damages could never be recovered by or against a personal representative. It was clearly forbidden by the ancient and uncontested maxim, *Actio personalis moritur cum persona*. For though some action which might be called *personal* action as distinguished from *real* actions, — as actions for debt, for instance, — never died with the person, yet, in personal actions within the meaning of this maxim, there always was included actions of tort wherein exemplary damages could be recovered, as will abundantly appear when the true meaning of this ancient maxim is explained.

2. *Actio Personalis Moritur Cum Persona.* — *Actio personalis*, personal action, in this maxim, is not meant a personal action as distinguished from a real action. By personal action in this maxim is meant only those brought for injuries to the person, — as assault and battery, false imprisonment, or injuries to the reputation; as slanders and libel and injuries to personal property,

It will be observed, that, in this opinion as in the syllabus, the ground on which it is held that the wealth or poverty of the defendant, as well as of the plaintiff, may be admitted as evidence in such a suit, is not that if the defendant is wealthy a larger recovery should be had of him than if he were poor, but because the wealth of both the plaintiff and the seducer of his daughter tend to show their relative rank and influence in society, and this affects the extent of the injury the plaintiff has sustained.

It is true that in a subsequent case (*Ogg v. Murdock*, 25 W. Va. 139), this court in the third point of the syllabus, lays down the law thus: "The rule for the measure of damages in cases where the malice necessary to sustain the action is such only as results from a groundless act, and there is no actual design to injure or oppress, is to allow compensatory damages, — that is, damages to indemnify the plaintiff, including injury to property, loss of time, and necessary expense, counsel fees, and other actual loss, — but not to allow vindictive or punitive damages to punish the defendant."

And in *Downey v. Railway Co.*, 28 W. Va. 733, point 7 of the syllabus is, "Where the evidence does not tend to prove that the injury complained of was caused by the wilful, wanton, or oppressive conduct of the agents of a railway company, and that such conduct was expressly or impliedly authorized or ratified by the company, it is error to refuse to instruct the jury that they cannot give punitive or exemplary damages." These propositions are indisputably right. But it may be said they imply that punitive damages may be given; but they really imply only that there are cases in which the measure of damages is not

confined to mere compensatory damages, when by this is meant, as defined in the first of these cases, "damages to indemnify the plaintiff, including injury to property, loss of time, and necessary expenses, counsel fees, and other actual loss." In other words, when compensatory damages are defined to mean what we have called "determinate pecuniary damages." And, of course, this is true. All that can be said from these two cases, is, that the words "vindictive and punitive damages" are used in an improper sense, as they have often been, as I have shown, in many other cases, as meaning something beyond determinate pecuniary damages, as, for instance, mental anguish, and the like, often called exemplary damages or punitive damages, and the like, merely as in opposition to determinate pecuniary damages. And compensatory damages are improperly used as meaning only determinate pecuniary damages, and excluding damages for mental anguish, and the like.

This same question came before the Supreme Court of Appeals of West Virginia in the case of *Pegram v. Stortz*, 6 S. East. Rep. 485, and after an exhaustive consideration of the subject in controversy, the court decided that exemplary damages did not mean additional damages given as a punishment of the defendant for his malicious tort, but damages which should compensate the plaintiff for his mental suffering, the proximate consequence of the defendant's malicious tort. The opinion of the entire court was pronounced by Judge Green. It is unnecessary to quote any of the language, as the substance of it is contained in this article, and much of the language used in this opinion has been herein copied.

attended by actual force; as for the destruction or diminution in value of personal property by force, as nuisances.¹

"All private injuries or wrongs, as well as all public crimes, are buried with the offender," as Lord Mansfield said;² and, as Lord Ellenborough said,³ "Executors and administrators are the representatives of the temporal property,—that is, the debts and goods of the deceased,—but not of their wrongs, except where these wrongs operate to the temporal injury of their personal estate."⁴

As exemplary damages are only given as a compensation for personal suffering; it would seem clear that they could not be recovered, in any case at common law, by or against a personal representative. The right to recover such damages at common law by this maxim died with the person of the wrong-doer, or of the party injured.

The operation of this maxim has, however, been, in England and in the different States of the Union, modified by statutes.⁵

But none of these statutes go so far as to give a right to recover after the death of the wrong-doer, or party injured for bodily or mental suffering; and, therefore, none of them give a right to recover exemplary damages, which we have seen is only compensation for mental suffering, loss of social position, injuries to reputation, and the like. A recovery for such injuries can only be

1. *Little v. Conant, etc.*, 2 Pick. (Mass.) 527; *Franklin v. Lowe, etc.*, 1 Johns. (N. Y.) 496; *U. S. v. Daniel*, 6 How. (U. S.) 13.

2. 1 Cowp. 375.

3. *Chamberlain, Admr., v. Williamson*, 2 M. & S. 415.

4. Take, for instance, the case of a wrong-doer seizing and carrying off the sheep of another, and then dying. An action of *trover* would lie against his personal representative who took possession of the sheep; but if the wrong-doer in his lifetime had eaten or consumed the sheep, no action would at common law lie against his personal representative, as the ancient maxim we are explaining would prevent the bringing of such action against the personal representative.

5. The common law was first changed by 4 Edw. III. c. 7. The preamble of this statute recites that "in times past executors have not had actions for trespasses done to their testators, as of the goods and chattels of the same testators, carried away in their life, and so such trespassers 'remained unpunished,'" therefore that statute enacted that "the executors in such cases should have an action against the trespassers, and recover damages in like manner as they, whose executors they be, should have had, if they were in life." 1 Carr. & Kirw. 273, note; 47 Eng. Com. Law, 271; 3 Rob. Prac.

289. Since this statute executors or administrators may in England maintain trespass or trover for the goods of the decedent taken in his lifetime. Com. Dig. title "Administration" (b. 13); 1 Wms. Saund. 216 a, note 1; *Towle v. Lovet*, 6 Mass. 394. But in England, an action of *trover* would not lie under the common law or this statute against a personal representative for a conversion by the decedent. *Humbly, etc., v. Trott, Cowp.* 371. And this rule formerly prevailed in some of the States of the Union. See *Barnard v. Harrington*, 3 Mass. 228; *Hench, etc., v. Metzger*, 6 S. & R. (Pa.) 272. But in Pennsylvania it was held that replevin would not abate by the death of the defendant. *Keite v. Boyd*, 16 S. & R. (Pa.) 300. And this statute has been given this equitable construction in Massachusetts and Pennsylvania, holding it to give to the executor a remedy for any wrong done to the personal property of the decedent, notwithstanding it may not have been carried away; and this statute so construed was adopted in these States. See *Holmes v. Moore, etc.*, 5 Pick. (Mass.) 258; *Penrod v. Morrison*, 2 Pen. & Watts (Pa.), 131. This statute of 4th Edward III. c. 7, has been extended by statutes, not only in Massachusetts and Pennsylvania, but also in Virginia, West Virginia, North Carolina, New York, and probably other States.

EXEMPLARY DAMAGES—EXEMPLIFICATION.

had during the lifetime of both the wrong-doer and the party injured. The right of recovery for such injuries dies with the person committing the wrong, or of the party suffering such wrong by the common law; and it is unchanged by any statute in England or in this country changing or modifying this maxim of *actio personalis moritur cum persona*.

3. *Action for Death*.—What are called exemplary damages, that is, injuries to the feelings, mental distress, etc., cannot be recovered under Lord Campbell's Act, and like statutes; nor is the pain and suffering of the deceased an element of damages under this and like statutes.¹

4. *Damages for Injuries the Result of Intoxication produced by the Illegal Sale of Liquor*.—Within the last few years, statutes have been passed in a number of States, giving to husband, wife, parent, child, or guardian, and sometimes to other parties, for injuries done by intoxicated persons, the right to maintain actions against the person or persons who may have sold or given the liquor which caused the intoxication; also for injuries to the means of support, for the expense and trouble of caring for the intoxicated person, and for other injuries particularly pointed out in these statutes.

These acts provide that actions may be brought, as well for the damages sustained as for exemplary damages. This, of course, means, if the circumstances attending the *tort* (the sale of the intoxicating liquors) were such as, upon common-law principles, would justify the giving of exemplary damages; that is, if the sale was accompanied by insult, not to the person to whom the sale was made, but to the plaintiff, the widow or child. Such exemplary damages cannot be given as a recompense for the plaintiff's anxiety of mind, mortification, social degradation, or loss of the society of the intoxicated person by reason of his drunkenness and misconduct. The weight of authority as well as reason sustains the position, but the cases are not agreed as to this legal proposition.²

EXEMPLIFICATION.—An exemplification is a copy of the record under the great seal, or under the seal³ of the particular court where the record remains.⁴

1. The true basis of recovery under this and like acts, is thus stated by Pollock, C. B., in *Franklin v. Railway Co.*, 3 Hurl. & N. 211. "It is held that these damages are not to be given as a *solatium*. This was so decided for the first time *in banc* in *Blake v. Railway Co.*, 18 Q. B. 93.

The case was tried before Parke, B., who told the jury 'that the Lord Chief Baron had frequently ruled at *nisi prius*, and without objection, that the claim of damages must be founded on pecuniary loss, actual or expected, and that mere injury of feelings could not be considered. . . . The damages should be calculated

in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise from the continuance of life.'"

2. *Pegram v. Stortz* (W. V.), 6 S. East. Rep. 582.

3. The seal of the court may be affixed by merely making the impression of the seal on the paper: the use of wax or a paper wafer is not essential. *Hunt v. Hunt*, 9 At. Rep. 690.

And it would seem that the seal must be the seal of a court which is recognized by the county where the exemplification is sought to be introduced. *Schaben's Case*, 6 Ct. of Cl. 230.

4. *Greenl. on Ev.* § 501.

An exemplification under the great seal was obtained at the common law, by removing the record into the court of chancery by a *certiorari*, where the great seal was kept, and a literal transcript of the record was then transmitted by *mittimus*. Such an exemplification was sufficient, even on an issue *nul tiel* record; but an exemplification under the seal of a particular court would not be sufficient on such an issue in England.

In the United States, however, the great seal being in possession of the secretary of state, a different course prevails, and an exemplification under the seal of a particular court is sufficient on an issue *nul tiel* record.¹

It is a perfect copy of a record or office-book so far as relates to the matter in question.²

It may be demanded as of common right³ for any use the party may think fit to make of it; and after a demand of it has been made, the proper officer might be punished for refusing to make it out.⁴

An exemplification has the effect of the original record. It is evidence of as high a nature as the original, and imports absolute verity.⁵ There is no occasion, consequently, to produce, or account for the non-production of, the original. The reason of the rule is the inconvenience that would otherwise result to the public if original records were liable to be removed from the public depositories.⁶

It is conclusive as to a judgment;⁷ and an exemplification of letters-patent granted by the United States, or a State, is conclusive evidence of the grant of authority.⁸

An exemplification must embrace the whole record: an abstract of the record is not such.⁹ This is determined by the court from

1. Greenl. on Ev. § 501 *et seq.*; Vail v. Smith, 4 Cow. (N. Y.) 71; Repoon v. Jenkins, 2 John. Cas. (N. Y.) 119.

2. Bouv. Law Dict.; Dickinson v. Railroad Co., 7 W. Va. 390.

3. 3 Coke's pre. p. iv.

4. Rex v. Brangan, 1 Leach's Cr. Cas. 32. This was approved in Stone v. Crocker, 24 Pick. (Mass.) 88. And see The People v. Poyllon, 2 Caines (N. Y.), 202.

5. Patterson v. Winn, 5 Pet. (U. S.) 242; Barton v. Merrain, 27 Mo. 235; Lancaster v. Smith & Wife, 67 Pa. St. 427; Kramer v. Settle, 1 Idaho (N. A.), 485.

But where the Rev. Stat. U. S. § 891 provided for the admission of copies from the books of the commissioner of the general land office, it may be shown by parol that a transcript from such office is not a true copy. Campbell *et al.* v. Laclede Gas Light Co., 119 U. S. 445.

6. Starkie on Ev. § 257.

"The carrying of original papers from one court to another is to be disapproved." Rogers v. Tillman, 72 Ga. 479; State v. Hunter, 94 N. Car. 830.

Hence, no copies of records belonging in private hand can be admitted in evidence, except by virtue of a special statutory provision. Bradley v. Silsbee, 33 Mich. 328.

7. Gunn v. Howell, 35 Ala. 144. See CONFLICT OF LAWS.

8. U. S. v. Amdondo *et al.*, 6 Pet. (U. S.) 728.

And such an exemplification is admissible in evidence, though the patent be signed only with the initials of the President and Commissioner of Patents. Briggs v. Holmstrong, 72 Mo. 337.

9. Griffith v. Tunchhauser, Pet. (C. C.) 418; Thomas v. Stewart, 92 Ind. 246; Jay v. East Livermore, 56 Me. 107; Anderson v. Nagle *et al.*, 12 W. Va. 98; Gest & Atkinson v. N. O. St. L. & Chicago R. R. Co., 30 La. Ann. pt. i. 28; Willis *et al.* v. Louderback *et al.*, 5 Lea (Tenn.), 561; Kusler *et al.* v. Crofoot, 78 Ind. 597; U. S. v. Gaussen, 19 Wall. 198.

A record consisting of loose and detached parts is not such an exemplification as is admissible in evidence. R. R. Co. v. Quick, 68 Pa. St. 189.

the certificate of the officer whose business it is to authenticate the copy.¹

An exemplification is not an exclusive mode of proving a record or such other documents as may be capable of being exemplified.² The original is likewise admissible in evidence.³ But if an exemplification of a lost record or deed be attainable, a party will not be permitted to prove such deed or record by memory or by witnesses.⁴

The use of exemplifications seems originally to have been confined to the proof of judicial records:⁵ they have been used for a long time, however, to prove public statutes, decrees of chancery,⁶ and foreign laws generally,⁷ private statutes,⁸ public registers,⁹ public documents;⁹ and there is now a tendency on the part of the courts to admit them to prove executive as well as legislative and judicial documents.¹⁰

But an exemplification of a judicial proceeding pending and

And where the Revised Statutes make the books of the treasury department or exemplifications of them evidence, the extracts must be *perfect and complete* for all that they purport to represent. *U. S. v. Gaussen*, 19 Wall. (U. S.) 198.

1. *Edmiston v. Schwartz*, 13 S. & R. (Pa.) 135.

Here the officer certified that it is "truly 'copied from the records,' and a true copy imports an entire copy." *Gibson, J., Edmiston v. Schwartz, supra.*

But in the case of exemplifications of private statutes, it is sufficient to exemplify those sections of the statutes relating to the subject-matter. *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208.

The certificate of the clerk of a county court of a sister State is a sufficient exemplification of the record in a case where the clerk certifies that he made a true copy of the record, as fully as the same remains on file and of record in his office. It is no defect that the reasons upon which the judgment of the court was founded are wanting. *West Feliciana R. R. Co. v. Thornton*, 12 La. Ann. 736.

2. *Greenleaf on Ev.* § 489.

3. *Davis v. Furman*, 21 Kan. 131; *Britton v. State*, 54 Ind. 535; *State v. Hunter*, 94 N. Car. 829; *Rogers v. Tillman*, 72 Ga. 479.

When the original is inadmissible, the exemplification is likewise inadmissible. *Meegan v. Boyle*, 19 How. (U. S.) 130; *Seechrist v. Baskin*, 7 W. & S. (Pa.) 403; *Lamberton et al. v. Windom et al.*, 18 Minn. 506. A statute making copies of records admissible, only makes the copies admissible where the originals would be admitted. *State v. Wells*, 11 Ohio, 261.

4. *Lowry v. Cady et al.*, 4 Vt. 506.

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As when the original records of a court have been burned, if there is a certified copy in existence, no parol evidence will be admitted. *Cornell v. Williams*, 20 Wall. (U. S.) 226.

So parol evidence of the commission of a felony is inadmissible if an exemplification of the record can be obtained. *Hills v. Colvin*, 14 Johns. (N. Y.) 182. Or of a patent. *Platt v. Haner*, 27 Mich. 167; *Ellis et al. v. Huff*, 29 Ill. 449; *Harvey v. Thorpe*, 28 Ala. 250.

5. *Repoon v. Jenkins*, 2 Johns. Cas. (N. Y.) 119. As of a petition in bankruptcy. *Bonesteel v. Sullivan*, 104 Pa. St. 9.

6. *Greenleaf on Ev.* § 511.

7. *Greenleaf on Ev.* § 489.

The certificate of the Secretary of the Government and Province of Florida of the grant of the governor of that province is evidence of that fact. *U. S. v. Delespine et al.*, 15 Peters (U. S.), 226, citing *U. S. v. Wiggins*, 14 Pet. (U. S.) 334.

8. *Wharton on Ev.* § 114. See opinion of Tighman, J., in *Biddis v. James*, 6 Binn. (Pa.) 326, as to distinction between public and private statutes.

9. *Wharton on Ev.* § 127; *Simmons v. Spratt*, 20 Fla. 495. See *Watkins v. Holman et al.*, 16 Pet. (U. S.) 25; and *Leland et al. v. Wilkinson*, 6 Pet. (U. S.) 317.

10. *Wharton on Ev.* § 105.

As a certified copy of a record from the navy department, under the hand of the secretary and the seal of the department. *Maurice v. Worden*, 57 Md. 510.

Or as the records of the Treasury Department, by virtue of an Act of Congress. *Mott v. Ramsay*, 92 N. Car. 152. See *U. S. v. Bell*, 111 U. S. 477.

In a suit on the bond of a purser in the navy. *U. S. v. Bell*, 111 U. S. 477.

undetermined will not be admitted in evidence,¹ nor of the records of the Confederate States of America.²

Exemplifications of deeds, etc., are only admissible by virtue of statutory provisions,³ and the mode of authentication prescribed by statute must be strictly followed.⁴ But such a copy under the seal of a particular court of the registry of a State is not admitted in another State by force of the statutes of that State, but according to the Acts of Congress,⁵ though the different States may permit exemplifications and copies of the register to be admitted without all the formalities prescribed by the Act of Congress.⁶ The Act of Congress, however, does not extend to exemplifications of the record of a private writing under a registry law,⁷ nor to the courts of the United States, nor to the public acts, records, or judicial proceedings of a State court, to be used as evidence in another court of the same State; but such records or acts are admitted independently of it when properly authenticated.⁸

EXEMPT. — One not liable to service.⁹

EXEMPTION. (See **EXECUTION** ; **HOMESTEAD** ; **TAXATION.**) — Immunity.¹⁰

EXERCISE. (See **CARRY.**) — To carry on.¹¹

1. Heath v. Page, 60 Pa. St. 108.

2. Schaben's Case, 6 Ct. of Cl. 230.

3. Wharton on Ev. 115; Bradley v. Silsbee, 33 Mich. 328. As the record of the probate of a will under the Act of Congress. Keith v. Keith, 80 Mo. 125; Cox v. Jones, 52 Ga. 438.

4. Smith v. U. S., 5 Pet. (U. S.) 292, 300; U. S. v. Hamill, McAll (U. S.), 243.

So certified copies of articles of consolidation of a railroad company filed in the office of the secretary of state. Vance v. Kohlberg, 50 Cal. 346; Columbus, etc., R. R. Co. v. Skidmore, 69 Ill. 566; Warren v. Wade et al., 7 Jones (N. Car.), 494.

5. See art. CONFLICT OF LAWS.

6. Baker et al. v. Field, 2 Yeates (Pa.), 532; Wharton on Ev. §§ 98, 100, 110, 115; Lothrop v. Blake, 3 Pa. St. 343.

7. Russell v. Kearney, 27 Ga. 96; Carlisle v. Tuttle, 30 Ala. 613. See Steere v. Tenney, 50 N. H. 461.

8. Turnbull v. Payson, 95 U. S. 418; Bradford et al. v. Russell, 79 Ind. 74.

9. "An 'exempt' is one who is 'free from any charge, burden, or duty,' 'not liable to,' etc. A detail, on the contrary, is one who belongs to the army, but is only detached, or set apart for the time to some particular duty or service, and who is liable, at any time, to be recalled to his place in the ranks." The State ex rel. Dawson, In re Strawbridge & Mays, 39 Ala. 379.

10. Long v. Converse, 91 U. S. 112 King v. L. & L. Canal Co., 5 East, 321.

"A dispensation and exemption differ in sound only; for a dispensation is properly to license a person to do a thing which he can do, but is by a law penally prohibited from doing it. An exemption is properly to license a man or men not to do a thing which they are penally by a law precepted to do." Thomas v. Sorrell, Vaughan, 349.

Exemption from jury service does not disqualify the person exempted to sit upon a jury. Glassinger v. State, 24 Ohio St. 206.

11. To exercise a trade, is to carry on a trade. "There is not, I think," says Fessell, M. R., "any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying-on of trade; but I know no one distinguishing incident, for it is a compound fact made up of a variety of things." A company, domiciled in Copenhagen, had three cables in connection with Newcastle and Aberdeen, communicating with the lines of the post-office. They also had workrooms with clerks, in these cities and in London. Messages were sent over the lines of the post-office, and the cables of this company, to Denmark, whence they were forwarded by the lines of this company and of foreign governments to different parts of the world. The charges for such messages were collected by the post-

EXERCITOR — EXHIBIT — EXHIBITION — EXHIBITS.

EXERCITOR. — The person who receives the earnings of a vessel.¹

EXHIBIT. (See INDECENT EXPOSURE.) — To show; to display; also to present, when used of a complaint or information.²

EXHIBITION. — Public show.³

EXHIBITS. — In its broadest sense an exhibit is a document produced and identified for future use.⁴ It is also the designation given to writings of any kind that are proved in a cause in chancery, either by admission or by witnesses; but it is often restricted to that kind of writings which may be proved *viva voce* at the hearing.⁵

Proof of, at the Hearing. — Where a cause is heard on bill and answer only, or documents have not been proved before the evidence was closed, writings may in certain cases be proved as

office, and transmitted, after deducting their dues to the Copenhagen Company. This company was *held* to be exercising a trade in the United Kingdom within the meaning of an income tax law, and under that law to be subject to tax. "Now that, as it appears to me," continues *Jessel, M. R.*, "is a perfectly plain case of carrying on trade in this country. The company habitually receive money in this country from English subjects for messages sent from England to places abroad, and they transmit those messages from stations in this country to places abroad. This, I think, makes it a carrying-on of trade in this country." *Erichsen v. Last*, 8 Q. B. D. 414.

"To exercise the right of suffrage," is "to vote." "When a man is spoken of as *exercising* a right, it is commonly understood that he is doing something." *United States v. Souders*, 2 Abb. (C. C.) 456.

1. *The Phoebe*, 1 Ware (C. C.), 265.

2. Used of a gaming device. *Whitney v. State*, 10 Tex. App. 379.

The exhibition of the books of a corporation to a stockholder can only be completed by showing the contents of the books, not their outsides merely. *Brouwer v. Cotheal*, 10 Barb. (N. Y.) 216.

To exhibit a complaint or information in criminal cases, is to present the complaint, signed by some proper informing officer, to a court or public officer, who has authority to receive the same, and to issue a warrant to apprehend the offender, and bring him to trial. *Newell v. State*, 2 Conn. 38.

3. A statute prohibiting the maintaining, without a license, of any public show, amusement, or exhibition, does not apply to a school for the teaching of dancing, although admittance thereto is paid for. *Com. v. Gee*, 6 Cush. (Mass.) 175.

A corporation, authorized to give premiums to encourage improvement in the mechanical arts, in the breed, usefulness, and value of horses, etc., which maintains a driving-track devoted annually for several successive days to horse-racing, at which time the grounds are kept open, for pay, to the public, is not liable to a tax, as conducting an exhibition of feats of horsemanship. "It is an exhibition of feats of horses, and not of their riders." *United States v. The Buffalo Park*, 16 Blatchf. (U. S.) 189.

4. Abb. Law Dict.

5. *Gres. Eq. Ev.* 146.

Where testimony is taken by an examiner, to be afterwards submitted to the chancellor at the hearing, it is necessary, when documents are put in evidence, to exhibit them to the witness and the examiner, the latter of whom, after they have been identified by the witness, marks them as having been exhibited upon the examination. They can then be produced before the chancellor, and identified by the examiner's marks. Abb. Law Dict.; Tom. Law Dict.; *Com. Bank of N. Y. v. Bank of State of N. Y.*, 4 Hill (N. Y.), 516.

Exhibits before an examiner are subject to the use of both parties, for the purpose of examining witnesses in respect to them.

The act of producing and proving a paper before an examiner makes it an exhibit, whether marked so or not; and the party so producing and proving it cannot qualify its effect. *Com. Bank of N. Y. v. Bank of State of N. Y.*, 4 Hill (N. Y.), 516.

The same method is pursued where documents are put in evidence at a jury trial, or before a referee, and need to be identified.

exhibits at the hearing, either *viva voce*, or by affidavit.¹ The documents that may be thus proved are: 1. Ancient records of endowments and institutions, whether offered as original instruments, or as found collected and recorded in ancient registers, and when coming from the proper custody. 2. Copies of public records. 3. Deeds, bonds, promissory notes, bills of exchange, letters or receipts.²

Of the last class no exhibit can be thus proved which requires more than proof of execution or handwriting, or which admits of cross-examination.³

A party intending to use an exhibit at the hearing must previously obtain an order to do so, which order must accurately describe the exhibit.⁴ But the adverse party has no right to the production or inspection of the exhibit before the hearing.⁵

In Pleading.—Documents are also called exhibits, which are referred to in pleadings, and annexed, instead of being copied into them in full. Such a reference makes the exhibit a part of the pleading.⁶

EX OFFICIO.—From office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position; also used as an act done in an official character, or as a consequence of office, and without any other appointment or authority than that conferred by the office.⁷

1. Rowland v. Sturgis, 2 Hare, 520; Chalk v. Raine, 7 Hare, 393; s. c., 13 Jur. 981; Neville v. Fitzgerald, 2 Dr. & War. 530. But see Jones v. Griffith, 14 Sim. 262; s. c., 8 Jur. 733.

By N. J. Chancery Rule 95, no documentary evidence which is not made an exhibit before the master can be read at the hearing of the cause.

2. Danl. Ch. Pr. (5th Am. ed.) 881, 882.

3. Danl. Ch. Pr. (5th Am. ed.) 882; Ellis v. Deane, 3 Moll. 62; Emerson v. Berkley, 4 Hen. & M. 441; Lake v. Skinner, 1 J. & W. 9.

"It is sometimes said that no questions which will admit of a cross-examination may be asked a witness thus proving exhibits. This is not, strictly speaking, correct; but the examination is restricted to three or four simple points, such as the custody and identity of ancient documents, the accuracy of an office copy, the execution of a deed, the handwriting of a letter, etc." Gres. Eq. Ev. 188.

If the execution or authenticity of the document is denied in the answer, it cannot be proved *viva voce* at the hearing: this is not the case, however, where its validity only is denied. Barfield v. Kelly, 4 Russ. 355; Rowland v. Sturgis, 2 Hare, 520; Jones v. Griffith, 14 Sim. 262.

4. Gres. Eq. Ev. 188; Clare v. Wood, 1 Hare, 314; Barrow v. Rhineland, 1 Johns. Ch. (N. Y.) 559; Miller v. Avery, 2 Barb. Ch. (N. Y.) 582.

5. Forrester v. Hulme, McC. 558; Lord v. Colvin, 2 De G. M. & G. 47; s. c., 18 Jur. 253.

6. Brown v. Redwyne, 16 Ga. 67.

7. Abbott's Law Dict.

Ex Officio Officers.—It is well settled that making a person an *ex officio* officer by virtue of his holding another office, does not merge the two into one. Attorney-General v. Laughton (Nev.), 9 Am. & Eng. Corp. Cas. 79; People v. Edwards, 9 Cal. 286; People v. Love, 25 Cal. 520; Lathrop v. Brittain, 30 Cal. 680; People v. Ross, 38 Cal. 76; Territory v. Ritter, 1 Wy. Ter. 333; Denver v. Hobart, 10 Nev. 31.

In Attorney-General v. Laughton (Nev.), 9 Am. & Eng. Corp. Cas. 79, it was held that the legislature has power to make the lieutenant-governor *ex officio* State librarian, and to impose reasonable conditions precedent to the holding of the legislative office. Also, that the failure of the lieutenant-governor to give the bond required by statute, as *ex officio* State librarian, does not create a vacancy in the office of lieutenant-governor.

But in California an act of the legislature

EXONERATION (see also EQUITY; PRINCIPAL AND AGENT; CONTRIBUTION; MARSHALLING OF ASSETS) is a right which exists between those who are successively liable for the same debt, by which, when a party who is secondarily liable has paid or satisfied the principal's obligation or any part thereof, he is entitled to be reimbursed by the principal debtor, and can bring a bill in equity for that purpose.¹

making the treasurer of San Joaquin County *ex officio* tax collector, in so far as it provided for the transfer of such office to take place before an election of such treasurer should occur, was *held* to be unconstitutional and void. *People v. Kelsey*, 34 Cal. 470.

An act of the California legislature, in regard to the State library, declared that it should be under the direction of five trustees, and that the chief justice of the Supreme Court should be an *ex officio* member of the board. *Held*, that the chief justice was constitutionally disqualified from taking the office, as it belonged to the executive department of the government, and that his disability created no vacancy at the board which could be filled. *People v. Sanderson*, 30 Cal. 160.

And under a constitutional provision — such as La. Const. of 1868, art. 117 — that no person shall hold more than one office of trust at the same time, the legislature cannot enact that the clerks of one class of courts shall be *ex officio* clerks of the courts of another grade. Describing the clerkship as an "*ex officio*" one, does not make it less an office of trust. *Bonanchaud v. D'Herbert*, 21 La. Ann. 138.

A board of commissioners, one from each of five counties, having been incorporated by a State statute to construct and maintain levees, with authority to make contracts for the doing of the work, and having made such a contract, and been sued in equity thereon, in the district in which the domicile of the board was established by its act of incorporation, by persons residing out of the district, a subsequent statute of the State abolished the offices of the commissioners, and constituted the treasurer and the auditor of accounts of the State *ex officio* the levee board with the declared purpose "to substitute the treasurer and auditor in place of the board of levee commissioners now in office;" and a bill of revivor was filed against them by leave of the court. *Held*, that the suit might be prosecuted against the new board, although both the treasurer and the auditor resided out of the district; and that an appeal from a final decree for the complainant might be taken by the treasurer and auditor, describing themselves by their individual names, and as

such officers, and as *ex officio* the levee board. *Hemingway v. Stansell*, 106 U. S. 399; s. c., 2 Am. & Eng. Corp. Cas. 335.

A comptroller who is *ex officio* secretary of the board of county commissioners, and, as such, has the custody of certain municipal bonds, has such a possession thereof as will render a wrongful conversion of them embezzlement. *State v. White* (Wis.), 12 Am. & Eng. Corp. Cas. 452.

A statutory provision that a judge of probate shall be *ex officio* county treasurer does not render the sureties on his bond as judge liable for his malfeasance as county treasurer. *Ritter v. Wyoming Ter.*, 1 Wy. Ter. 318.

Ex Officio Services. — A Kentucky statute provided that no fee bill should be made out, or compensation allowed, for any *ex officio* services rendered by any officer. *Held*, that the *ex officio* services, intended by the statute, are those services which relate to the public interests or business of the county or State, as distinguished from those relating to the private interests of individuals. *Gilbert v. Justices of Marshall Co.*, 18 B. Mon. (Ky.) 427.

1. *Bispham's Eq.* (4th ed.) 392, § 331; 3 *Pomeroy's Eq. Jur.* 467, § 1416.

This right could not originally have been enforced at law; but a legal remedy now exists, which, however, has not taken away the equitable remedy. "The subject of equitable relief in behalf of sureties, is one of original jurisdiction in courts of chancery. The peculiar rights of a surety originated in, and are exclusively the growth of, equity. Formerly it was held, in several instances, that the remedy of the surety was only in equity, and could not be made available at common law. But it is now *held*, as a general rule, that the liability of sureties is governed by the same principles at law as in equity. . . . But a court of equity will not send a party suing there to a court of law for the discharge or relief to which he is equally entitled in equity, but will extend the same relief, and exercise the same powers in behalf of sureties, that were exercised before jurisdiction of this subject was entertained at law." Per *Isham, J.*, in *Viele v. Hoag*, 24 Vt. 46, 51. And see *Heath v. Derry Bank*, 44 N. H. 174; *Wesley Church v. Moore*, 10 Pa. St. 273;

Irick v. Black, 17 N. J. Eq. 189; Smith v. Hays, 1 Jones, Eq. (N. C.) 321.

The remedy of exoneration rests upon the same principles as that of contribution. See title CONTRIBUTION.

The surety who has paid the debt of the principal is entitled to recover from the principal not only the amount of the debt he has paid, but also the costs incurred. Wynn v. Brookes, 5 Rawle (Pa.), 106; Hayden v. Cabot, 17 Mass. 169.

But if he satisfies the obligation at less than its full amount, he can only recover from the principal debtor what he has actually paid or the value of the property given up. Bonney v. Seely, 2 Wend. (N. Y.) 481; Blow v. Maynard, 2 Leigh (Va.), 30.

The right of exoneration arises between surety and principal, so soon as the obligation becomes payable; and before the surety has paid it, whether he has been sued or not, he may bring a bill in equity, in the nature of a bill *quia timet*, to compel the principal to pay the debt, or perform the obligation, provided the creditor can himself enforce performance and neglects or refuses to do so. 3 Pomeroy's Eq. Jur. 468, note; Bispham's Eq. (4th ed.) 393; Woolridge v. Norris, L. R. 6 Eq. 410; Ardesco Oil Co. v. N. A. Mining Co., 66 Pa. St. 375; Fame Ins. Co.'s Appeal, 83 Pa. St. 396; Bishop v. Day, 13 Vt. 81; King v. Baldwin, 17 Johns. (N. Y.) 384; Morton v. Reid, 11 S. Car. 593; Gilliam v. Esselman, 5 Sneed (Tenn.), 86; Irick v. Black, 17 N. J. Eq. 189; Dempsey v. Bush, 18 Ohio St. 376; Bates v. Wiggins, 37 Kans. 44.

So when the principal debtor is insolvent, the surety may, before paying the debt, proceed against the principal for indemnity or to subject particular assets to the payment of the debt. Washington v. Tait, 3 Humph. (Tenn.) 543; McConnell v. Scott, 15 Ohio, 401; Laughlin v. Ferguson, 6 Dana (Ky.), 111.

In accordance with this principle it has been held, that, when the principal and surety both execute a mortgage to the creditor, conveying lands which belong to them separately, the surety has an equity to require that the lands of the principal shall be first sold, and applied to the satisfaction of the debt; and he may, after default, maintain a bill to redeem his land, asking a foreclosure as to the property of the principal, and offering to pay the balance that may remain due. Gresham v. Ware, 79 Ala. 192.

And similarly, if the principal debtor is dead, the surety may file a bill *quia timet* against the executor and the creditor to compel the former to pay the debt, and exonerate him. Stephenson v. Tavernus, 9 Gratt. (Va.) 398.

This equity, like that of contribution, only arises when the payment is made in discharge of a binding obligation. Reed

v. Bachelder, 34 Me. 205; Turner v. Burrows, 8 Wend. (N. Y.) 144; Adams, Eq. 267; Suppiger v. Garrels, 20 Ill. App. 625. But compare Robertson v. Mowell, 66 Md. 530. In this case it was said that "in most cases this equity is applied in behalf of one who is under an obligation of some kind to pay the debt of another, as a surety who is obliged to pay the debt of his principal, or one who is obliged to pay a lien or incumbrance on property purchased by him. 'But,' say the court, in Milholland v. Tiffany, 64 Md. 455, 'it is not necessarily confined to these cases, but may be applied on equitable principles in behalf of one, who, at the instance and request of the debtor, pays a lien or incumbrance, which he was under no legal obligation to pay, provided it does not interfere with intervening rights and incumbrances.'"

The facts were, that Mrs. D. had, at the request of her brother, M., paid a large part of a mortgage on the estate of her said brother. Both Mrs. D. and M. died shortly afterwards. In the settlement of the estates, R., the trustee under the will of Mrs. D., claimed the sum paid on account of the mortgage as a lien upon the said estate of M., which claim the executor of M. denied. The court held that Mrs. D. was such a meritorious creditor of her brother as to be entitled to this equity, and that of subrogation, to the extent of the payment on the mortgage debt, thus made by her.

But the surety will not, as a rule, be entitled to subrogation until the debt be actually paid, partial payments giving him merely an interest in the securities to that extent. Rice v. Downing, 12 B. Mon. (Ky.) 44; Morrison v. Insurance Co., 18 Mo. 262; Grove v. Brien, 1 Md. 439; Gannett v. Blodgett, 39 N. H. 150; Nixon v. Beard (Ind. May 24, 1887), 12 N. E. Rep. 131. And see, generally, title SUBROGATION.

Compare Bates v. Wiggins, 37 Kans. 44. In this case, B. had signed C.'s notes as surety; and in consideration of such signing, C. had agreed to convey certain personal property to him. Afterwards W., as receiver of C. in another action, took possession of such personal property, C. being insolvent. It was held that B., after the maturity of the notes, was entitled to the possession of the property, without waiting till he had actually paid the notes as surety. The decision, however, seems to have rested on the ground that the agreement between B. and C. operated as a mortgage by parol of the property in question.

A surety who stands passively by, and takes no steps to compel the discharge of the debt, cannot claim exoneration from the payees for loss, through their want of care, of property mortgaged as further security for the debt. Grisard v. Hinson (Ark.), 6 S. W. Rep. 906.

EX PARTE. — On the part ; of one part ; on one side. A term applied to proceedings in an action, had on the application, or at the instance, of one side only, and without notice or opportunity to oppose given to the other side ; and to proceedings in which there is no adverse party.¹

EXPATRIATION. — SEE ALIENS ; CITIZENSHIP.

Under the common law of England, as adopted in this country, every person owes allegiance to the nation in which he was born. Expatriation is the act of divesting one's self of this allegiance, in order to assume a new allegiance to another state.

At Common Law. — The principle of the common law, applicable to this question, was as follows : no natural-born subject can divest himself of his allegiance to the country of his nativity without the consent of the government thereof.²

Whether this rule was not also a part of our law, has been a matter of great uncertainty.³ Allegiance being due primarily to the Federal Government,⁴ expatriation became, therefore, a federal question. In 1866 Congress enacted a law⁵ in which expatriation is declared "a natural and inherent right to all people."⁶

The common-law rule of England was also changed by Act of Parliament ;⁷ and a British subject naturalized in a foreign state

1. Abb. Law Dict.

"The term *ex parte* implies an examination in the presence of one of the parties, and in the absence of the other." *Lincoln v. Cook*, 2 Scam. (Ill.) 62.

Ex parte materna and *ex parte paterna* "have a well-known signification in the law. They are found constantly used in the books to denote the line, or blood, of the mother or father, and have no such restricted or limited sense as from the mother or father exclusively." *Banta v. Demarest*, 24 N. J. 433.

2. *Nemo Potest Patriam Exuere.* — 1 Bl. Com. 370, 371 ; 1 Hale's P. C. 68 ; Foster's Crown Law, 7, 59, 183 ; 1 East, P. C. 81 ; 1 Hawk. P. C. b. 1, c. 22 ; *Fitch v. Weber*, 6 Hare, 51 ; *Udney v. Udney*, L. R. 1 H. L. sc. 441.

3. Kent considered it to be the rule in the United States. 2 Kent, Com. (12th ed.) 49, and cases there reviewed. Compare *Alsberry v. Hawkins*, 9 Dana (Ky.), 178, where the court held that expatriation was a fundamental right of every citizen or subject, and, in the absence of any statute forbidding it, consent of the government was presumed to be implied.

Cushing, Atty.-Gen. (8 Atty.-Gen. Opin. 139), takes the same ground, but says no "such implied consent can be applied to any pretended emigration which is in itself a violation of the law, either public or municipal, as in the case of an illegal military enterprise ; nor by it can any one escape the punishment of crime or the perform-

ance of local contracts, nor appeal to it as a mask to cover desertions or treasonable aid to the enemy."

The same opinion as to the right of expatriation is expressed by Black, Atty.-Gen. (9 Atty.-Gen. Opin. 356). "The natural right of every free person, who owes no debt, and is not guilty of any crime, to leave the country of his birth, and, in good faith and for an honest purpose, the privilege of throwing off his natural allegiance, and substituting another allegiance in its place, is incontestable."

4. *Planters' Bank v. St. John*, 1 Woods (U. S.), 588 ; *U. S. v. Greiner*, 4 Phila. (Pa.) 396.

5. Act of July 27, chap. 249.

6. This declaration comprehends "our own citizens, as well as those of other countries." 14 Atty.-Gen. Opin. 295.

7. St. 33 Vict. ch. 14, § 6. By this statute Great Britain abandoned the rule by her so long and so earnestly maintained, — "Once a subject, always a subject." During the war of 1812, between England and the United States, the Prince Regent issued a proclamation asserting this principle, and announcing that all Americans who had been born British subjects, and taken prisoners while bearing arms against England, were to be shot as traitors. In retaliation, Mr. Madison, then President, declared that two British prisoners would be executed for every American citizen so treated. While France, Spain, Prussia, and, in general, all the states of Europe, conceded

thereby ceases to be a subject of Great Britain, and loses all rights as such.

How effected. — Expatriation takes place when one leaves his own country with the intention of not returning, and of acquiring a new status as citizen or subject to some other state.¹

Its Results. — By expatriation, one becomes an alien to the country of his former allegiance,² and is divested of all his former privileges and obligations to the state: he remains liable, however, for all crimes done, or debts contracted, before his expatriation.³ If, however, by the law of his former country, his emigration and expatriation was a crime, though in good faith, the United States will not concede the right of said foreign state to punish him therefor.⁴

Re-Expatriation. — When a naturalized citizen returns to the allegiance to his former country, or acquires the relation of citizen or subject to a country other than that previously adopted by him, he is said to re-expatriate himself.⁵

Quasi Expatriation. — Citizens of one country resident in another, may, without losing their nationality, acquire a new status for commercial purposes, so that for such purposes they will possess

the right of expatriation, Great Britain still denied it, until the passage of the above act, notwithstanding that there was on its statute-books a law of George I., providing for the naturalization of foreigners as British subjects.

1. Congress has not made any provisions for expatriation from this country. Therefore the intention of the emigrant, as manifested by his acts, is the sole test of his expatriation. "The selection and actual enjoyment of a foreign domicile, with an intent not to return, would not alone constitute expatriation; but where in addition thereto are other acts done by him which import a renunciation of his former citizenship, and a voluntary assumption of the duties of a citizen of the country of his domicile, these, together with the former, might be treated as *presumptively* amounting to expatriation, even without proof of naturalization abroad, though the latter is the highest evidence of expatriation." 14 Atty.-Gen. Opin. 295. "The expatriation would have to be an actual one by foreign residence, and with authentic renunciation of the pre-existing citizenship." 8 Atty.-Gen. Opin. 139 (Cushing, Atty.-Gen.). "Expatriation includes not only emigration, but naturalization." 9 Atty.-Gen. Opin. 356 (Black, Atty.-Gen.). Where a citizen of the United States entered into the service of a foreign power, and took an oath of allegiance to said power, it was *held* that he had expatriated himself. *Stoughton v. Taylor*, 2 Paine (U. S.), 666.

2. A person who has divested himself of his American citizenship becomes an alien,

and loses all his former rights. In order to recover them, he must be again naturalized, according to the laws in force. *The Santissima Trinidad*, 1 Marsh (U. S.), 485. "Children born abroad of persons once citizens of the United States, but who have become citizens or subjects of a foreign power, are not citizens of the United States." 14 Atty.-Gen. Opin. 154.

3. "A naturalized citizen who returns to his native country is liable, like any one else, to be arrested for a debt or a crime; but he cannot be rightfully punished for the non-performance of a duty which is supposed to grow out of this abjured allegiance." 9 Atty.-Gen. Opin. 356 (Black, Atty.-Gen.).

4. "A foreign government cannot justify the arrest of a former subject, who was naturalized in the United States, by showing that he emigrated contrary to the laws of his native country." 9 Atty.-Gen. Opin. 356 (Black, Atty.-Gen.).

5. The various treaties between the European nations and this country have provisions relative to the circumstances under which naturalized or native American citizens will be presumed to have relinquished their American citizenship. The following case will serve as an illustration. A native-born citizen of the United States, a child of naturalized parents, formerly Austrian subjects, returned to Austria with his parents, and resided there over five years, during which time he frequently obtained passports from the Austrian Government, and travelled under its protection. Being forced into the Austrian military

all the privileges, and be subject to all the duties, of such quasi citizenship.¹

EXPECT.²

EXPECTANCY (see CATCHING BARGAINS; EXECUTORY ESTATES), or chance, is a mere hope unfounded in any limitation, provision, trust, or legal act whatever, such as the hope which an heir-apparent has of succeeding to the ancestor's estate.³

An estate, the right to the possession of which is postponed to a future period.⁴

EXPENSE.⁵

service, he claimed exemption as an American citizen. Our Government referred the question to the attorney-general, who advised that the citizen had, by his acts, expatriated himself. 14 Atty.-Gen. Opin. 154.

1. *Scott v. Schwartz*, 1 Comyns, 677; *Wilson v. Maryatt*, 8 T. R. 31; *U. S. v. Gillies*, 1 Pet. (C. C.) 159; *The Charming Betsy*, 2 Cranch (U. S.), 64.

2. A statement, in a letter to a person sought to be retained as clerk of a boat then building, that the boat was expected out at a specified time, cannot be construed into a guaranty that she would be out at that time. *Johnson v. McCune*, 27 Mo. 171; and see *Bold v. Rayner*, 1 M. & W. 343.

3. 2 *Fearne on Rem.* 22; *Jeffers v. Lampson*, 10 Ohio St. 106.

4. *Campan v. Campan*, 19 Mich. 123; *Lawrence v. Bayard*, 7 Paige (N. Y.), 76. An estate in expectancy is an estate the possession of which a person is entitled to have *in futuro*; an estate where the right to the pendency of the profits is postponed to some future period. It does not include a future acquisition by purchase. A conveyance of "all their right, title, interest, etc., as well in possession as in expectancy," in a certain piece of land, where the grantors had an interest therein, upon which the deed might have operated, does not cover a subsequently acquired title of the grantors. *Valle v. Clemens*, 18 Mo. 486.

5. **A Liability incurred is an Expense.**—Under a statute of California, which provides that "the trustees of any corporation formed under the general laws of the State shall have power to levy and collect, for the purpose of paying the proper and legal expenses of such corporation, assessments on the capital stock thereof," it was held that debts already incurred were included within the term "expenses." "In common speech and in contracts," said the court, "the term 'expenses' signifies not only the cost of contemplated services, materials, etc., but also the charges for such as have

been performed or furnished. . . . In these senses the term is employed in statutes, and its precise signification must be ascertained from the context." *Sullivan v. Triunfo Min. Co.*, 39 Cal. 459.

Where the declaration for breach of an agreement to assign a lease alleged that the plaintiff had been "put to great expenses, amounting to a large sum of money," etc., in investigating the title, it was held that he might, by way of damage, recover the amount of a bill of costs due to his attorney for investigating the title, though such bill was not paid before action brought. *L. Denman, C. J.*: "If a plaintiff chooses to allege in his declaration that he has paid money, he must prove that he has paid it; but if he merely says that he has been 'put to expense,' the allegation is satisfied by proof that he has incurred a liability to pay." *Richardson v. Chasen*, 10 Q. B. 756.

Expenses of Administration.—A., by will, gave the bulk of his estate to his two sons, and smaller portions to his daughters, and appointed the sons executors of the will. The will contained the following clause: "And I do order and direct that all my just debts and expenses be duly paid and satisfied out of the legacies bequeathed to my sons." It was held that the executors were not entitled to commissions for settling the estate. Said the court, "The word 'expenses' is never used to signify expenses during the life of the testator: they would be debts. The clause may be read thus: 'All my debts, and the expenses, to be paid by my executors out of the property devised to my sons;' and I think this would mean the expenses of the executors in settling the estate; and the will making the sons executors, would put it on them to pay the debts." *Matter of Haines*, 8 N. J. Eq. 506.

The testator by his will created a trust for his daughter, directing the trustee to hold the share of the estate belonging to her; to pay to her, until her majority, rents and income sufficient for her support and education; all the rents and income thereafter,

EXPENSIVE — EXPERT AND OPINION EVIDENCE.

EXPENSIVE.¹

EXPERT AND OPINION EVIDENCE.—See also EVIDENCE; HANDWRITING.

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until she reached twenty-four years, and then the principal and accumulations. He further directed the trustee to deduct and retain "out of such rents, profits, interest, and income," while he held the share, "all proper and reasonable expenses and charges in and for the care and keeping of the same, the renting, investing, and re-investing thereof," all taxes, etc., "and the proper expenses and charges of collecting and applying such income." The trustee claimed that the words quoted were a provision for compensation in lieu of commissions. But the court *held* that the words "expenses and charges," etc., referred not to compensation of the trustee, but to necessary disbursements in administration, and imported an intent that the daughter should be supported out of the net income of the trust fund, and the trustee was entitled only to his statutory commissions. *Greer v. Greer*, 5 Redf. (N. Y.) 214.

Expenses appertaining to Goods in Trade.

— Where partners in trade contract that one partner shall receive a certain share of the profits arising from the sale of goods, deducting the "actual expenses that may appertain to the goods themselves," the expenses of clerk-hire, advertising, and taxes are properly deducted from the gross amount. Said the court, "Expenses for clerk-hire and advertising are as much incident to the transaction of mercantile business as those incurred for insurance, 'freight,' and storage; and the merchant might as reasonably calculate to procure goods without cost, as to expect to keep them on hand for sale without their being subject to taxation." *Foster v. Goddard*, 1 Cliff. (U. S.) 158, affirmed 1 Black. (U. S.) 506.

Expenses incurred.—By 6 & 7 Vict. c. 18, sect. 55, it was provided that the "expenses incurred" by the town clerk of any borough, in the performance of his duties in respect to the registration of the parliamentary voters of the borough, should be defrayed by the parishes and townships of the borough. It was *held* that the words "expenses incurred" applied only to such money as he had to pay, and not to remun-

eration for his labor. *Queen v. Kingston upon Hull*, 2 Ell. & Bl. 182.

Expenses of paving Street.—Under an act conferring power upon a city to pave an unpaved street, and to assess "the expenses thereof" upon the owners of adjacent lots, it was *held* that the charges for establishing the grade, for advertising and surveying, as also a reasonable commission for collecting the tax, were included within the term "expenses." *Dashiell v. Mayor*, etc., of Baltimore, 45 Md. 615.

Individual Expenses.—By articles of partnership it was provided that each partner was to pay "his own individual expenses." It was *held* that this phrase "was manifestly intended to apply to private or family expenses not connected with the business of the partnership. But it would be an unjust and forced construction of the stipulation to extend it to extra expenses incurred when abroad on the business of the partnership." *Withers v. Withers*, 8 Pet. (U. S.) 355.

Expenses in an Act of Congress.—When Congress appropriates money to pay expenses, it must mean those expenses which are necessarily incident to the work they direct to be done. *Dunwoody v. United States*, 22 Ct. of Claims, 269.

1. A statute of Connecticut provides that "whenever execution shall be levied upon any personal property, being in its nature perishable, or being live-stock, the custody and preservation of which would be expensive, the same shall be sold at public vendue . . . at the expiration of seven days, instead of at the end of twenty-one days," as provided by the general law concerning sales on execution. It was *held* that "the word 'expensive' here is not used in the sense which lexicographers attach to it, but in its popular sense, meaning that which would involve or require expense. There is not such a difference in the expense of keeping different kinds of stock, or different animals of the same kind, or different ones of any kind at different times, as to justify any other construction." *Webster v. Peck*, 31 Conn. 495.

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I. Definition of Expert Evidence. — Expert evidence is that given by one specially skilled in the subject to which it is applicable, concerning information beyond the range of ordinary observation and intelligence.

II. Definition of Opinion Evidence. — Opinion evidence is the conclusions of witnesses concerning certain propositions, drawn from ascertained or supposed facts, by those who have had better opportunities than the ordinary individual or witness to judge of the truth or falsity of such propositions, or who are familiar with the subject under inquiry, and give their conclusions from the facts within their own knowledge concerning certain questions involved in the issue.¹

III. Definition of an Expert. — An expert is one who has made the subject upon which he gives his opinion a matter of particular study, practice, or observation, and he must have a particular and special knowledge on the subject.²

1. In *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146, the court observes, "An expert, as the word imports, is one having had experience. No clearly defined rule is to be found in the books as to what constitutes an expert. Much depends upon the nature of the question in regard to which an opinion is asked." See also, for further definitions of experts, *Page v. Parker*, 40 N. H. 59; *Jones v. Tucker*, 41 N. H. 546; *Boardman v. Woodman*, 47 N. H. 134; *Heald v. Thing*, 45 Me. 392; *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290; *Slater v. Wilcox*, 57 Barb. (N. Y.) 608.

2. Quoting *Dole v. Johnson*, 50 N. H. 454, "A person instructed by experience." *Hyde v. Woolfolk*, 1 Iowa, 159. "An expert is a person that possesses peculiar skill and knowledge upon the subject-matter that he is required to give an opinion upon." *State v. Phair*, 48 Vt. 366.

"An expert is one instructed by experience; and to become one requires a course of previous habit and practice, or of study, so as to be familiar with the subject." *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453, 460. "All persons, I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts so far as expertness is required." *Vander Donckt v. Thellusson*, 8 M. G. & S. 812; adopted in *Bird v. State*, 21 Gratt. (Va.) 800. An "expert is a person of large experience in any particular department of art, business, or science." *Dickenson v. Fitchburg*, 13 Gray (Mass.), 546, 555. Quoting *Burrill, Heald v. Thing*, 45 Me. 394; *Nelson v. Johnson*, 18 Ind. 334; *Estate of Toomes*, 54 Cal. 514; *Travis v. Brown*, 43 Pa. St. 12. See *Rochester v. Chester*, 3 N. H. 349, 365; *Buffum v. Harris*, 5 R. I. 250.

IV. General Rule concerning Opinions.—The general rule is, that witnesses must testify to facts, and not to opinions:¹ they must only state facts,² not draw conclusions³ or inferences. To allow them to draw conclusions or inferences, is to usurp the province of the court or jury.⁴ To this rule, there are many exceptions, as detailed in this article.

V. Opinion from Necessity.—Necessity may call for an opinion. Such is the case where it is impossible to give the jury or court a fair or intelligible understanding of the matter in controversy. In all such instances it is received in furtherance of justice.⁵

An Ancient Practice.—The Roman law permitted the use of experts to inform the judge, or *judex*, on the physical laws or phenomena. L. 8, § 1, XI.; L. 3, § 4, XI. 6. From an early time (1532) it was allowed in France. 2 Beck, Med. Juris. 896. In England, in an early case, on an appeal of Mayhew, the accused prayed that the court would see the wound to ascertain if there had been a maiming. The court, because the wound was new, did not know how to adjudge, and the accused asked that the wound be examined by surgeons. Accordingly, a writ was issued to the sheriff to summon surgeons for the purpose prayed. 28 Ass. pl. 5. See also 9 H. 7, 16; 7 H. 6, 11; and Buckley v. Rice, 1 Plow. 125.

1. Clark v. Fisher, 1 Paige (N. Y.), 171; s. c., 19 Am. Dec. 402; Neilson v. Chicago, etc., R. Co., 59 Wis. 516; Watson v. Milwaukee, etc., R. Co., 57 Wis. 332; McNiel v. Davidson, 37 Ind. 336; Pindar v. Kings County Fire Ins. Co., 36 N. Y. 648; Bass Furnace Co. v. Glasscock, 82 Ala. 452; Heath v. Slocum, 115 Pa. St. 549.

2. Luning v. State, 2 Pin. (Wis.) 215; s. c., 1 Chand. (Wis.) 178; s. c., 2 Pin. (Wis.) 285; s. c., 1 Chand. (Wis.) 264; Abbott v. People, 86 N. Y. 460.

3. People v. Murphy, 101 N. Y. 126; Sloan v. New York Central R. Co., 45 N. Y. 125; Campbell v. State, 10 Tex. App. 560.

4. Booth v. Cleveland Rolling Mill Co., 74 N. Y. 15; s. c., 11 Hun, 279; Allen v. Stout, 51 N. Y. 668; Campbell v. State, 10 Tex. App. 560; *In re* sale of infant's land, 6 C. E. Greene (N. J.), 92.

Border-Line of Opinions.—It is often difficult to tell whether a question calls for an opinion, or a statement of facts. Thus, a question whether the plaintiff was able to help herself, and at what point she required assistance to do what was necessary to be done, was *held* to call for facts, and not mere opinions, and was unobjectionable. Sloan v. New York Central R. R. Co., 45 N. Y. 125. So, in an action where the issue raised was whether the defendant, or he and others, employed the plaintiff, it was *held* competent to ask, "On the part of

and for whom were the services rendered?" Sweet v. Tuttle, 14 N. Y. 465.

5. Whittier v. Town of Franklin, 46 N. H. 23; Davis v. State, 78 Ind. 15; Gahn v. City of Ottumwa (Iowa), 22 Amer. L. Reg. 644; Knoll v. State, 55 Wis. 249; s. c., 42 Am. Rep. 704.

"The general rule certainly is, that witnesses are to testify to facts, and not to give their individual opinions. This rule, however, has its exceptions, some of which are as familiar and as well settled as the rule itself. When all the pertinent facts can be sufficiently detailed and described, and when the triers are supposed to be able to form correct conclusions without the aid of opinions or judgment from others, no exception to the rule is allowed. But cases occur where the affirmation of these propositions cannot be assumed. The facts are sometimes incapable of being presented with their proper force and significance to any but the observer. And it often happens that the triers are not qualified, from experience in the ordinary affairs of life, duly to appreciate all the material facts when proved. Under these circumstances, the opinions of witnesses must of necessity be received." Clifford v. Richardson, 18 Vt. 626. "It is true, as a general rule, that the opinion of a witness cannot be given, the witness relating the facts from which the jury form their opinion. This rule, however, is not universal. The facts here sought to be proved,—to wit, that the defendant could not avoid the conflict,—could not be well proved to the jury by a statement of facts: the time occupied by the deceased in passing from where he stood to the defendant, a distance of only a few feet, could hardly be stated with any accuracy of measurement. The rapidity of his motion could not be calculated so as to convey any very definite idea of his velocity. The particular position of the defendant, in reference to surrounding objects, as well as the position of his body at the time, were important items in determining the fact whether he could have got out of the way, or not; and yet it would be very difficult, perhaps impossible, to convey any

VI. Common Understanding. — Opinions are never received if all the facts can be ascertained and made intelligible to the jury,¹ or if it is such as men in general are capable of comprehending and understanding.² The ordinary affairs of life cannot be the subject of expert testimony.³

very clear idea to the jury in reference to these matters. A variety of circumstances that could only be perceived, but not detailed, would constitute the aggregate from which the opinion would be formed. The person who had witnessed the transaction could alone, most probably, form any idea on the subject that could be relied upon with safety." *Stewart v. State*, 19 Ohio, 302.

On a trial for larceny of a horse, the fact that the prisoner's wagon had made certain tracks became relevant. A witness who had examined the wagon, observed its peculiarities, and measured the width of its wheels, was allowed to testify, that, in his opinion, the prisoner's wagon had made the tracks. "It is true," said the court, "that, as a general rule, witnesses are not allowed to give their opinions to a jury; but there are exceptions. In many cases they are the best evidence of which the nature of the case will admit, cases where nothing more than an opinion can be obtained. Duration, distance, dimension, velocity, etc., are often to be proved only by the opinion of witnesses, depending, as they do, on many minute circumstances which cannot fully be detailed by witnesses." *State v. Folwell*, 14 Kan. 105.

In a case tried in 1867, in Vermont, the question arose, whether one T. lived in the town of J. in 1829. A witness, sixty-four years old, who had been acquainted with T., was asked, "From your opportunities of knowing, as you have stated them, do you think it possible for T. to have lived in J. that year, and you not to have known it?" He was allowed to answer, and said, "I should not think it was." This was held proper, the appellate court saying, "Where the witness has the means of personal observation, and the facts and circumstances which lead the mind of a witness to a conclusion are incapable of being detailed and described so as to enable any one but the observer himself to form any intelligent conclusion from them, the witness is often allowed to add his opinion, or the conclusion of his own mind. Such is the case in questions of identity of persons and things, handwriting, the value of property, questions of insanity, time and distance, etc., and various other circumstances that might be referred to. It would be so difficult for the witness to detail and describe all the facts and circumstances in their full force, which go to

make up his knowledge of that T. lived in H., and not in J., that season, as to bring this question and answer within the exception, and not within the rule that excludes opinions of witnesses, if it can be regarded as an opinion in the legal sense of the rule. It is, rather, a mode of expressing the degree of confidence the witness has in the fact he affirmed as to the place of the residence of T. during the time in question. It is like the case where two witnesses are present at a conversation with a third person, and one witness testified that a particular thing was said; and the other is called, and testified that he was present all the time, and heard no such thing said. In such case, it is always allowable for the latter witness to state whether, if any such thing had been said, he thinks he should have heard it." *Cavendish v. Troy*, 41 Vt. 99.

So, where the question was as to the discharge of water from a hose, and its effect upon a team of horses, it was held that a witness might state not only that the water was discharged, but that, in his opinion, it was this that frightened the horses. *Yahn v. City of Ottumwa*, 22 Amer. L. Reg. 644; s. c., 60 Iowa, 429. To same effect is *Whittier v. Town of Franklin*, 46 N. H. 23. See *Davis v. State*, 38 Ind. 15.

Inferences drawn by Witness. — "A witness ought never to draw inferences without stating the train of reasoning by which his mind has been conducted to them." *The Nereide*, 9 Cranch (U. S.), 388.

1. *Clark v. Fisher*, 1 Paige (N. Y.), 171; s. c., 19 Am. Dec. 402; *Stowe v. Bishop*, 58 Vt. 498.

2. *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Passmore's Appeal*, 27 N. W. Rep. 601; *Hallahan v. New York, etc., R. Co.*, 102 N. Y. 194.

3. *Bemis v. Central Vermont R. Co.*, 58 Vt. 636; *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469; *Schmieder v. Barney*, 113 U. S. 645; *Durrell v. Bederley*, 1 Holt, 285; *Campbell v. Richards*, 5 B. & Ad. 846; *Carter v. Boehm*, 3 Burr. 1905; *Higgins v. Dewey*, 107 Mass. 494.

Matters concerning which the jury can form an opinion as intelligently as can the witness, are inadmissible. *Neilson v. Chicago, etc., R. Co.*, 59 Wis. 516; s. c., *Watson v. Milwaukee, etc., R. Co.*, 57 Wis. 332.

VII. Voluminous Facts. — The results of voluminous facts may be proven by a person who has made an examination of them, and who is shown competent to make the deductions.¹

VIII. Opinions of Experts. — The opinions of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are not likely to prove capable of forming a correct judgment upon it without such assistance.²

Thus, a plaintiff was employed upon a machine used for wetting nap from woollen cloth, and, in his work, it was necessary for him to use his hands for the purpose of guiding the cloth under the blades of the machine, and in smoothing away the wrinkles. In doing this, his hand was caught in the machine, and injured. At the trial, an expert testified that it would not be safe to put the hand upon the cloth in a certain position near the knife-blades when the cloth was moving at a certain rate. The witness was then asked whether the danger of the operator's hand being drawn under the knives, if placed upon the cloth, would be obvious to an inexperienced operator, but the question was excluded. It was *held* that this question was addressed to the common knowledge of the jury, and not to the special knowledge of an expert, and was properly excluded. *Gilbert v. Guild*, 144 Mass. 361.

Having showed the effect of the weather upon, and the wear of, rails made under the plaintiff's patent, which the witness saw in use, the length of time they were kept in use, and that, compared with them, the iron rail was better, it was *held* that he may not give his opinion as to their comparative durability. *Booth v. Cleveland Rolling Mill Co.*, 74 N. Y. 15; s. c., 11 Hun (N. Y.), 279.

In a case of homicide, a witness testified that he had made a comparison of hair taken from the head of the deceased, with hair found upon a wheelbarrow belonging to the defendant; that such comparison was founded upon his experience, he having made a careful study of hair; that the hair was precisely the same in length, magnitude, and color, and in every other respect, so that any person could have told it as well as himself; and added, "As the result of that comparison, I can say that it was from the head of the same person." It was *held* that the words quoted were improperly admitted in evidence, it appearing to be founded upon facts open to common observation. "The comparison made required no peculiar skill, no scientific knowledge. It was no more in the province of an expert than of an ordinary person to make it. It related to a matter of common observation. The jury were as competent

to make the comparison from the description given of the hair, and draw the conclusion whether it came from the head of the same person, as was the witness. The opinion of the witness, as to the fact that the hair came from the head of the same person, was not admissible on the ground that the inquiry related to a scientific subject, — one which required peculiar knowledge or previous study and experience to give information about; but it related to a matter within the observation, judgment, and knowledge of any ordinary man; for the resemblances relied upon in making the comparison, as the length, magnitude, and color of the hair, were as open to the observation of the jury, or the jury could draw their inference from those resemblances, as well as any one. The witness, then, could not testify to his opinion on the ground that the subject-matter of the inquiry related to a scientific subject, and was expert testimony.

"Is there any other principle upon which the testimony would be admissible? At first we had some doubt whether it should not be received on the ground that the witness was merely stating his opinion as to the identity of the hair, and that it was admissible upon the same principle as an opinion in respect to the value of property, or damage done to it, or the identity of a chattel or person, or facts of that nature. In regard to this class of facts, a witness can only testify by using language which amounts to little more than giving his opinion about them. But this kind of evidence is admitted in that class of cases from necessity, because it is impossible, by any mere words of description, to give the jury a proper understanding of the facts. . . . In a number of cases, which will be found in our reports, the rule has been laid down as to when and upon what questions a witness may testify to his opinion as a conclusion of facts. But none of these go the length of sanctioning the admission of such testimony. We think it was clearly incompetent." *Knoll v. State*, 55 Wis. 249; s. c., 42 Am. Rep. 704.

1. *Burton v. Driggs*, 20 Wall. (U. S.) 125; *Von Sachs v. Kretz*, 72 N. Y. 548; s. c., 10 Hun (N. Y.), 95.

2. It may be received "when it so far

partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it;" but it may not be received when "the opinions of witnesses cannot be received when the inquiry is into a subject-matter, the nature of which is not such as to require any particular habits of study in order to qualify a man to understand. If the relations of facts and their probable results can be determined without especial skill or study, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury." *Muldowney v. Illinois Central R. Co.*, 36 Iowa, 472.

"The very notion of science springs from the recognition of the existence of general truths and laws, to which the relations of things to, and their operation upon, each other conform. These laws or truths, ascertained by the investigations of men devoted to particular departments of inquiry, constitute science. In different branches of knowledge, different degrees of certainty are attained; while in medicine, we are compelled, from the nature of the subject, to rest satisfied with a less degree of certainty. In every case, the scientific witness brings the result of the previous investigation of general truths or laws to aid the particular inquiry. In case of death, the physician, from an examination of the body, or from the appearance of its parts, as proved by witnesses, speaks as to the cause of death, as that it was produced by poison or by disease. In such a case, the substance of his testimony is, that those appearances, seen by himself in the body, or proved to exist there, either generally or universally, have been observed to accompany death produced by such poison or disease. It is the general or universal fact, which science supplies to him, and which, through him, is made available to the jury.

"And, moreover, as the application, no less than the original recognition, of these matters of scientific knowledge requires trained habits of observation, and that skill which does not exist without experience, the scientific witness is allowed to form a complex judgment upon the matter in hand, embracing both the general truths of his science and their particular application to the facts presented to him, which takes the shape of opinion or judgment, that, in the particular case, death did, or did not, result from such a poison or such a disease. In all these cases of inquiry as to scientific opinion, without exception, I believe, the witness need know nothing, of his own knowledge, as to the facts of the particular case. His opinion may be given as to hypothetical cases, or upon any view of the facts in evidence, as established, or supposed to be established, by other wit-

nesses; though, of course, so given, its weight may be much less than where he can speak, both to the particular facts and to the proper scientific interpretation of them.

"Evidence of opinion is also recognized as proper, on the same ground of necessity, in cases where language is not adapted to convey those circumstances on which the judgment must be formed. In questions of identity of persons or things, language is wholly incapable to convey the appearances and sensible marks on which alone an intelligent judgment can be formed. So, too, in respect to handwriting: Who would undertake to describe in words the ground upon which he recognizes his own, with any expectation, by that means, of enabling another person to pronounce upon its genuineness? In these cases, the opinion of the witness is received, because there are no other means of investigation adapted to the inquiry. Opinions on the value of a specific thing, expressed by a witness acquainted with that thing, stand much upon the same principle. To take the case of *Vandine v. Burpee* (13 Met. 288), as to the value of a horse, a whole volume of descriptive testimony about the horse would be not so likely to guide a jury to a true estimate of his value, as the testimony of a single witness, acquainted with the animal, and speaking of his judgment as to the value. Upon this ground, as well as upon that of superior convenience and the constant reception of such testimony upon trials, without objection, a tacit but strong proof of its propriety, it must be deemed established, that, upon a question of value, the opinion of a witness who has seen the thing in question, and is acquainted with the value of similar things, is not incompetent to be submitted to a jury." *Clark v. Baird*, 9 N. Y. 183; *Kippner v. Biebb*, 24 Alb. L. J. 192; *Jones v. Tucker*, 41 N. H. 546; *Atchison, etc., R. Co. v. U. S.*, 15 Ct. of Cl. 126; *Taylor v. Town of Monroe*, 43 Conn. 36.

"The opinions of experts are only admissible when it appears from the nature of their avocations, or from their testimony concerning experience, that the matter inquired of involves some degree of science or skill which they have made use of, so that, from experience, they are fitted to answer the questions propounded with more accuracy than others who may not have been called upon to employ science or exercise skill on the subject." *Clark v. Bruce*, 12 Hun (N. Y.), 271; *Rochester, etc., R. Co. v. Budlong*, 10 How. Pr. (N. Y.) 289; *Kennedy v. People*, 39 N. Y. 245; *Dillard v. State*, 58 Miss. 368; *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56; *Cook v. State*, 24 N. J. L. 843; *People v. Morrgan*, 29 Mich. 4.

1. That witnesses shall testify to facts, and not opinions, is the general rule.

IX. Opinions of Non-Experts.—Any witness, not an expert, who knows the facts personally, may give an opinion in a matter regarding skill after having stated the facts upon which he bases such opinion.¹ So an opinion can be given by a non-expert concerning matters with which he is specially acquainted, but which cannot be specifically described.²

2. Exceptions to this rule have been found to be, in some cases, necessary to the due administration of justice.

3. Witnesses shown to be learned, skilled, or experienced in a particular art, science, trade, or business, may, in a proper case, give their opinions upon a given state of facts. This exception is limited to experts.

4. In matters more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts, where such opinions involve conclusions material to the subject of inquiry.

5. In such cases the witnesses are required, so far as may be, to state the primary facts which support their opinions.

6. Where it is practicable to place palpably before the jury the facts supporting their opinions, the witnesses should be restricted in their testimony to such facts, and the jurors left to form their opinions from these facts, unaided by the mere opinions of the witnesses.

7. "As the warrant for the admission of the opinions of witnesses as evidence is found in some exceptions to the general and very salutary rule which requires that only facts be stated to the jury, it is the duty of a reviewing court to see that the admission of mere opinion as evidence was within some one of the established exceptions to such general rule; and where it does not appear upon the whole record, but that the jury was equally capable with the witnesses of forming an opinion from the facts stated, it is error to admit in evidence the opinions of witnesses." *Railroad Co. v. Shultz*, 43 Ohio St. 270; s. c., 54 Am. Rep. 805.

The functions of an expert are to instruct the court and jury in matters so far removed from the ordinary pursuits of life that accurate knowledge of them can only be gained by experience, so as to enable the court and jury to judge intelligently of the force and application of the several facts introduced in evidence. *Coyle v. Commonwealth*, 104 Pa. St. 117; *Ferguson v. Hubbell*, 97 N. Y. 507; s. c., 26 Hun (N. Y.), 250.

Rule not extended.—The rule allowing the admission of opinions, it is said, should not be extended. *Teerpenning v. Corn Exchange Ins. Co.*, 43 N. Y. 279.

Hearsay.—Hearsay opinions are not admissible. *People v. Millard*, 53 Mich. 63.

Purely Hypothetical.—Questions purely hypothetical cannot be asked. *Hotchkiss v. Mosher*, 48 N. Y. 478.

1. *Indianapolis v. Huffer*, 30 Ind. 235; *Doe v. Reagan*, 5 Blackf. (Ind.) 217; s. c., 33 Am. Dec. 466; *Wilkinson v. Mosley*, 30 Ala. 562; *South & North Alabama R. Co. v. M'Lendon*, 63 Ala. 266; *Chicago, etc., R. Co. v. George*, 19 Ill. 510; *Willis v. Quimby*, 11 Post. (N. H.) 485; *Elliott v. Van Buren*, 33 Mich. 49; s. c., 20 Am. Rep. 668; *Culver v. Dwight*, 6 Gray (Mass.), 444; *Irish v. Smith*, 8 S. & R. (Pa.) 573; *Colee v. State*, 75 Ind. 511.

Ditch.—**Public Health.**—Thus, in a proceeding to establish a ditch, a witness was allowed to state in detail the number of acres in the vicinity of the ditch, and, after giving its size and location, to testify as to how many acres of land would be benefited by its construction, and also to state what effect the drainage of the wet land would have upon the public health of the community. *Bennett v. Meehan*, 83 Ind. 566; s. c., 43 Am. Rep. 78.

2. *Whart. Ev. § 512*; *Stephen's Ev. 103*. This falls within the rule of necessity already detailed.

"Many cases illustrate this rule; thus, a witness may state his opinion of a culvert,—*City of Indianapolis v. Huffer*, 30 Ind. 235; *Lund v. Tyngsborough*, 9 Cush. (Mass.) 36,—that a horse is gentle,—*Sytleman v. Beckwith*, 43 Conn. 9;—that a certain substance is 'hard pan,'—*Currier v. Boston, etc., R. Co.*, 34 N. H. 498,—that a highway was in good repair, or that it was out of repair,—*Alexander v. Town of Mt. Sterling*, 71 Ill. 366; *Clinton v. Howard*, 42 Conn. 294,—that a certain liquor was whiskey,—*Commonwealth v. Doudican*, 114 Mass. 257,—that a train was running at a specified rate of speed,—*State v. Folwell*, 14 Kan. 105; *Commonwealth v. Malone*, 114 Mass. 295,—that the weather was cold enough to freeze potatoes,—*Curtis v. Chicago, etc., R. Co.*, 18 Wis. 312. In *Porter v. Pequonnoc, etc., Co.*, 17 Conn. 249, a non-expert witness, acquainted with the facts, was permitted to give an opinion as to the sufficiency of a dam, the court saying, 'It was a question of common sense as well as of science.'" *Bennett v. Meehan*, 83 Ind. 566; s. c., 43 Am. Rep. 78.

X. Health.—Expert.—An expert may testify concerning the health of a certain person whom he has examined or personally knows.¹

Where a defendant was being tried for murder, a witness was asked whether the hold of the prisoner and the deceased was a friendly or unfriendly grasp; and his answer, that he thought it was friendly, was received. *Blake v. People*, 73 N. Y. 586.

So, in an action to recover wages, the opinion of a witness that the plaintiff seemed to acquiesce in a proposal made to him, was received. *Bradley v. Salmon Falls Mf. Co.*, 30 N. H. 487.

On a trial for larceny, the opinion of a witness, that when the prisoner made a certain statement, he did so in jest, is admissible. *Ray v. State*, 50 Ala. 104. So, too, is the opinion of a witness receivable in an action for trespass, that the property was seized in an offensive and insulting manner, — *Raisler v. Springer*, 38 Ala. 703; on a trial for murder, the opinion of witnesses that the prisoner's manner in answering a question was "short," — *Carroll v. State*, 23 Ala. 28; in an action for negligence, the opinions of witnesses that the defendant's servants were careful, temperate, and attentive, — *Gahagan v. Boston*, etc., R. Co., 1 Allen (Mass.), 187; in an action against a county for medical services, the opinion of a witness that the patient was in such destitute circumstances as to demand public charity and prompt attention, — *Autauga Co. v. Davis*, 32 Ala. 703. The question being whether there was any ill-feeling between two parties at a certain time, the opinion of witnesses on this point was received, — *Polk v. State*, 62 Ala. 237; so in a prosecution under the liquor laws, that a certain person was of intemperate habits, — *Smith v. State*, 55 Ala. 1; *Stanley v. State*, 26 Ala. 26; *Tatun v. State*, 63 Ala. 150; the identity of goods found upon deceased, — *State v. Babb*, 76 Mo. 501; as to intoxicating effect of certain liquor supplied him, — *State v. Miller*, 53 Iowa, 84; and that a certain woman looked like a white woman, — *Moore v. State*, 7 Tex. App. 608.

Plaintiff, who had invented an improved cotton-gin, and had applied for letters-patent therefor, contracted to sell the same to the defendants, and to assign the letters-patent, when obtained, for a specified sum. The contract contained a warranty that the cotton-gin would "be equal in all respects to the best saw-gin then in use." In an action upon the contract, wherein the defendant set up a breach of the warranty as a defence, it was held that the testimony of men, competent from education and experience to express an opinion as to whether plaintiff's invention was in fact equal to

the best saw-gins, was competent; that the inquiry related to a matter which was not the subject of general knowledge, but which depended on facts, from their nature difficult if not impossible to be testified to, and it could only be answered by one having peculiar knowledge and skill in the use of this and other machines. It was further held, that the plaintiff, having given evidence as to the comparative merits of this and other machines, could not object to the giving of similar evidence by the defendant. *Scattergood v. Wood*, 79 N. Y. 263; *Off. 14 Hun (N. Y.)*, 269.

1. *Louisville*, etc., R. Co. *v. Wood*, 12 N. E. Rep. 572.

After detailing the facts he has seen, a medical witness may express an opinion what produced the symptoms he saw. *Louisville*, etc., R. Co. *v. Wood*, 12 N. E. Rep. 572; *Louisville*, etc., R. Co. *v. Falvey*, 104 Ind. 409; *Van Deusen v. Newcomer*, 40 Mich. 120.

Such opinion may not only rest upon his own knowledge of the patient's condition, or upon a medical examination of him which he has made, but upon a hypothetical case stated to him in court. *Louisville*, etc., R. Co. *v. Falvey*, 104 Ind. 409; *Burns v. Barenfield*, 84 Ind. 43; *Bush v. Jackson*, 24 Ala. 273.

"A physician cannot be permitted to decide upon the credibility of witness, nor to take into consideration facts known to him, and not communicated to the jury; but, after having communicated such facts in his testimony, he may take them into consideration in forming his opinion." *Louisville*, etc., R. Co. *v. Falvey*, 104 Ind. 409; *Koenig v. Globe Mutual L. Ins. Co.*, 10 Hun (N. Y.), 558; *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.), 169; *Van Zandt v. Mutual Benefit L. Ins. Co.*, 55 N. Y. 169; s. c., 14 Amer. Rep. 215; *Bennett v. Fail*, 26 Ala. 605; *Bush v. Jackson*, 24 Ala. 273.

"The opinion of a medical witness may rest in part on statements made by his patient. Upon this subject the authorities are in harmony, although there is some difference of opinion as to whether statements of past symptoms may be taken into consideration." *Louisville*, etc., R. Co. *v. Falvey*, 104 Ind. 409; *Barber v. Merriam*, 11 Allen (Mass.), 322; *Towle v. Blake*, 48 N. H. 92; *Brown v. N. Y. Cent. R. R.*, 32 N. Y. 597; *Quaife v. Chicago*, etc., R. Co., 48 Wis. 513; *Eckles v. Bates*, 26 Ala. 655; *State v. Gedicke*, 43 N. J. L. 86; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438; *Denton v. State*, 1 Swan (Tenn.), 279; *Aveson v. Kinnaird*, 6 East, 188.

XI. Health.—Non-Expert.—A witness acquainted with the condition of a person, though not a physician nor an expert, may testify to facts concerning him within his knowledge and observation in reference to his health and physical condition,¹ and that he had been, or was apparently, in good or bad health.²

XII. Wounds and Injuries.—A physician or surgeon may testify as to the probable effect of wounds and injuries,³ whether they would produce death or not;⁴ after viewing the body, how the wound was inflicted.⁵ Usually, in these enumerated instances, he may give an opinion upon a hypothetical question covering the facts.⁶

1. Tierney v. Minneapolis, etc., R. Co., 24 Amer. L. Reg. 669; Higbee v. Guardian Mut. L. Ins. Co., 53 N. Y. 603, affirming 66 Barb. (N. Y.) 462.

2. Smalley v. City of Appleton, 35 N. W. Rep. 729; Louisville, etc., R. Co. v. Wood, 12 N. E. Rep. 572; Hardy v. Merrill, 56 N. H. 227; Commonwealth v. Sturtivant, 117 Mass. 122; s. c., 19 Am. Rep. 401; Wilkinson v. Moseley, 30 Ala. 562; Barker v. Coleman, 35 Ala. 221; Carthage, etc., Co. v. Andrews, 102 Ind. 138; Evans v. People, 12 Mich. 27; Irish v. Smith, 8 S. & R. (Pa.) 573; Elliott v. Van Buren, 33 Mich. 49; s. c., 20 Am. Rep. 668.

In an action for personal injuries sustained by a plaintiff, a witness testified that she had seen the plaintiff several times just after the injury, and then again after an interval of about a month; and she was allowed, after describing his condition, to express an opinion that he had grown worse in the interval. Louisville, etc., R. Co. v. Wood, 12 N. E. Rep. 572. In this case it was said, "In determining whether an injured person is growing better or worse, a non-expert must necessarily express an opinion, for the fact is one that cannot be described by any other than an expert witness. Any witness of ordinary intelligence may be able to state that a sick or wounded person has grown worse, or has improved, without being able to give an accurate description of his condition. Undoubtedly the facts on which the conclusion rests may be asked for on cross-examination; but the opinion is not incompetent merely because the witness cannot state the grounds on which it rests, although the failure to do so may, perhaps, weaken its probative force." Reid v. Ins. Co., 54 Mo. 425, disapproved.

3. Montgomery v. Town of Scott, 34 Wis. 338. He may describe the character of the wound. Batten v. State, 80 Ind. 394; McDaniel v. State, 76 Ala. 1; Noblesville, etc., Gravel Road Co. v. Gause, 76 Ind. 142.

4. Davis v. State, 38 Md. 15; State v.

Crenshaw, 32 La. Ann. 406; Armstrong v. Town of Ackley, 71 Iowa, 76.

5. Rash v. State, 61 Ala. 89; Doolittle v. State, 93 Ind. 272.

6. Page v. State, 61 Ala. 16. A physician may be asked if a patient suffered pain. Chicago, etc., R. Co. v. Martin, 1 N. E. Rep. (Ill.) 111.

In the examination of an expert as to the appearance of the bullet-wound of which deceased died, it is not improper to state a supposed case as a means of showing what, under different conditions, the appearance of a wound made by the same agency might or would have been. Schlenker v. State, 9 Neb. 241.

Where a surgeon gave the character of a wound inflicted by a knife, it was held that he could be asked, on cross-examination, whether, at the time he treated the deceased, he supposed that the intestines were severed by a knife used by the accused. Batten v. State, 80 Ind. 394.

The fact that an autopsy has been made without authority, and the course prescribed by a statute not followed, does not exclude the testimony of an expert. Commonwealth v. Taylor, 132 Mass. 261.

A physician may testify as to the nature of the affection complained of, although it is inside the body, its cause, and the probability of its being cured. Matterson v. N. Y. Cent. R. Co., 35 N. Y. 487. Whether there will probably be a return of inflammation, and its effect on the future health of the patient. Filer v. N. Y. Cent. R. Co., 49 N. Y. 42; Sinclair v. Sar. & Schn. R. Co., 23 W. R. 425.

But the testimony of a physician as to the result which might follow blows and violence of a given character when it is not claimed the result did follow, is not competent as tending to prove an assault with intent to inflict great bodily harm. State v. Redfield, 35 N. W. Rep. 673.

Instrument likely to produce Death.—Whether or not the instrument in evidence, identified with which the homicide was committed, would, in the hands of a man of ordinary strength, and used as a bludgeon,

XIII. Wounds.—Non-Expert.—A non-expert may not testify to the effect of wounds or injuries.¹

XIV. Cause of Death.—A medical expert may give his opinion as to the probable cause of the death of a person.²

produce the wounds described, and be likely to produce death, is a question for an expert. Physicians and surgeons who are known to be experts may testify as to the instrument producing the wound. *Waite v. State*, 13 Tex. App. 169; *Banks v. State*, 13 Tex. App. 182; *Powell v. State*, 13 Tex. App. 244.

A witness, although not a professional expert, may testify as to whether, in his opinion, a wound was inflicted with a dull or sharp instrument, if he testifies that he has had experience with wounds, and is able to tell, from seeing them, with what they were made. *People v. Sullivan*, 7 Crim. L. Mag. 236. Yet it has been held that a non-expert may not give his opinion as to how certain wounds were probably made. *State v. Cross*, 68 Iowa, 180.

Direction of Blow.—Where a physician had examined a wound on the head of the deceased, it was held competent to testify from what direction the blow came. *Hopt v. Utah*, 120 U. S. 430; *Davis v. State*, 38 Md. 15. A surgeon may testify as to the nature, extent, depth, length, width, and direction of a fatal wound, with its precise location on the head, the amount of force requisite to produce it, and the probable shape of the instrument used; but it is not competent for him to testify as to the probable position of the deceased when he received the blows. *Kennedy v. People*, 39 N. Y. 245.

1. An officer in the late civil war, who there "saw the range of balls in a good many gun-shot wounds," but who is not a physician or surgeon, cannot be allowed to testify as to "how the balls range," and describe "some wounds he has seen." *Rash v. State*, 61 Ala. 89. An undertaker is not necessarily an expert on physiological questions; and unless he shows special knowledge entitling him to give an opinion, he can only testify to specific facts. *People v. Millard*, 53 Mich. 63. A non-expert may testify that he examined plaintiff's leg, in an action for damages, and found both bones of his leg "were broken, three fingers wide above the ankle;" for he is testifying to a fact. *Montgomery v. Town of Scott*, 34 Wis. 338.

2. Such as it was produced by choking, from the finger-marks on the neck. *Boyle v. State*, 61 Wis. 349. Or which of two wounds produced death. *Eggler v. People*, 56 N. Y. 642. Where a physician testified to the condition of a woman, as shown by a *post-mortem* examination, and that death,

in his opinion, was produced by a shock to the nervous system, he may be asked, in his opinion, what caused the shock; but if he says it might be caused by fright and dread of sudden peril, it is error to ask him if it would be more likely to occur to a person who was fearing an injury. This was a case of abortion. *People v. Sessions*, 58 Mich. 594.

Time of Death.—A physician may testify when death took place,—such as it occurred before a certain train passed over the body, he having examined it first. *State v. Clark*, 15 S. Car. 403.

Effect of Gas.—A physician, *merely because he is such*, cannot give an opinion as to the effect upon the health by breathing illuminating-gas; and an experience in attending other persons, who, it is alleged, were made sick by breathing such gas from the same leak, is insufficient to enable him to testify. *Emmerson v. Lowell Gas-Light Co.*, 6 Allen (Mass.), 146. But a physician, who is a student and teacher of chemistry, when called as an expert to show the kinds of gas evolved by the manufacture of illuminating-gas, may testify as to his experience with such gases. *Citizens' Gas-Light, etc., Co. v. O'Brien*, 118 Ill. 174.

Experiments with Guns, Pistols, etc.—Where the subject under consideration was the appearance and characteristics of near gun-shot wounds upon the human body, the results of experiments made by non-professional witnesses upon paste-board targets were held inadmissible. *State v. Justus*, 11 Oregon, 170; s. c., 50 Am. Rep. 470. So where the object of the experiments was to ascertain the facility of breaking a human skull with a poker, and a witness testified that he made experiments upon another skull with a poker like the poker with which the skull of the deceased had been broken, the evidence was rejected. *Commonwealth v. Twichell*, 1 Brewst. (Pa.) 566. Yet where the experiment was made by a physician upon stuff similar to the gown worn by the deceased, through which the bullet passed into her abdomen, with the same pistol loaded with cartridges out of the same box, he was allowed to show the effect of powder-marks made by firing at short range. *Sullivan v. Commonwealth*, 93 Pa. St. 285. See *Boyd v. State*, 14 Lea (Tenn.), 161.

This last was an instance of an experiment shown to have been made under conditions the same as those existing in the case at trial, when they are admissible.

XV. Malpractice Cases.—In actions against physicians and surgeons for malpractice, opinions of physicians and surgeons are received in evidence, whether such treatment was proper or not.¹ Neither the general skill of the defendant,² nor the reputation of the medical school at which they graduated,³ is admissible in evidence to prove his skilfulness.

XVI. Rape, Abortion, etc.—In an action for rape, a physician may testify whether there has been an actual penetration;⁴ or as to the health and physical condition of the prosecutrix at the time of the offence, as bearing upon her ability to resist the accused;⁵ or what effect rape would have upon the sexual organs, and that,

Commonwealth v. Piper, 120 Mass. 188; *Eidt v. Cutter*, 127 Mass. 523.

A physician may give his testimony from the character of a wound made by a pistol-ball, as to whether the person wounded had his hand over the muzzle of the pistol at the time it was fired. *State v. Cross*, 68 Iowa, 180.

The question whether the deceased, seated at or near the window through which he was shot, could have seen and recognized the person outside who shot through the window, is not one of skill or science, but one which it is the province of the jury to determine from the evidence as to the circumstances and conditions of things at the time of the transactions; and experiments made by others elsewhere, and the results thereof, and opinions founded thereon, are not competent evidence to prove such facts. *Jones v. State*, 71 Ind. 66. See *People v. Westlake*, 62 Cal. 303.

Wadding of Gun.—The question whether a piece of paper picked up near the scene of an alleged homicide by shooting, appeared to have been used as a wadding for a gun, is not a question calling for the opinion of an expert. *Manke v. People*, 17 Hun, 410; affirmed, 78 N. Y. 611.

Incest.—Where the examination has been made soon after the time of the alleged crime, a physician may testify relative to the condition of the person of the woman, and that the condition of the parts indicated frequent sexual intercourse. *Commonwealth v. Lynes*, 142 Mass. 577.

Controlling Appetite.—A physician may not be asked if the accused can or cannot control his appetite for intoxicating liquor. *Goodwin v. State*, 96 Ind. 550.

1. *Quinn v. Higgins*, 63 Wis. 664; *Kay v. Thomson*, 10 Amer. L. Reg. (N. Brunsw.) 594; *Boydston v. Giltner*, 3 Oregon, 118; *Williams v. Poppleton*, 3 Oregon, 139; *Wright v. Hardy*, 22 Wis. 348; *Roberts v. Johnson*, 58 N. Y. 613; *Mertz v. Detweiler*, 8 W. & S. (Pa.) 376.

2. *Leighton v. Sargent*, 11 Fost. (N. H.)

120; *Williams v. Poppleton*, 3 Oregon, 139; *Boydston v. Giltner*, 3 Oregon, 118; *Mertz v. Detweiler*, 8 W. & S. (Pa.) 376; *Gramm v. Boener*, 56 Ind. 497.

3. *Leighton v. Sargent*, 11 Fost. (N. H.) 120.

What the defendant told the expert physician, although confined to what he saw, is inadmissible. *Leighton v. Sargent*, 11 Fost. (N. C.) 120. He may be asked the effect and properties of medicines used by the defendant,—*Mertz v. Detweiler*, 8 W. & S. (Pa.) 376,—and the usual practice of physicians under like circumstances. *Twombly v. Leach*, 11 Cush. (Mass.) 405. A physician may testify how a patient under his care had been formerly treated by the defendant, the effect of such treatment, how it differed from his own, so far as he could judge from an examination of the patient. *Barber v. Merriam*, 11 Allen (Mass.), 322. He may be asked whether the death of the patient was, or was not, the result of any neglect or lack of skill in the attending physician. *Wright v. Hardy*, 22 Wis. 348. In an action for a personal injury to a patient's limbs, caused by the negligence of the defendant, he may be asked concerning the permanent effects of the injury, and likelihood of recovery. *Wilt v. Vickers*, 8 Watts (Pa.), 227. See *Roberts v. Johnson*, 58 N. Y. 613. In an action for injury to the eye, producing blindness, he may be asked if, in his experience, he ever knew a case where contagion of the kind was communicated, of gonorrheal ophthalmia, by the use of the brush. *Doyle v. N. Y. Eye & Ear Infirmary*, 80 N. Y. 631.

4. *State v. Smith*, Phill. (N. Car.) 302.

5. *State v. Knapp*, 45 N. H. 148. But the expert may not testify whether, in his opinion, the accused could have had carnal intercourse with her against her will, without the resort to other means than the exercise of his ordinary physical powers. This invades the province of the jury. *Woodin v. People*, 1 Park. Cr. Cas. (N. Y.) 464. See *Cook v. State*, 24 N. J. 843.

on examination, he found them inflamed.¹ So they may testify that an abortion has been performed.²

XVII. Nature and Symptoms of Disease. — The opinions of a physician are admissible on the nature of the disease with which a person is afflicted,³ and how long he has probably been afflicted with it;⁴ as to the severity and ordinary duration of a disease,⁵ the probability of its recurrence,⁶ its effect upon the general

1. But not that in his opinion such inflammation "was produced by having violent connection." *Noonan v. State*, 55 Wis. 258.

2. *State v. Smith*, 32 Me. 370; *State v. Wood*, 53 N. H. 484.

Medical experts may show the effect of certain drugs upon a pregnant female, and how large a dose would be required to produce an abortion. *Regina v. Still*, 30 U. C. (C. P.) 30. So they may testify that certain medical instruments found in the house of the defendant were adapted to produce an abortion. *Commonwealth v. Brown*, 121 Mass. 69. The parts of the person, if preserved, may be submitted to the jury in connection with the testimony of the physician who made a *post-mortem* examination. *Commonwealth v. Brown*, 14 Gray (Mass.), 419.

Pregnancy. — Physicians may express an opinion upon the question of pregnancy, — *State v. Wood*, 53 N. H. 484, — that it is as likely to take place in a case of rape as voluntary intercourse. *State v. Knapp*, 45 N. H. 148. But not unless he possesses peculiar skill. *Boies v. McAllister*, 12 Me. 308.

Seduction. — A physician may testify whether it was possible for the act of intercourse to take place in the position described by the prosecutrix (i.e., in a buggy), the probable pain, etc. *People v. Clark*, 33 Mich. 112.

Premature Birth. — An experienced nurse may express an opinion as an expert whether the birth of a child was premature. *Mason v. Fuller*, 45 Vt. 29. A child, just born, had no hair or nails, and a physician testified that for that reason the child was prematurely born. Others were called to show that this was no reason for asserting that it was a premature birth. *Dalling v. State*, 56 Wis. 586. See *Young v. Makepeace*, 103 Mass. 50.

Miscellaneous. — A physician may testify as to the sex of a person from an examination of the skeleton, but not a non-professional witness. *Wilson v. State*, 41 Tex. 320. So an expert may testify as to the curability of a disease, the nature and cause of which he has described, — *Matteson v. N. Y.*, etc., R. Co., 35 N. Y. 487; whether a certain wound endangered life, — *Rumsey v. People*, 19 N. Y. 41; what certain

described injuries were likely to produce, — *Wendell v. Troy*, 36 Barb. (N. Y.) 329; what the indications would have been if a person had been suffocated before he fell into the water, — *Erickson v. Smith*, 2 Abb. App. Dec. (N. Y.) 64; whether the appearance of extravasated blood in the neck was an indication of mechanical violence or disease, and whether the clot of blood found could have existed twelve hours without causing death, — *State v. Pike*, 65 Me. 111; so as to the manner in which *prolapsus uteri* could be caused, and the degree of violence that would produce it, — *Napier v. Ferguson*, 2 P. & B. (N. B.) 415; that certain routine of diet was injurious to the health of children, — *Crowley v. People*, 83 N. Y. 464; as to the permanency of a person's loss of vision, — *Tinney v. N. J. Steamboat Co.*, 12 Abb. Pr. (N. S.) 1; concerning conditions of the body (after a *post-mortem* examination) as to fulness or paucity of blood, — *O'Mara v. Commonwealth*, 75 Pa. St. 424; as to condition of human remains after burial, and how long before decay would set in, and when it would be complete, — *State v. Secrest*, 80 N. Car. 450; as to what would have been good medical practice under certain facts, — *Twombly v. Leach*, 11 Cush. (Mass.) 405.

An expert on the subject of paralysis, a physician, who is himself partially paralyzed, may testify that he "is paralyzed in the left arm and leg, and that he has no practical use of them, though he can move the leg along," in a case for the recovery of damages for personal injuries, where it is a controverted question whether or not the plaintiff was paralyzed in her left arm and leg. *Chicago, etc., R. Co. v. Lambert*, 119 Ill. 255.

3. *Napier v. Ferguson*, 2 P. & B. (N. B.) 415; *Jones v. White*, 11 Humph. (Tenn.) 268; *Flynt v. Bodenhamer*, 80 N. Car. 205; *Polk v. State*, 36 Ark. 117; *Hook v. Stovell*, 26 Ga. 704; *Pidcock v. Potter*, 68 Pa. St. 342; *Linton v. Hurley*, 14 Gray (Mass.), 191; *Cooper v. State*, 23 Tex. 336.

4. *Litch v. McDaniel*, 13 Ired. (N. Car.) 485; *Edgington v. Aetna Life Ins. Co.*, 77 N. Y. 564; *Eckles v. Bates*, 26 Ala. 655.

5. *Linton v. Hurley*, 14 Gray (Mass.), 191; *Willey v. Portsmouth*, 35 N. H. 303.

6. *Filer v. N. Y. Cent. R. Co.*, 49 N. Y. 42.

health;¹ the cause of the disease, and its remedy;² to describe its symptoms,³ explain its characteristics,⁴ and that it is contagious.⁵ If an attending physician, he may state whether he ever saw any appearance of a certain disease in the family of a certain person,⁶ and if he considered the person before a certain injury a hearty or vigorous man.⁷

XVIII. Blood and Blood-Stains. — Any witness may testify that certain stains resembled blood.⁸ Experts with the microscope may be called to show whether certain blood is human or animal blood.⁹

XIX. Poisons. — Experts, after having made a chemical analysis of the stomach, may testify as to the presence of poison in the internal organs of the body.¹⁰ A chemist and toxicologist may so testify, although not a physician or surgeon.¹¹ So may a physician,¹² and he may be asked to describe the symptoms which appear upon the administering of any particular poison.¹³ He may give his opinion whether death resulted from the effects of a poison.¹⁴

1. *Pidcock v. Potter*, 68 Pa. St. 344; *Anthony v. Smith*, 4 Bosw. (N. Y.) 503; *Flynt v. Bodenhamer*, 80 N. Car. 205.

2. *Matteson v. N. Y.*, etc., R. Co., 62 Barb. (N. Y.) 364; *Cooper v. State*, 23 Tex. 336; *Jones v. Tucker*, 41 N. H. 546.

3. *Welch v. Brooke*, 10 Rich. (S. Car.) 124; *Lake v. People*, 1 Parker, Cr. Cas. 495; *Pitts v. State*, 43 Miss. 472; *United States v. McGlue*, 1 Curtis (U. S.), 1; *Napier v. Ferguson*, 2 P. & B. (N. B.) 415.

4. *Washington v. Cole*, 6 Ala. 212; *Jones v. White*, 11 Humph. (Tenn.) 268.

5. *Moore v. State*, 17 Ohio St. 521.

6. *Morrissey v. Ingham*, 111 Mass. 63.

7. *Sanderson v. Nashua*, 44 N. H. 492.

8. *Thomas v. State*, 67 Ga. 460. On a trial for murder, the testimony tended to show that the crime had been committed with a certain shovel which had stains upon it. These were subjected to a chemical analysis and microscopic examination by different experts, some of whom asserted that the stains were caused by human blood, while others failed thus to identify them. Certain unlearned observers testified that in their opinion the stain was caused by human blood. The court, remarking that if scientific research gave no aid in such an investigation, it was deplorable, instructed the jury that they might convict upon the testimony of the unlearned observers, if they were satisfied of the truth. It was held that this was not error. *McLain v. Commonwealth*, 99 Pa. St. 86.

It is no objection that such a witness is not an expert as a chemist. *Dillard v. State*, 58 Miss. 368; *People v. Greenfield*, 30 N. Y. Sup. Ct. 462; s. c., 85 N. Y. 75; *People v. Gonzalez*, 35 N. Y. 49. See *Rickerson v. State*, 1 S. E. Rep. (Ga.) 178.

9. *Knoll v. State*, 55 Wis. 249; s. c., 42

Am. Rep. 704; *Commonwealth v. Sturivant*, 117 Mass. 122; *State v. Knight*, 43 Me. 1.

No expert witness with any regard for his reputation will testify that certain blood is the blood of an animal, nor of a human being. The test is, if certain blood is either human or animal blood: if it has to be either, which is it? This is determined by the average size of the blood corpuscles examined. The blood corpuscles of a sheep, chicken, bird, or camel are easily distinguishable from human blood because of their oval shape, while the latter is round. Experts affirm that they can distinguish between human and mammalian blood in all instances (unless in the case of a dog), — *R. U. Piper* in 15 Amer. L. Reg. 561; in 16 Amer. L. Reg. 257; in 19 Amer. L. Reg. 529 and 593, — while others affirm it cannot be done. 10 Cent. L. Journal, 183. On the whole, however, it is a very difficult problem, the solution of which is quite doubtful. See 26 Amer. L. Reg. 20.

Direction of Flowing Blood. — An expert or a microscopist may testify from what direction blood flowed, or the direction whence it came. *State v. Knight*, 43 Me. 1, 133; *Commonwealth v. Sturivant*, 117 Mass. 122. But from blood-spots experts cannot give the relative position of the contestants in a fight. *Dillard v. State*, 58 Miss. 368.

10. *State v. Bowman*, 78 N. Car. 509. See 1 Crim. L. Mag. 294.

11. *State v. Cook*, 17 Kan. 394.

12. *State v. Terrell*, 12 Rich. (S. Car.) 321.

13. *People v. Robinson*, 2 Park. Cr. Cas. (N. Y.) 236; *Polk v. State*, 36 Ark. 117.

14. *Mitchell v. State*, 58 Ala. 418.

In order to express an opinion as to the

XX. Chemists.—A chemist may be asked concerning the probability of spirits evaporating while undergoing transportation in certain casks;¹ concerning the constituent parts of a compound;² concerning the nature of inks;³ concerning the effect of noxious gases discharged from a copper-mill, and the result of experiments with gases extracted from the ground alleged to have been injured by the gases;⁴ concerning the point of drainage of surrounding lands by a filter-basin on dirt taken for that purpose, and as determined by a chemical analysis of such dirt;⁵ and concerning the safety of camphene or other lamps.⁶

XXI. Diseased Animals.—One who says he has had experience with horses, and can tell whether their eyes are good or not, though there might be diseases of the eye with which he is unacquainted, and although not a farrier, may give an opinion relative to the defects of a horse's eyes,⁷ but only an expert may testify whether a horse is sound or not;⁸ nor may a non-expert testify as to the appearance and symptoms of cattle starved to death,⁹ nor that he had observed certain appearances in horses that had been hard driven and exposed,¹⁰ nor that a certain wound is sufficient to kill a horse.¹¹ Any witness may testify whether a horse seemed well.¹²

XXII. Insanity.—Experts.—The opinions of medical men, or experts in insanity, are admissible in evidence concerning the sanity or insanity of a person at a particular time; and such opinions may be based as well upon facts within their personal knowledge, as upon a hypothetical case disclosed by the testimony of others.¹³

ingredients of a mixture, and whether it contains poison, a chemical analysis is not necessary. *State v. Slagle*, 83 N. Car. 630. In case of poisoning, there must be an analysis of the stomach. *Joe v. State*, 6 Fla. 591. It should be shown that the contents of the stomach of the deceased are identical with those examined, and that there has been no tampering with them. *State v. Cook*, 17 Kan. 394; *State v. Hinkle*, 6 Iowa, 380.

1. *Turner v. The Black Warrior*, 1 McAlister (U. S.), 181.

2. *Allen v. Hunter*, 6 McLean (U. S.), 303.

3. 18 Am. L. Reg. 273; *Goodyear v. Vosburgh*, 63 Barb. (N. Y.) 154; *Sheldon v. Warner*, 45 Mich. 638; *Clark v. Bruce*, 12 Hun (N. Y.), 271. See *Ellingwood v. Bragg*, 52 N. H. 488; *People v. Brotherton*, 47 Cal. 388.

4. *Lincoln v. Taunton Mfg. Co.*, 9 Allen (Mass.), 182. See *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. App. 705.

5. *Williams v. Taunton*, 125 Mass. 34.

6. *Bierce v. Stocking*, 11 Gray (Mass.), 174. Whether or not a lamp was safe, although he had never experimented with lamps, or made or used camphene, or paid

any particular attention to such lamps, but that he was an experienced chemist.

7. *House v. Fost*, 4 Blackf. (Ind.) 293. See, generally, *Slater v. Wilcox*, 57 Barb. (N. Y.) 604.

8. *Spear v. Richardson*, 34 N. H. 428.

9. *Stonan v. Waldo*, 17 Mo. 489.

10. *Moulton v. Scruton*, 39 Me. 288.

11. *Harris v. Panama R. Co.*, 3 Bosw. (N. Y.) 7.

12. *Spear v. Richardson*, 34 N. H. 428. See *Willis v. Quimby*, 11 Fost. (N. H.) 489. The testimony of veterinary surgeons is always admissible. *Pierson v. Hoag*, 47 Barb. (N. Y.) 243; *Pinney v. Cahill*, 48 Mich. 584.

13. *Connecticut Mutual Life Ins. Co. v. Lathrop*, 111 U. S. 612; *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Fairchild v. Bascomb*, 35 Vt. 398, 408; *Tullis v. Kidd*, 12 Ala. 648; *Grant v. Thompson*, 4 Conn. 203; s. c., 10 Am. Dec. 119; *Rambler v. Tryson*, 7 S. & R. (Pa.) 90; s. c., 10 Am. Dec. 444; *State v. Feltes*, 51 Iowa, 495; *Dejarnette v. Commonwealth*, 75 Va. 867; *U. S. v. Guiteau*, 3 Crim. L. Mag. 347; *State v. Baber*, 74 Mo. 292; *People v. Hall*, 48 Mich. 482; *People v. Schuyler*, 106 N. Y. 298; *Quaife v. Chicago, etc., R. Co.*, 48

1. *Massachusetts Rule.*—In *Massachusetts* the opinions of an ordinary physician are not received: an expert's opinion, to entitle its reception in evidence, must be one given by a professional person conversant with insanity, who has made a specialty of mental diseases, and had experience with the insane. Such a person need not have seen the alleged insane person.¹ An ordinary physician cannot give an opinion unless he was the person's attending physician.²

2. *Catholic Priest.*—A Roman Catholic priest is required by his priestly office to pass upon the sanity and mental condition of invalids and dying persons under his charge, to the end that he may administer the sacrament only to those whose minds are in a proper state to reason or act of their own volition. In this respect he is an expert, and may answer a hypothetical question touching the sanity of such an individual.³

3. *Non-Professional Witnesses as to Insanity.*—Any witness who

Wis. 513; In the Matter of the Will of Blakely, 48 Wis. 294; Goodwin v. State, 96 Ind. 550; Coryell v. Stone, 62 Ind. 307; Davis v. State, 35 Ind. 496.

Judge Dillon, speaking of the right of an expert to give his opinion of the sanity or insanity of a man, said, in *State v. Feltes*, 25 Iowa, 67, "There is no more reason why he may not do this than why he might not testify that he saw a certain person at a certain time, and that he was then laboring under an epileptic fit, or under an attack of typhus-fever, or had been stricken down and rendered unconscious by an apoplectic stroke."

If a physician has made a personal examination, it is necessary for him to state the facts and describe the symptoms from which he draws his conclusions. *Puryear v. Reese*, 46 Tenn. 21; *White v. Bailey*, 10 Mich. 155; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329. And even here there is no reason why a hypothetical question may not be put to him. See *People v. Lake*, 12 N. Y. 358; s. c., 1 Park. Cr. Cas. (N. Y.) 495.

Illustrations.—Testimony is receivable showing that paralysis in old persons has a tendency to impair the mind. *Lord v. Beard*, 79 N. Car. 5. Yet where positive evidence of insanity had been given in a testatrix, and it was proven that she had a paralytic shock shortly before the execution of her will, it was held improper to prove by an expert that in nine cases out of ten paralysis did not produce any effect upon the mind. *Landis v. Landis*, 1 Grant (Pa.), 249.

An expert may be asked if the fact that a testator had judiciously managed his property prior to his sickness and the making of his will, tends to show that he was subject to no delusions while making

the will. *Coryell v. Stone*, 62 Ind. 307. But he may not testify that melancholia compelled the deceased to commit suicide; for it is not information peculiarly within the knowledge of an expert, but an inference which was within the province of the jury to draw, without being influenced by the opinion of the witness. *Van Zandt v. Mutual Benefit L. Ins. Co.*, 55 N. Y. 169.

On a question of insanity, the doubt of an expert is not admissible. *Sanchez v. People*, 22 N. Y. 147.

Touching testamentary capacity, the testimony of experts is entitled to but little weight as against proof of facts and circumstances which shows mental and testamentary capacity. *Burley v. McGough*, 115 Ill. 11.

1. *Commonwealth v. Rogers*, 7 Met. (Mass.) 500; s. c., 4 Am. Dec. 458. See *Commonwealth v. Rich*, 14 Gray (Mass.), 335. It is the rule in *Mississippi*. *Reed v. State*, 62 Miss. 405.

2. "It is his duty to make himself acquainted with the peculiarities, bodily and mental, of a person who is the subject of his care and advice." *Hastings v. Rider*, 99 Mass. 625. If physicians in that State give the facts on which they base them, their opinions are receivable. *Dickinson v. Barber*, 9 Mass. 225; s. c., 6 Am. Dec. 58; *Hathorn v. King*, 8 Mass. 371; s. c., 5 Am. Dec. 106.

In *Maine* a physician cannot qualify himself by a single examination. *Inhabitants of Fayette v. Inhabitants of Cherterville*, 77 Me. 28; s. c., 52 Am. Rep. 741.

3. *Estate of Toomes*, 54 Cal. 509; s. c., 35 Am. Rep. 83.

Form of Question.—For the form or manner of question for an expert, to get

has been familiar with the person, whose mental condition is drawn in question, at the time of his alleged insanity, may state the facts and circumstances within his personal knowledge, and upon those facts and circumstances give his opinion touching the sanity or insanity of the individual. He need not be an expert.¹

his opinion, see the subject discussed *infra*, this title, "Form of Question."

1. Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 612; Leach v. Prebster, 39 Ind. 492; O'Brien v. People, 36 N. Y. 276; s. c., 48 Barb. (N. Y.) 274; Charter Oak Life Ins. Co. v. Rodol, 95 U. S. 232; Hardy v. Merrill, 56 N. H. 227; s. c., 22 Am. Rep. 441,—a valuable case which overrules State v. Pike, 49 N. H. 399; s. c., 6 Am. Rep. 533,—and disapproves of the *Massachusetts* rule. *Pidcock v. Potter*, 68 Pa. St. 342; s. c., 8 Am. Rep. 181; *Clark v. State*, 12 Ohio, 483; s. c., 40 Am. Dec. 481; *Sutherland v. Hankins*, 56 Ind. 343; *Eggers v. Eggers*, 57 Ind. 461; *State v. Newlin*, 69 Ind. 108; *Doe v. Reagan*, 5 Blackf. (Ind.) 217; s. c., 33 Am. Dec. 466; *Rex v. Wright*, R. & R. Crim. Cases, 456; *Schlencker v. State*, 9 Neb. 241; *State v. Hayden*, 51 Vt. 296; *Upstone v. People*, 109 Ill. 169; *Polin v. State*, 14 Neb. 540; *People v. Wreden*, 59 Cal. 392; *Colee v. State*, 75 Ind. 511; *Dejarnette v. Commonwealth*, 75 Va. 867; *Clary v. Clary*, 2 Ired. (N. Car.) 73; *Grant v. Thompson*, 4 Conn. 203; *Dunham's Appeal*, 27 Conn. 193; *Hathaway v. Ins. Co.* 48 Vt. 335; *Morse v. Crawford*, 17 Vt. 499; *Potts v. House*, 6 Ga. 324; *Vananken's Case*, 2 Stock. Ch. (N. J.) 190; *Brooke v. Townshend*, 7 Gill (Md.), 10; *De Witt v. Barly*, 17 N. Y. 342; *Hewlett v. Wood*, 55 N. Y. 634; *Clapp v. Fullerton*, 34 N. Y. 190; *Rutherford v. Morris*, 77 Ill. 397; *Duffield v. Morris*, 2 Harr. (Del.) 375; *Wilkinson v. Pearson*, 23 Pa. St. 119; *Dove v. State*, 3 Heisk. (Tenn.) 348; *Butler v. Ins. Co.*, 45 Iowa, 93; *People v. Sanford*, 43 Cal. 29; *State v. Klinger*, 46 Mo. 229; *Holcombe v. State*, 41 Tex. 125; *McClackey v. State*, 5 Tex. App. 320; *Norton v. Moore*, 3 Head (Tenn.), 482; *Powell v. State*, 25 Ala. 28.

In *Connecticut Mutual Life Insurance Co. v. Lathrop*, 111 U. S. 612, it was said, "Counsel for the plaintiff in error contends that witnesses who are not experts in medical science may not, under any circumstances, express their judgment as to the sane or insane state of a person's mind. This position, it must be conceded, finds support in some adjudged cases as well as in some elementary treatises on evidence. But, in our opinion, it cannot be sustained consistently with the weight of authority, nor without closing an important avenue of truth in many if not in

all cases, civil and criminal, which involve the question of sanity. Whether an individual is insane, is not always best solved by abstruse metaphysical speculations expressed in the technical language of medical science. The common sense, and, we may add, the natural instincts, of mankind reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which all men have more or less knowledge according to their mental capacity and habits of observation,—matters about which they may and do form opinions sufficiently satisfactory to constitute the basis of action. While the mere opinion of a non-professional witness, predicated upon facts detailed by others, is incompetent as evidence upon an issue of insanity, his judgment, based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value, because the natural and ordinary operations of the human intellect and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by every one of ordinary intelligence who comes in contact with his species. The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached. It will also depend in part upon the degree of the mental unsoundness of the person whose condition is the subject of inquiry, for his derangement may be so total and palpable that but slight observation is necessary to enable persons of ordinary understanding to form a reasonably accurate judgment as to his sanity or insanity: in other cases, the symptoms may be of such an occult character as to require the closest scrutiny and the highest skill to detect the existence of insanity.

"The truth is, the statement of a non-professional witness as to the sanity or insanity, at a particular time, of an individual, whose appearance, manner, habits, and conduct come under his personal observation, is not the expression of a mere opinion. In form it is opinion, because it expresses an inference or conclusion based upon observation of the appearance, manner, and motions of another person, of

which a correct idea cannot well be communicated in words to others, without embodying, more or less, the impressions or judgment of the witness. But in a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual, as sane or insane, is a fact; and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact,—not, indeed, a fact established by direct and positive proof, because in most, if not all, cases, it is impossible to determine, with absolute certainty, the precise mental condition of another; yet being founded on actual observation, and being consistent with common experience and the ordinary manifestations of the condition of the mind, it is knowledge, so far as the human intellect can acquire knowledge upon such subjects. Insanity is a disease of the mind which assumes as many and various forms as there are shades of difference in the human character. It is, as has been well said, a condition which imposes itself as an aggregate on the observer; and the opinion of one personally cognizant of the minute circumstances making up that aggregate, and which are detailed in connection with such opinion, is, in its essence, only fact 'at shorthand.' 1 Wharton & Stille's Med. Juris. § 257. This species of evidence should be admitted, not only because of its intrinsic value when the result of observation by persons of intelligence, but from necessity. We say from necessity, for a jury or court, having had no opportunity for personal observation, would otherwise be deprived of the knowledge which others possess; but also because, if the witness may be permitted to state, as undoubtedly he would be, where his opportunities of observation have been adequate, that he has known the individual for many years, has repeatedly conversed with him, and heard others converse with him; that the witness had noticed that in these conversations he was incoherent and silly, that in his habits he was occasionally highly pleased and greatly vexed without a cause; and that in his conduct he was wild, irrational, extravagant, and crazy,—what would this be but to declare the judgment or opinion of the witness of what is incoherent or foolish conversation, what reasonable cause of pleasure or resentment, and what the *indicia* of sound or disordered intellect? If he may not so testify, but must give the supposed silly and incoherent language, state the degrees and all the accompanying circumstances of highly excited emotion, and specifically set forth the freaks or acts regarded as irrational, and this without the least intimation of an opinion which he has formed

of their character, where are such witnesses to be found? Can it be supposed that those not having a special interest in the subject, shall have so charged their memories with these matters as distinct, independent facts as to be able to present them in their entirety and simplicity to the jury? Or, if such a witness be found, can he conceal from the jury the *impression* which has been made upon his mind? and, when this is collected, can it be doubted but that his judgment has been influenced by many, very many, circumstances which he has not communicated, which he cannot communicate, and of which he himself is not aware? *Clary v. Clary*, 2 Ired. L. (N. Car.) 73. The jury, being informed as to the witness's opportunities to know all the circumstances, and of the reasons upon which he rests his statement as to the ultimate general fact of sanity or insanity, are able to test the accuracy or soundness of the opinion expressed, and thus, by using the ordinary means for ascertainment of truth, reach the ends of substantial justice."

A non-professional witness will not be allowed to give his opinion until he has first shown upon what he bases that opinion; and that basis must be such as will justify the conclusion that his opinion is something more than mere guess-work. *Kenworthy v. Williams*, 5 Ind. 375. "His mere opinion on this question, without having given, or offered to give, sufficient facts, from which such opinion was formed, was not competent evidence to go to the jury." *Sutherland v. Hankins*, 56 Ind. 349; *Eggers v. Eggers*, 57 Ind. 461.

Extent of Knowledge.—"It is true that a non-expert witness must always state the facts upon which he bases his opinion as to the mental capacity of a defendant in a criminal prosecution; and it is also true that it must appear that he has some knowledge of the acts and conduct of the person upon whose mental condition he declares his opinion. The extent of this knowledge has never been defined, and we cannot form any general rule which will determine just how much or how little knowledge will entitle the witness's opinion to admission. If the witness's knowledge is meagre, his opinion will have but a weak foundation, and ought not to have very great weight with the jury. A witness who has a thorough knowledge of the acts and conduct of a person whose mental capacity is the subject of investigation, ought, all other things being equal, to be able to give a much better opinion than one who possessed a scanty and slender knowledge; but what weight the opinion shall receive, is a question of fact for the jury. The court cannot decide whether the opinion is of much or little weight: its

XXIII. Disposition of a Person. — A witness who knows, although not an expert, may testify concerning the disposition of a person, such as he is fickle-minded;¹ or whether he manifested, on a certain occasion, anger;² or whether one person was attached to another, if based upon observation;³ or if one was intoxicated.⁴

XXIV. Compulsory Inspection of Person. — In cases of divorce on the ground of impotency, the court may compel the person to sub-

duity is merely to decide whether such knowledge is shown, and such facts are stated, as entitle the witness to express any opinion at all." *Colee v. State*, 75 Ind. 511; *Sage v. State*, 91 Ind. 141; *Turner v. Cook*, 36 Ind. 129. See *Choice v. State*, 31 Ga. 424; *McClackey v. State*, 5 Tex. App. 320.

Opinion of Non-Experts not received. — There are a number of cases in which it has been held that the opinion of a non-expert witness concerning the sanity or insanity of a witness cannot be received. These are usually early cases in the history of our jurisprudence. In some States they have been overruled, while in a few (notably Massachusetts) they have been adhered to. *State v. Pike*, 49 N. H. 399; *Cowles v. Merchants*, 140 Mass. 377; *May v. Bradlee*, 127 Mass. 414; *Hastings v. Rider*, 99 Mass. 622; *Commonwealth v. Brayman*, 136 Mass. 438; *Gehrke v. State*, 13 Tex. 568; *Wyman v. Gould*, 47 Me. 159; *Poole v. Richardson*, 3 Mass. 330; *Baxter v. Abbott*, 7 Gray (Mass.), 71; *Hickman v. State*, 38 Tex. 191; *Van Horn v. Keenan*, 28 Ill. 449; *State v. Geddis*, 42 Iowa, 268.

New-York Rule. — In *Dewitt v. Barley*, 9 N. Y. 371; s. c., 13 Barb. (N. Y.) 550, it was held that a non-professional witness could not be asked the broad question, whether, in his opinion, a grantor was, by reason of unsound mind, incapable of managing his affairs; for such a question involved matter of law as well as of fact. On a subsequent appeal of the same case it was limited, by holding that non-professional witnesses may testify as to their opinions of the unsoundness of a grantor, founded on personal observation. *Dewitt v. Barley*, 17 N. Y. 340. The case was approved in *Gardiner v. Gardiner*, 34 N. Y. 155, with the qualification, that the opinions of witnesses, in such cases, must be accompanied by the facts. In *Deshon v. Merchants' Bank*, 8 Bosw. (N. Y.) 461, the court reiterated the doctrine that non-professional witnesses could not be asked the broad question, whether a testator was so affected in his mind as to be unfit for transacting business. But in *Hewlett v. Wood*, 55 N. Y. 634, it was held that non-professional witnesses, after testifying

to facts tending to show unsoundness of mind, may state the impression thereby produced on them. See *Howell v. Taylor*, 11 Hun (N. Y.), 214; *Arnold's Will*, 14 Hun (N. Y.), 525; *Sisson v. Conger*, 1 T. & C. (N. Y.) 564. The following was held inadmissible: "From what you saw of him that night, what impression did his words and acts make upon your mind? What impression as to his condition of mind did his conduct and acts and words make upon you at the time? In what state of mind did you believe him to be by reason of what he did and said upon that occasion?" *Real v. People*, 42 N. Y. 270; s. c., 55 Barb. (N. Y.) 576.

Time of Opinion. — The witness should be asked what opinion he held at the time of the trial, and not what it was at the time he observed the person whose sanity is questioned. *Punyan v. Price*, 15 Ohio St. 14. It is no objection that he did not form an opinion on observing the facts from which he afterwards drew his opinion. *Hathaway v. Nat. Life Ins. Co.*, 48 Vt. 335.

Testamentary Capacity. — The subscribing witnesses to a will may always give their opinions concerning the sanity or insanity of the testator at the time he signed the will in their presence, whether they "happen to be the attending physicians, nurses, children, or chance strangers." *Williams v. Lee*, 47 Md. 321; *Van Huss v. Rainbolt*, 42 Tenn. 139; *Hardy v. Merrill*, 56 N. H. 227; *Poole v. Richardson*, 3 Mass. 330; *Potts v. House*, 6 Ga. 324; *Dewitt v. Barley*, 9 N. Y. 371; *Grant v. Thompson*, 4 Conn. 203; *Wogan v. Small*, 11 S. & R. (Pa.) 141; *Robinson v. Adams*, 62 Me. 369. Even without stating the facts. *Williams v. Lee*, 47 Md. 321; *Van Huss v. Rainbolt*, 42 Tenn. 139.

1. *Mills v. Winter*, 94 Ind. 329.
2. *State v. Shelton*, 64 Iowa, 333.
3. Breach of promise. *M'Kee v. Nelson*, 4 Cow. (N. Y.) 355; s. c., 15 Am. Dec. 384.
4. *City of Aurora v. Hillman*, 90 Ill. 66; *State v. Huxford*, 47 Iowa, 16; *Stacy v. Portland Put. Co.*, 68 Me. 279; *Pierce v. State*, 53 Ga. 365; *State v. Pike*, 49 N. H. 407.

mit to an examination¹ by physicians² or midwives.³ Such testimony is received with caution.⁴ In criminal cases, compulsory examination of the person cannot be resorted to,⁵ but it may be in civil cases.⁶

XXV. Disclosing Confidential Communications. — If a statute prohibits physicians giving testimony of facts disclosed in attending persons professionally, this does not prohibit them testifying as to facts *observed* while making an examination, or while attending such persons.⁷

XXVI. Nautical Experts. — The opinions of persons engaged in the navigation of vessels and boats are admissible on questions appertaining to nautical science.⁸

1. *Devenbagh v. Devenbagh*, 5 Paige (N. Y.), 554; *Brown v. Brown*, 1 Hagg. 523; *Briggs v. Morgan*, 3 Philm. 325; *Welde v. Welde*, 2 Lee, 580; *H— v. P—*, L. R. 3 P. & D. 126; *G— v. G—*, L. R. 2 P. & D. 287. A strong case for the necessity of such an examination must be made before it will be ordered. *Newell v. Newell*, 9 Paige (N. Y.), 26.

2. *Newell v. Newell*, 9 Paige (N. Y.), 26; *Dean v. Aveling*, 1 Rob. 279.

3. *Welde v. Welde*, 2 Lee, 580. In such cases, the feelings of the parties are usually consulted. *Devenbagh v. Devenbagh*, 5 Paige (N. Y.), 554. If there has been an examination by competent persons, a second one will not be ordered. *Brown v. Brown*, 1 Hagg. 523, note *a*; *Devenbagh v. Devenbagh*, 5 Paige (N. Y.), 554. But see *Newell v. Newell*, 9 Paige (N. Y.), 26.

4. *Norton v. Seton*, 3 Philm. 147. The interrogatories to be propounded to the person to be examined may be agreed upon by the parties, or be settled by the court, and must be such only as relate to the alleged incapacity, and the commencement and progress of the disease by which it has probably been produced. *Newell v. Newell*, 9 Paige (N. Y.), 26. See *G— v. G—*, L. R. 2 P. & D. 287.

The husband pays the expense, — *Devenbagh v. Devenbagh*, 5 Paige (N. Y.), 554, — and if the wife refuse, the allowance of her alimony will be withheld. *Newell v. Newell*, 9 Paige (N. Y.), 26. A refusal to submit to an examination is regarded as evidence of incapacity. *Harrison v. Harrison*, 4 Moore, P. C. 96; *H— v. P—*, L. R. 3 P. & D. 126. See *Pollard v. Wybourn*, 1 Hagg. 725; *Sparrow v. Harrison*, 3 Curteis, 16.

5. *State v. Jacobs*, 5 Jones (N. Car.), 259; *State v. Johnson*, 67 N. Car. 58; *People v. McCoy*, 45 How. Pr. (N. Y.) 216. *Contra*, *State v. Ah Chuey*, 14 Nev. 79; s. c., 33 Am. Rep. 530 (an enforced exhibition of a mark on the arm as a means of identification). Evidence of an enforced com-

parison of foot-prints is not admissible. *Stokes v. State*, 5 Baxt. (Tenn.) 619; s. c., 30 Am. Rep. 72; *People v. Mead*, 50 Mich. 228 (trying on shoe); *Day v. State*, 63 Ga. 667; *Blackwell v. State*, 67 Ga. 76. *Contra*, *Walker v. State*, 7 Tex. App. 245; s. c., 32 Amer. Rep. 595; *State v. Graham*, 74 N. Car. 646; s. c., 21 Am. Rep. 493; *State v. Garrett*, 71 N. Car. 85; s. c., 17 Am. Rep. 1. 6. *Schroder v. C. R. I. & P. R. Co.*, 47 Iowa, 375; *Walsh v. Sayre*, 52 How. Pr. (N. Y.) 334.

7. *Pierson v. People*, 25 N. Y. Sup. Ct. 239; *Pierson v. People*, 79 N. Y. 424; *Staunton v. Parkes*, 26 N. Y. Sup. Ct. 56; *Linz v. Massachusetts Mut. L. Ins. Co.*, 8 Mo. App. 369. But see *Grattan v. Metropolitan Ins. Co.*, 80 N. Y. 281, distinguishing *Edington v. Aetna Ins. Co.*, 77 N. Y. 564, and *Pierson v. People*, 79 N. Y. 424.

Yet where a physician was sent to a prisoner after a crime had been committed, and she accepted his services professionally, disclosures made by her to him were held privileged communications, both in civil and criminal cases. *People v. Murphy*, 101 N. Y. 126, reversing 37 Hun (N. Y.), 138. So where the facts observed and the communications were so interwoven as not to be distinguishable in drawing an opinion, the opinion was excluded. *Gartside v. Connecticut Mut. L. Ins. Co.*, 8 Mo. App. 593.

8. *Delaware, etc., Co. v. Starrs*, 69 Pa. St. 36. That a vessel was unseaworthy. *Baird v. Daly*, 68 N. Y. 547; *Western Ins. Co. v. Tobin*, 32 Ohio St. 77. By a marine surveyor and inspector. *Perkins v. Augusta Ins. Co.*, 10 Gray (Mass.), 312. What caused a leak. *Parsons v. Mfg., etc., Ore Co.*, 16 Gray (Mass.), 463; *Zugasti v. Lamer*, 12 Moore, P. C. 331. The soundness of a cable. *Reed v. Dick*, 8 Watts (Pa.), 479. The possibility of avoiding a collision with proper care. *Jameson v. Drinkald*, 12 Moore, 148; *Fenwick v. Bell*, 1 C. & K. 312; *Carpenter v. Eastern Trans. Co.*, 71 N. Y. 574. Whether a port could have been made by skilful management.

XXVII. Railroad Experts. — Opinions may be given concerning the running and management of locomotives and trains by persons skilled therein.¹

XXVIII. Machinist. — A machinist may give an opinion as an expert relative to the construction of machinery.²

Olz v. Morris, 17 N. Y. Sup. Ct. 202. Direction from which a boat was struck, as indicated by the marks. *Steamboat Clipper v. Logan*, 18 Ohio, 375. Whether a vessel was stranded by unskillfulness or accident. *N. E. Glass Co. v. Lovell*, 7 Mass. (Mass.) 319. The proper time and place of changing boats in tow. *Delaware, etc., Co. v. Starrs*, 69 Pa. St. 36. Whether safe for a tug-boat, on very wide waters, to go three boats abreast, with a high wind. *Western Trans. v. Hope*, 95 U. S. 297. The effect on a ship of cross-seas, heavy swells, shifting winds, and sudden squalls. *Walsh v. Washington, etc., Ins. Co.*, 32 N. Y. 427. Whether a ship, as described, was properly managed. *Guterman v. Liverpool, etc., Co.*, 83 N. Y. 358. What is a full cargo for a ship to carry safely. *Ogden v. Parsons*, 23 How. (N. S.) 167. The effect of deck-load on the safety of the vessel. *Upham v. Atlas Ins. Co.*, 24 Pick. (Mass.)

That the opening of the garboard seam is due to the working of the stern. *Padlock v. Con. Ins. Co.*, 104 Mass. 521. The addition of the fastenings of a vessel as to safety. *Moore v. Westervelt*, 7 Bosw. (N. Y.) 558. Whether an injured boat is worth repairing. *Steamboat v. Logan*, 18 Ohio, 375. But not the expense of repairing. *Wright v. Hazard*, 5 Hill (N. Y.), 604. See *Kes v. Painé*, 10 Ired. (N. Car.) 282. Whether an article was properly stowed. *Ice v. Powell*, 3 N. Y. 322. Or that desisting gold coin under the ballast was usual, and increased the risk. *Leitch v. Mut. Ins. Co.*, 66 N. Y. 100. They may be asked concerning the necessity of jettison. *Price v. Hartshorn*, 44 N. Y.

But an opinion is not admissible to give what effect a given log would have, in a given place, in changing the current of stream. *Cooper v. Mills Co.*, 69 Ia. 350. As to log-jam, see *Butterfield v. Gilchrist*, N. W. Rep. (Mich.) 682. *Bellevue v. Bellefontaine, etc., R. Co. v. Bailey*, Ohio St. 333.

A machinist, connected for years with a railroad, may express an opinion as to what would be a safe train off the track. *Seaver v. Boston, etc., R. Co.*, 14 Gray (Mass.), 466. Those skilled in running trains may be asked, upon an assumed state of facts, if brakemen were in their proper places, — *Mcinnati, etc., R. Co. v. Smith*, 22 Ohio 227; conductors, as to the means of stopping a train, — *Mobile, etc., R. Co. v. Kealey*, 59 Ala. 471; a roadmaster,

whose duty it is to receive and inspect ties, as to quality of certain ties, — *Jeffersonville R. R. Co. v. Lanham*, 27 Ind. 171. Persons who have had experience in building railroads may be asked if a certain railroad was "finished" at a certain date, stating the facts in relation to it. *Hilton v. Mason*, 92 Ind. 157. An expert may show the kind of turn-table in use, whether the one used was of an approved pattern. *Fitts v. Creon City R. Co.*, 59 Wis. 323. The construction of cars, the mode of working them, and the effect of a particular thing on their safety and usefulness, are questions for an expert. *Baldwin v. Chicago, etc., R. Co.*, 18 Am. L. Reg. 761, and note; s. c., 50 Iowa, 680.

A newspaper editor, who has visited "dozens of railroad accidents," may not give his opinion as to whether a rail was defective, or whether it was maliciously cut. *Hoyt v. L. I. R. Co.*, 57 N. Y. 678. Nor a conductor, that guard-chains attached to the cars would have avoided a certain accident: he is "not an expert, and has no peculiar knowledge on the subject." *Bixby v. Montpelier, etc., R. Co.*, 49 Vt. 125. Nor a witness of long experience, whether the blowing of a whistle was, under the circumstances, prudent. *Hill v. Portland, etc., R. Co.*, 55 Me. 438. Nor a switchman, that it was not necessary for another switchman to have been where he was when he received an injury. *Pennsylvania Co. v. Conlan*, 101 Ill. 93.

Speed. — A conductor may testify as to speed of train. *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537. In this case it was said that an ordinary person riding upon the train could not express an opinion as to its speed. Any one who saw the train running may give his opinion as to its speed, — *Chicago, etc., R. Co. v. Johnson*, 103 Ill. 512; *Guggenheim v. L. S. & M. S. Ry. Co.*, 32 Am. & Eng. R. R. Cas. 89, — although very unsatisfactory. *Hoppe v. Chicago, etc., Ry. Co.*, 61 Wis. 357.

Fence. — Whether a railroad fence is such as ordinary husbandmen keep, is a question for farmers, and the like. *Indiana, etc., R. W. Co. v. Hale*, 93 Ind. 79; *Louisville, etc., R. W. Co. v. Spain*, 61 Ind. 460.

2. *Sheldon v. Booth*, 50 Iowa, 209. Not constructed in a workmanlike manner. *Curtis v. Gano*, 26 N. Y. 426. Whether a certain cotton-gin is equal to the best sowing in use. *Scattergood v. Wood*, 79 N. Y. 263. A manufacturer of steam-gauges, who

XXIX. Mechanics, Builders, and Masons. — The opinion of a practical engineer in bridge-building may be received;¹ of a dealer in lumber, and a house-builder, concerning the value of a house;² or whether it was a "good job," or "well done;"³ of an architect, how long alterations and extra work, specified, will take;⁴ of the owner of a mill, having knowledge of its structure, as to the length of time required to repair it.⁵

XXX. Painters and Photographers. — An artist in painting may be asked his opinion concerning the genuineness of a painting;⁶ an ambrotypist or daguerrotypist, if photographs are well executed;⁷ and an expert in photography, how many photographic pictures a photographic painter can paint in a month.⁸

XXXI. Surveyors. — A practical surveyor may give an opinion whether certain piles of stones, and marks on trees, are monuments of a boundary;⁹ whether a particular line was marked by the government engineers, if familiar with the marks used by the government;¹⁰ how much land would be overflowed at a certain height of water.¹¹ But he may not give a construction to a given survey, nor as to what are the controlling calls of a deed,¹² or the proper location of a grant.¹³

XXXII. Insurance Experts. — The opinions of underwriters concerning the materiality of concealed facts in applications for insurance may be received, if so special and technical in their nature that persons, without previous experience in the business of insur-

has repeatedly tested hose, may state what constitutes "a fair and satisfactory test," such as a contract calls for. *City of Chicago v. Greer*, 9 Wall. (U. S.) 726. A person acquainted with a machine and its construction may say how much work it will do. *Burns v. Welch*, 8 Yerg. (Tenn.) 117. A master mechanic, in a railroad machine-shop, that a certain spark-arrester is the best known. *Great Western R. R. Co. v. Haworth*, 39 Ill. 349. Workers in brass, that, from common observation, it could not be told whether certain brass couplings were perfect or imperfect, or of any use for the purpose for which they were intended. *Jupitz v. People*, 34 Ill. 516. The engineer of a stationary engine, who has fired and handled a locomotive, as to the effect of a leaky throttle-valve upon the handling and operation of the latter. *Brabbitts v. Chicago, etc., R. Co.*, 38 Wis. 289.

In all cases it is not necessary that the expert be a machinist by trade: if he has had practical experience in operating a particular machine, or machines of a similar character, he is competent. *Sheldon v. Booth*, 50 Iowa, 209; *Cole v. Clark*, 3 Wis. 323.

1. *Union Pacific R. Co. v. Clopper*, 102 U. S. (L. ed.) 708.

2. *Woodruff v. Imperial Fire Ins. Co.*, 83 N. Y. 133.

3. *Ward v. Kilpatrick*, 85 N. Y. 413.

4. *Campbell v. Russell*, 139 Mass. 278.

5. *Terre Haute v. Hudnut*, 18 Am. & Eng. Corp. Cas. 302.

Of masons, as to length of time required to dry walls of a house so as to render the house fit for habitation. *Smith v. Gugerty*, 4 Barb. (N. Y.) 619. Any one may testify what effect water had upon plastering. *Underwood v. Waldron*, 33 Mich. 232. So an experienced builder may be asked whether a building partly of brick and partly of wood is properly called a "brick" building. *Mead v. N. W. Ins. Co.*, 3 Selden (N. Y.), 530. Builders and contractors may testify whether the employment of an architect to make plans and designs for a building carries with it an employment to superintend its construction. *Wilson v. Bauman*, 80 Ill. 493.

6. *Folkes v. Chadd*, 3 Doug. (Mich.) 157.

7. *Barnes v. Ingalls*, 39 Ala. 193.

8. *Barnes v. Ingalls*, 39 Ala. 193.

9. *Davis v. Mason*, 4 Pick. (Mass.) 156; *Knox v. Clark*, 123 Mass. 216.

10. *Brantly v. Swift*, 24 Ala. 390.

11. *Phillips v. Terry*, 3 Abb. Dec. (N. Y.) 607.

12. *Whittelsey v. Kellogg*, 28 Mo. 404.

13. *Schultz v. Lindell*, 30 Mo. 310; *Randolph v. Adams*, 2 W. Va. 519.

ance, are unable to arrive at any intelligent conclusion whether the risk was increased or not;¹ but not if the ordinary person is perfectly competent to decide the question of their materiality.²

XXXIII. Fire Experts.—The proper time at which to burn fallow is not a question for an expert,³ nor whether it was improper to put out a fire at a certain time.⁴

XXXIV. Highways.—A witness may not say, that, in his opinion, a highway is abandoned,—he must give the facts tending to show an abandonment,⁵—nor that a proposed highway would be a public utility;⁶ but an expert may say of a place where an injury occurred by reason of a defect in the highway, that it was in a dangerous condition.⁷

1. *Hartford Protection Co. v. Harmer*, 2 Ohio St. 452; *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.), 545; *Merriam v. Middlesex Ins. Co.*, 21 Pick. (Mass.) 162; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297; *National Bank v. Kennedy*, 17 Wall. (U. S.) 19; *Steinbach v. Lafayette Fire Ins. Co.*, 54 N. Y. 90, affirming 12 Hun (N. Y.), 641.

2. *Carter v. Boehm*, 2 Burr. 1905; s. c., 1 Smith, L. C. 618; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Mulry v. Ins. Co.*, 5 Gray (Mass.), 541.

In an action upon a policy of fire insurance providing against any increase of risk, the testimony of experts is competent upon the question as to the materiality of circumstances affecting the risk, especially where its determination calls for a degree of knowledge not likely to be possessed by an ordinary jury; but expert testimony, although uncontradicted, is not conclusive, save in cases where none but experts are capable of determining the questions. Where special circumstances are proved, calling upon the jury to determine whether the general principles governing similar cases, as testified to by experts, are applicable, in the case before them, it is proper to submit the question to the jury. A policy of insurance upon a dwelling-house contained a condition to the effect that any instance of hazard or material change, without consent, should avoid the policy. At the time it was issued, the dwelling was occupied by a tenant: it thereafter became vacant, and remained unoccupied about two months, when it was burned. On the trial of an action upon the policy, three persons engaged in the business of insurance, called as witnesses by defendant, testified that unoccupied buildings were more exposed to the hazard of fire than if occupied, and they were classed as more hazardous, as they had not the care which occupied buildings had, and were more exposed to be burned by tramps and children. No testimony directly con-

tradictory was introduced by plaintiff, but he gave evidence showing the location and condition of the premises and the character of the neighborhood. It was held that the question as to whether there had been a breach of the condition was properly submitted to the jury; that the question as to increase of risk was one of fact, as to which the testimony of experts was competent, but not controlling. *Cornish v. Farm Buildings Fire Ins. Co.*, 74 N. Y. 295, affirming 10 Hun, 466, citing *New York Firemen's Ins. Co. v. Walden*, 12 John. (N. Y.) 513; *Grant v. Howard Ins. Co.*, 5 Hill (N. Y.), 10; *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274; *Gates v. Madison, etc., Co.*, 2 Comst. (N. Y.) 43; *Leitch v. Atlantic, etc., Co.*, 66 N. Y. 100.

3. *Ferguson v. Hubbell*, 97 N. Y. 507; s. c., 49 Am. Rep. 544; *Frazer v. Tupper*, 29 Vt. 409.

4. Such things are matters of common knowledge. *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469; *Schmieder v. Barney*, 113 U. S. 645; *Kellogg v. Railroad Co.*, 26 Wis. 224; *Perley v. Railroad Co.*, 98 Mass. 414. A fire-marshal in a city may not express an opinion as to the origin of a fire,—*Cook v. Johnston*, 58 Mich. 437; may not ask if it is dangerous to use a steam-dredge without a spark-arrester,—*Teal v. Barton*, 40 Barb. (N. Y.) 137. See *Higgins v. Dewey*, 107 Mass. 494; *Hays v. Miller*, 6 Hun, 320; s. c., 70 N. Y. 112.

5. *Pittsburgh, etc., R. Co. v. Reich*, 101 Ill. 157.

6. *Thompson v. Deprez*, 96 Ind. 67; *Lochbaugh v. Birdsell*, 90 Ind. 466.

7. *Stillwater Turnpike Co. v. Coover*, 26 Ohio St. 520; *Baltimore, etc., Co. v. Cassell*, 66 Md. 419; s. c., 59 Am. Rep. 175; *Village of Fairbury v. Rogers*, 98 Ill. 554; *Laughlin v. Street Ry. Co.*, 26 Am. & Eng. R. R. Cas. 377; *Smith v. Township of Sherwood*, 28 Mich. 806; *Harris v. Clinton Tp.*, 31 N. W. Rep. (Mich.) 425.

Contra.—*Town of Albion v. Hetrick*, 90 Ind. 543; *Montgomery v. Scott*, 34

XXXV. Value.—Experts may give their opinions on the value of an article. Thus, the owner of a cloak may testify to its value by the knowledge she has obtained in pricing similar cloaks,¹ although she never bought but one.² Experts may give the value of a dog, based either upon actual sales or their general knowledge,³ or of a particular breed of horses,⁴ or of land.⁵

Wis. 345; *Crane v. Northfield*, 33 Vt. 126; *Bliss v. Wilbraham*, 8 Allen, 564. But see *Benedict v. Fond du Lac*, 44 Wis. 495; *Griffin v. Town of Willow*, 43 Wis. 509.

Any person of experience may testify that an object along the highway has a tendency to frighten horses. *Piollet v. Simmers*, 106 Pa. St. 95; s. c., 51 Am. Rep. 496.

1. *Printz v. People*, 42 Mich. 144; s. c., 36 Am. Rep. 437; *Berney v. Dinsmore*, 141 Mass. 42; s. c., 55 Am. Rep. 445.

2. *State v. Finch*, 70 Iowa, 316; s. c., 59 Am. Rep. 443.

3. *Cantling v. Hannibal, etc., R. R. Co.*, 54 Mo. 385; s. c., 14 Am. Rep. 476.

4. *Harris v. R. R. Co.*, 36 N. Y. Sup. Ct. 373.

5. *Clark v. Baird*, 9 N. Y. 183; *Bearss v. Copley*, 10 N. Y. 93.

A merchant may swear to the value of goods, — *Buckley v. U. S.*, 4 How. (U. S.) 251, — or by one who had inquired of merchants. *Cliquot v. Campagne*, 3 Wall. (U. S.) 114.

"It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business for the conduct of that business, that qualifies him to testify." *Whitney v. Thacher*, 117 Mass. 526; *Stone v. Tupper*, 58 Vt. 409; *Haish v. Payson*, 107 Ill. 365.

"In general, the opinion of a witness is not evidence for a jury, although there are exceptions to the rule; but they all proceed on the principle, that the question is one of skill or science, or has reference to some object upon which the jury are not supposed to have the same degree of knowledge with the witness. The evidence of experts is received on the ground of science or skill; and the witnesses may speak on the value of property or labor where it appears they have peculiar sources of knowledge to guide them on these subjects, and which are not presumed to be equally within the reach of the jury. The parties were entitled to the judgment of the jury on the value of the defendant's services, and how were they rightfully to be aided by the mere opinion of a witness who had no

means of information beyond their own? Opinions are to be formed by jurors, but it is the business of witnesses to deal with facts." *Lamoure v. Caryl*, 4 Denio (N. Y.), 370. See *Clark v. Baird*, 9 N. Y. 183.

In a case of contributory policies, an adjustment of loss made by an expert may be submitted to the jury, not as evidence of the facts stated therein, or as obligatory upon them, but for the purpose of assisting the jury in calculating the amount of liability of the insurer upon the several hypotheses of fact mentioned in the adjustment, if they find either hypothesis correct. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

Witnesses having peculiar knowledge as to services, and some general knowledge of the value, may give opinions as to the value, based either upon their own knowledge or upon a hypothetical question, including some or all the facts proved. *Mercer v. Vose*, 67 N. Y. 56.

A physician may testify to the value of a nurse's services. *Reynolds v. Robinson*, 64 N. Y. 589. In one case the owner of a clock described it, and a dealer in clocks was then allowed to give his opinion as to its value. *Whiton v. Snyder*, 88 N. Y. 299; s. c., 25 Hun, 563.

A non-expert may testify as to the value of board, on hypothetical questions. *Chamness v. Chamness*, 53 Ind. 301.

Where the action was for the services of an attorney, it was held error to charge the jury that they must accept the opinions of attorneys as to their value as conclusive. "It was the province of the jury to weigh the testimony of the attorneys as to the value of the services by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ in principle from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from

XXXVI. Handwriting. See also title HANDWRITING. — Experts who have qualified themselves by study and experience may be received to testify concerning the genuineness and identity of handwriting.¹

XXXVII. Books of Science. — Books of science are inadmissible in evidence to prove the opinion contained in them; but if a witness refers to them as an authority, they may be received for the purpose of contradicting him.²

XXXVIII. Definition of Words. — The definition of ordinary words cannot be given in evidence;³ but technical words,⁴ or a "term of art,"⁵ may be explained or defined by a witness.

laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way they could arrive at a just conclusion. While they cannot act in any case upon any particular fact material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may — and, to act intelligently, they must — judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry. If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty, and probably come to a wrong conclusion, if, controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damages sustained, they should ignore their own knowledge and experience as to the value of a sound limb. Other persons besides professional men have knowledge of the value of professional services; and while great weight should always be given to the opinion of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge: they should control only as they are found to be reasonable." *Head v. Hargrave*, 105 U. S. 45; *Anthony v. Stinson*, 4 Kan. 212; *Patterson v. Boston*, 20 Pick. (Mass.) 159 (damages for opening a street); *Murdock v. Sumner*, 22 Pick. (Mass.) 158 (value and quality of certain goods). See *Wood v. Barker*, 22 Amer. L. Reg. 323.

Quantum of Damages. — The amount of damages the plaintiff is entitled to recover cannot be given by experts; that is a question for the jury or court. *McReynolds v. Burlington, etc.*, R. Co., 106 Ill. 152; *City of Logansport v. McMillen*, 49 Ind. 493; *Kirkpatrick v. Snyder*, 33 Ind. 169; *Vandusen v. Young*, 26 N. Y. 9, reversing 29 Barb. (N. Y.) 9.

7 C. of L. — 33

1. *Plunket v. Bowman*, 2 M'Cord (S. Car.), 139; *Morrison v. Porter*, 35 Minn. 425; s. c., 59 Am. Rep. 331; *Moore v. United States*, 91 U. S. 270; *Baker v. Haines*, 6 Whart. (Pa.) 284; s. c., 36 Am. Dec. 254. See title HANDWRITING.

2. *Pinney v. Cahill*, 22 Am. L. Reg. 104. A witness cannot state what is contained in them, nor an attorney read them to the jury. *Boyle v. State*, 57 Wis. 472; *Epps v. State*, 102 Ind. 539; *Stilling v. Town of Thorp*, 54 Wis. 528; *Luning v. State*, 2 Pinn. (Wis.) 215; s. c., 1 Chand. (Wis.) 178; *Luning v. State*, 2 Pinn. (Wis.) 285; s. c., 1 Chand. (Wis.) 264. To discredit them, *City of Ripon v. Bittel*, 30 Wis. 614.

See, generally, to same effect, *People v. Sessions*, 58 Mich. 594; *Quackenbush v. Chicago, etc., R. Co.*, 35 N. W. Rep. (Iowa) 523; *Collier v. Simpson*, 5 C. & P. 73; *Ashworth v. Kittridge*, 12 Cush. (Mass.) 193; *Commonwealth v. Wilson*, 1 Gray (Mass.), 338; *Fowler v. Lewis*, 25 Tex. 380; *Melvin v. Easby*, 1 Jones (N. Car.), 387; *Darby v. Ouseley*, 1 H. & N. 12.

Life Tables. — Tables showing the probable duration of life are admissible. *Wager v. Schuyler*, 1 Wend. (N. Y.) 553; *Schell v. Plumb*, 55 N. Y. 598; *Mills v. Catlin*, 22 Vt. 98; *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa, 280, 291; *David v. Railroad*, 41 Ga. 223. *Tide tables*, see *Green v. Cornwell*, 1 City Hall, R.; s. c., (N. Y.) 11.

3. *Goodwin v. State*, 96 Ind. 550; *Horn v. Taunton*, 5 H. & N. 667; *Hoare v. Silverlock*, 12 Ad. & El. (N. S.) 624; *Rodgers v. Kline*, 56 Miss. 818; *Campbell v. Rusch*, 9 Iowa, 337.

4. *Bissell v. Campbell*, 54 N. Y. 353; *Brown v. Brown*, 8 Met. (Mass.) 573; *Prather v. Ross*, 17 Ind. 495.

5. "In reaching the conclusion as to what is generally understood by the use of the word 'telephone,' we have been governed partly by the information judicially within our reach, and, in other respects, by the evidence. The word having become a term of art, evidence was admissible to

XXXIX. Foreign Laws.—An expert acquainted with a foreign law, if unwritten, may testify as to what it is, as applicable to an issue raised;¹ but not if it is written; that can be proven only by a certified copy.²

XL. Competency of Experts.—The competency of an expert, whose testimony it is proposed to introduce, must first be shown;³ and whether he is competent, is a question for the court, and not the jury.⁴

XLI. Form of Question.—The party seeking an opinion of an expert, may, within reasonable limits, put his case hypothetically, as he claims it to have been proved, and take the opinion of the witness thereon, leaving the jury to determine whether the case, as put, is the one proved.⁵

explain its proper meaning." *Hackett v. State*, 105 Ind. 250.

Contract.—Experts may not give an interpretation of a contract; that is, for the court. *Winans v. N. Y. & E. R. Co.*, 21 How. (U. S.) 88; *Roberts v. Cooper*, 20 How. (U. S.) 467; *Dunlap v. Munroe*, 7 Cranch (U. S.), 242; *Half v. Curtis*, 68 Tex. 640; *Barrett v. Wheeler*, 71 Iowa, 662; *Zube v. Weber*, 34 N. W. Rep. (Mich.) 264; *Johnson v. Glover*, 10 N. E. Rep. (Ill.) 214.

1. *Talbot v. Leeman*, 1 Cranch (U. S.), 1; *Drake v. Glover*, 30 Ala. 382; *Shed v. Augustine*, 14 Kan. 282. The stamp duty of *Germany*, by a university law-student. *Bristow v. Sequeville*, L. R. 5 Exch. 275. The law of *Belgium* concerning a note payable there by a London hotel-keeper, a native of *Belgium* who did business there once. *Donckt v. Thelluson*, 8 C. B. 812. A cardinal to prove the Roman matrimonial law. *The Sussex Peerage Case*, 11 C. & F. 85. But not a "special pleader" to show testamentary law of Italy, he living in that country. *Goods v. Bonelli*, 24 W. R. 255; L. R. 1 P. & D. 69.

2. *Church v. Hubbard*, 2 Cranch (U. S.), 187. See *Dougherty v. Snyder*, 15 S. & R. (Pa.) 84. To interpret and show its exposition and adjudications thereon, parol testimony is admissible. *Walker v. Forbes*, 31 Ala. 9; *Hoes v. Van Alstyne*, 20 Ill. 202; *Barrows v. Downs*, 9 R. I. 446, 453; *Roberts' Will*, 8 Paige (N. Y.), 446.

3. *Stennett v. Pennsylvania Ins. Co.*, 68 Iowa, 674; *Russell v. Cruttenden*, 53 Conn. 564; *Ft. Wayne v. Coombs*, 107 Ind. 75. Until proven to be an expert, it is not error to exclude a question calling for an opinion. *Higbee v. Guardian*, etc., Ins. Co., 53 N. Y. 603, affirming 66 Barb. (N. Y.) 462; *Russell v. Cruttenden*, 53 Conn. 564; *Hinds v. Harbou*, 58 Ind. 121.

4. *Ft. Wayne v. Coombs*, 107 Ind. 75; *McEwen v. Bigelow*, 40 Mich. 215; *Dole v. Johnson*, 50 N. H. 452; *Castner v. Sliker*, 33 N. J. L. 96; *Flynt v. Boden-*

homer, 80 N. Car. 205; *Perkins v. Stickney*, 132 Mass. 217; *Wright v. Williams' Estate*, 47 Vt. 222. Some of the cases hold that the trial courts' decision on this point is not reviewable, but the better authority is that the courts' decision is reviewable. *Ft. Wayne v. Coombs*, 107 Ind. 75; *Congress, etc., Spring Co. v. Edgar*, 99 U. S. 645.

"No one has any title to respect as an expert, or has any right to give an opinion upon the stand, unless as his own opinion; and if he has not given the subject involved such careful and discriminating study as has resulted in the formation of a definite opinion, he has no business to give it. Such an opinion can only be safely formed or expressed by persons who have made the scientific questions involved, matters of definite and intelligent study, and who have by such application made up their own minds." *People v. Millard*, 5 Crim. L. Mag. 588.

Cross-Examination.—Only a *prima facie* showing need be made to entitle the proposed expert to testify. *Sarle v. Arnold*, 7 R. I. 582. In this case it was held that the court was not bound to allow a preliminary cross-examination. If it turn out on cross-examination, before he testifies, that he is incompetent, he will be excluded; if after, the jury may be told that his opinion is of no weight. *Ft. Wayne v. Coombs*, 107 Ind. p. 86; *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409; *Washington v. Cole*, 6 Ala. 212; *Goodwin v. State*, 96 Ind. 550; *Davis v. State*, 35 Ind. 496; s. c., 9 Am. Rep. 760.

In his own Behalf.—An expert may give an opinion in his own behalf. *Wooster v. Paige*, 1 Pac. Coast Rep. 324.

5. *Bishop v. Spining*, 38 Ind. 143; *Guetig v. State*, 66 Ind. 94; *Goodwin v. State*, 90 Ind. 550; *Cowley v. People*, 83 N. Y. 464; s. c., 38 Am. Rep. 464. Even though the court does not regard all the facts as proved, if there is evidence tending to

prove them. *Quinn v. Higgins*, 63 Wis. 664; s. c., 53 Am. Rep. 305; *Page v. State*, 61 Ala. 16; *Boardman v. Woodman*, 47 N. H. 120; *Yardley v. Cuthbertson*, 108 Pa. St. 395; s. c., 56 Am. Rep. 218; *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Commonwealth v. Rogers*, 7 Met. (Mass.) 500; s. c., 41 Am. Dec. 458; *Forsyth v. Doolittle*, 120 U. S. 73; *State v. Cross*, 68 Iowa, 180; *Morrill v. Tegarden*, 19 Neb. 534; *Ray v. Ray*, 98 N. Car. 566; *People v. Augsburg*, 97 N. Y. 501.

The question need not embody all the matters of which there is any evidence, even in insanity cases. *Goodwin v. State*, 96 Ind. 550, disapproving *People v. Thurston*, 2 Park. Cr. Cas. (N. Y.) 49. One not based on the facts may be refused. *Strong v. Stevens's Point*, 62 Wis. 255. So one not within the range of legitimate evidence, containing inferences and conclusions. *Haish v. Payson*, 107 Ill. 365.

"The claim is that a hypothetical question may not be put to an expert, unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is, that it supposes, assumes something for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly." *Cowley v. People*, 83 N. Y. 464, citing *Erickson v. Smith*, 2 Abb. App. Dec. (N. Y.) 64; *People v. Lake*, 12 N. Y. 358; *Seymour v. Fellows*, 77 N. Y. 178; *Guterman v. Liverpool, etc., Steamship Co.*, 83 N. Y. 359, 464.

In some States, where a witness reads or hears the evidence, he may give an opinion upon it without the intervention of a hypothetical question. *Gilman v. Town of Stafford*, 50 Vt. 723. He must assume that it is true. *Commonwealth v. Rogers*, 7 Met. (Mass.) 500; s. c., 41 Am. Dec. 458; *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.), 170; *Sillar v. Brown*, 9 C. & P. 601; *Rex v. Searle*, 1 M. & R. 75. It may not be so done if the evidence is voluminous,—*Bennett v. State*, 57 Wis. 69; s. c., 46 Am. Rep. 26,—nor upon the facts where the evidence is conflicting,—*Guterman v. Liverpool, etc., Steamship Co.*, 83 N. Y. 358,—or asked if both statements of facts are true when there are two different sets, as shown by several witnesses. *Fairchild v. Bascomb*, 35 Vt. 398, 415; *Yardley v. Cuthbertson*, 108 Pa. St. 395; s. c., 56 Am. Rep. 218; *Page v. State*, 61 Ala. 16. In other States, none but hypothetical questions can be put; and this is the better

practice. *Elliott v. Russell*, 92 Ind. 526; *Luning v. State*, 2 Pinn. (Wis.) 215; s. c., 1 Chand. (Wis.) 178; *People v. Lake*, 12 N. Y. 35, affirming 1 Park. Cr. Cas. (N. Y.) 495.

Where an opinion may be given on the evidence alone, the expert must have heard all of it that affects his testimony. *People v. Lake*, 12 N. Y. 358; s. c., 1 Park. Cr. Cas. (N. Y.) 495. He must recollect all the facts. *Guterman v. Liverpool, etc., Steamship Co.*, 83 N. Y. 358.

Hypothetical questions on conjectures are inadmissible. *Higbil v. Guardian, etc., Co.*, 53 N. Y. 603. Also those omitting material facts. *State v. Hanley*, 34 Minn. 430.

In the case of one not an expert, he must first detail the facts within his personal knowledge, and then give his opinion with these facts as a basis. *State v. Erb*, 74 Mo. 199; *Palin v. State*, 14 Neb. 540; *Harrison v. Ely*, 120 Ill. 83; *State v. Newlin*, 69 Ind. 108; *Coffman v. Reeves*, 62 Ind. 334. Long hypothetical questions reciting a great number of facts, so presented as to require the witness to determine questions that should be left to the jury, and so long that neither jury nor witness can remember and take account of all the elements presented, are very objectionable. *People v. Brown*, 53 Mich. 531. An expert may give his reasons for his opinion. *Lewiston, etc., Co. v. Androscoggin Water Power Co.*, 78 Me. 274; *Barber v. Merrian*, 11 Allen (Mass.), 322.

A leading question calling for an opinion, as a rule, is not objectionable. *Hilton v. Mason*, 92 Ind. 157.

Cross-Examination of an Expert.—"Counsel, in forming hypothetical questions to be put to expert witnesses, are not confined to facts admitted or absolutely proved, but facts may be assumed which there is any evidence on either side tending to establish, and which are pertinent to the theories which they are attempting to uphold. In the direct examination of their own witnesses, it would tend to confusion if facts were assumed in hypothetical questions which did not bear upon the matters under inquiry, or which were not fairly within the scope of any of the evidence. Upon the cross-examination of an expert, counsel may not be so narrowly confined, but may, in putting hypothetical questions, assume any facts pertinent to the inquiry, whether testified to by witnesses or not, with the view of testing the skill and accuracy of the expert; but such cross-examination must, to some extent, be under the control of the trial court." *Dilleber v. Home Life Ins. Co.*, 87 N. Y. 79, reversing 21 Hun (N. Y.), 232; *Louisville R. Co. v. Falvey*, 104 Ind. 409; *Kelly v. Erie Tel., etc., Co.*, 34 Minn. 321; *Epps v. State*, 102

XLII. Jury's Relation to Expert Testimony.—It is for the jury to decide what weight, if any, shall be given to the opinions or evidence of an expert, or to the opinion of a non-professional witness.¹ They are not bound by such testimony, and may exercise their own experience in deciding the question touching which the opinions were given.²

XLIII. Instructions to Jury.—In instructing the jury, the court cannot throw discredit upon the testimony of an expert,³ nor pronounce, as a matter of law, whether the testimony of an expert is entitled to greater weight than a non-professional witness upon the same subject.⁴

Ind. 539; *People v. Augsburg*, 97 N. Y. 501; *Brown v. American, etc., Ins. Co.*, 70 Iowa, 390; *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56.

1. *Congress, etc., Co. v. Edgar*, 99 U. S. 645; *Schwinger v. Raymond*, 105 N. Y. 648; *Gueting v. State*, 64 Ind. 94; *State v. Bailey*, 4 La. Ann. 376; *Von Valkenberg Von Valkenberg*, 90 Ind. 433; *Stone v. Chicago, etc., R. Co.*, 33 N. W. Rep. (Mich.) 24.

2. *Head v. Hargrave*, 105 U. S. 45; *Atchison, etc., v. Thul*, 32 Kan. 255; *Davis v. State*, 35 Ind. 496; *McGregor v. Armill*, 2 Iowa, 30; *Tatum v. Mohr*, 21 Ark. 349; *Chandler v. Barrett*, 21 La. Ann. 58.

They are not required by law to give greater weight to the testimony of experts than to other witnesses who state facts within their knowledge. It is for them to judge of the weight which each shall receive. *Sanders v. State*, 94 Ind. 147; *People v. Montgomery*, 13 Abb. Pr. (N. S.) (N. Y.) 207. Their credibility is tested by general rules. *Cuneo v. Bessoni*, 63 Ind. 524; *State v. Cole*, 63 Iowa, 695; *Epps v. State*, 102 Ind. 539. They are not bound by it, unless they believe it is true. *United States v. Molloy*, 31 Fed. Rep. 19.

3. *Templeton v. People*, 10 Hun (N. Y.), 357; *Eggers v. Eggers*, 57 Ind. 461. May not say such testimony should be received with caution. *Atchison, etc., R. Co. v. Thul*, 32 Kan. 255; s. c., 49 Am. Rep. 484; *Stone v. Chicago, etc., R. Co.*, 33 N. W. Rep. (Mich.) 24. Or was of very little value. *Eggers v. Eggers*, 57 Ind. 461. So, to say "the less experience a professional has, and less satisfactory the reasons for his opinion, the less weight should the opinion have." *Cuneo v. Bessoni*, 63 Ind. 524.

"The opinions of medical experts are to be considered by you in connection with all the other evidence in the case, but you are not bound to act upon them to the exclusion of all other evidence. Taking into consideration these opinions, and giving them just weight, you are to determine for yourselves, from the evidence, whether the

accused was, or was not, of sound mind, yielding him the benefit of a reasonable doubt, if such doubt arise." *Held*, not erroneous. *Goodwin v. State*, 96 Ind. 550. To say that the facts stated in a hypothetical case need not necessarily be always fully proven to give value to the testimony of an expert, is substantially a correct statement. *Epps v. State, supra*. To say that an expert's opinion is "authoritative, and in all doubtful cases" should control, is error. *Humphries v. Johnson*, 20 Ind. 190; *Spensley v. Lancashire Ins. Co.*, 62 Wis. 443.

Yet in one case an instruction was sustained to the effect that the law attached peculiar importance to the opinion of medical witnesses who have had opportunity of observation upon questions of mental capacity, where the issue was the insanity of an individual. *Flynt v. Bodenhamer*, 80 N. C. 205. See *Tinney v. N. J. Steamboat Co.*, 12 Abb. Pr. N. S. (N. Y.) 1.

Where the question was whether a signature had been forged, it was *held* proper to say that expert testimony on the subject was "of the lowest order of evidence, or evidence of the most unsatisfactory character. It cannot be claimed that it ought to overthrow positive and direct evidence of credible witnesses who testify from their personal knowledge, but it is most useful in cases of conflict between witnesses as corroborating witnesses." *Whitaker v. Parks*, 42 Iowa, 586. See *Pratt v. Rawson*, 40 Vt. 183; *United States v. Pendergast*, 32 Fed. Rep. 198; *State v. Townsend*, 7 Crim. L. Mag. 65, an insanity case.

4. *Sanders v. State*, 94 Ind. 147.

Pay of Experts.—In a number of cases it is *held* that an expert cannot be compelled to give his opinion unless he is compensated for it; and a refusal to testify unless compensated is not a contempt, although he may be compelled to testify concerning facts, as other witnesses are, without compensation. *Buchman v. State*, 59 Ind. 1; s. c., 26 Am. Rep. 75; 17 Alb. L. J. 242; *Dills v. State*, 59 Ind. 15; *Webb v. Page*, 1 C. & K. 23; *Parkinson v. Atkin-*

EXPERTS.—See EXPERT TESTIMONY.

EXPIRE.¹

EXPLICIT.²

EXPLORATION.³

EXPLOSIONS.

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| <p>I. General Rules as to Liability for Explosions, 517.</p> <p>II. Sale of Explosives, 518.</p> <p>III. Carriers, 518.</p> <p>IV. Master's Liability to Servant, 519.</p> <p>V. Rules governing Particular Explosives, 520.</p> | <p>1. <i>Illuminating-Gas</i>, 520.</p> <p>2. <i>Explosives used in Blasting</i>, 521.</p> <p>3. <i>Steam-Boilers</i>, 522.</p> <p>4. <i>Gunpowder</i>, 523.</p> <p>5. <i>Fire-Arms</i>, 523.</p> <p>6. <i>Fireworks</i>, 524.</p> |
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I. General Rules as to Liability for Explosions.—As a general rule, the true and only ground of liability for damage caused by an explosion occurring while the party sought to be charged is in the lawful possession or use of the thing exploding, is the want of ordinary care and skill in its management.⁴

son, 31 L. J. (N. S.) C. P. 199; Turner v. Turner, 5 Jur. (N. S.) 839; *In re Roelker*, Sprague, 276; People v. Montgomery, 13 Abb. Pr. (N. S.) 207; United States v. Howe, 12 Cent. L. J. 193.

Several other cases hold that they are not entitled to extra compensation. *Ex parte Dement*, 53 Ala. 389; *Summer v. State*, 5 Tex. App. 365. If paid, it cannot be taxed as cost unless authorized by statute. *Mask v. Buffalo*, 13 Reporter, 251. See *Haynes v. Mosher*, 15 How. Pr. (N. Y.) 216. Sometimes, in criminal cases, a statute authorizes it to be paid out of the public funds. Attorney-General, Petitioner, 104 Mass. 537.

Authorities.—Wharton, Greenleaf, Phillips, Starkie, Taylor, Best, Wood, and Abbott treat of the subject of expert and opinion evidence in a general way, in different parts of their works on evidence. Lawson on "Expert and Opinion Evidence," and Rogers on "Expert Evidence," contain a thorough examination of the subject. See article of Professor Washburn on experts in 1 Am. L. Review, 62. From a medical stand-point, see Wharton & Stiles (1882), Dean (1873), Elwell (1881), Elwell (1887), McClelland (1877), and Ordonaux (1869); Taylor (1883) on Medical Jurisprudence; Medico-Legal Papers (N. Y. 1874); Woodman & Tidy's Forensic Medicine and Toxicology (1877); Naquet's Legal Chemistry (1876); Ordonaux on Insanity (1878); Taylor on Poisons (1875); and Field's Medico-Legal Guide (1887).

1. Expiration, applied to an Estate for Years, may aptly enough signify the end of it, whatever way it be. Wrotesley v. Adams, Plowden, 198, a.

Expire in a Lease.—A lease for a term of years, under which the rent was payable

quarterly on certain days named, contained the following condition: "Provided, however, that if the lessee shall neglect to pay the rent as aforesaid, then this lease shall thereupon, by virtue of this express stipulation, expire and terminate; and the lessor may, at any time thereafter, re-enter said premises, and same possess as of his former estate." It was held that the terms "expire" and "terminate" were merely equivalent to the more common expression, "shall become void," and that the lease, by the non-payment of rent, did not become void, but only voidable at the option of the lessor. *Bowman v. Foot*, 29 Conn. 331.

2. In defining Proof, see CLEAR.

3. Under a general railroad law of New Jersey, by which license was given to enter upon lands or waters for the purpose of "exploring, surveying, levelling, and laying out the route of, and locating, any railroad" that it was proposed to construct under the act, it was held that a railroad company contemplating the construction of a railroad under the bed of the Hudson River could not enter upon the land of another for the purpose of sinking a shaft to the depth of sixty-five feet, with the intention, if no insuperable difficulty presented itself, of proceeding from the shaft to the construction of the tunnel, working it through the shaft. Said the court, "Though, in a certain sense, the shaft may be said to be an experimental work, and the enterprise tentative, it is obviously an abuse of language to term the work an exploration, within the meaning . . . of the general railroad law." *Morris & Essex R. R. v. Hudson Tun. Co.*, 25 N. J. Eq. 384.

4. "Ordinary care and skill" is a relative term, exacting a degree of vigilance

Legislative authority to a corporation or individual to do work for its or his profit does not carry with it authority to use, at the risk of others, highly explosive and dangerous materials, even though they be necessary for conveniently prosecuting the work; and if injury is caused by the use of such materials, the corporation or individual will be liable, even though it be shown that the work was performed in the most careful manner.¹

The mere keeping of explosives within the limits of a city, in violation of ordinance, will not render their owner liable for death caused by their explosion: negligence, or a common law nuisance, must be proved.² Failure to comply with a city ordinance regulating the use of explosives tends to show negligence.³

II. Sale of Explosives.—If a person sells goods, chattels, or machinery, which possess some concealed defect, or tendency to do harm, such as will, according to the probabilities of ordinary experience, do harm to innocent persons, he must respond in damages if such harm ensue without the intervention of the negligence or fault of others.⁴ A person selling an explosive to be resold, without giving information of its nature, is liable to a purchaser, without notice from his vendee, for damages from its explosion.⁵

III. Carriers.—A carrier is not liable, in the absence of negligence, for damage to adjacent property caused by the explosion of a dangerous substance received and transported in a package, the contents of which were unknown to the carrier.⁶

One who knowingly delivers an apparently harmless package,

and technical knowledge in proportion to the dangerous character of the substance dealt with, and requiring that a person shall take for the safety of others whatever precautions the nature of his employment suggests. *Thomp. Neg. chap. i. notes, §§ 11-13.*

Persons having in their custody instruments of danger should use them with the utmost care. *Dixon v. Bell, 5 Maule & S. 198.*

It is the duty of those who use hazardous agencies, to use them carefully, to adopt every known safeguard, and to avail themselves, from time to time, of every approved invention to lessen their danger to others. *Frankford, etc., Turnpike Co. v. Philadelphia, etc., R. Co., 54 Pa. St. 345.*

In the use of explosive machinery and substances involving the personal safety and lives of others, due care and diligence are nothing less than the most watchful care and the most active diligence. *Hadley v. Cross, 34 Vt. (5 Shaw) 586.*

1. *McAndrews v. Colliard, 42 N. J. L. 189; s. c., 36 Am. Rep. 508.*

2. *Fillo v. Jones, 2 Abb. Ct. App. Dec. (N. Y.) 121.*

3. *Devlin v. Gallagher, 6 Daly (N. Y.),*

494; *Koster v. Noonan, 8 Daly (N. Y.), 231.*

4. *Thomp. Neg. chap. iv. notes, § 2.*

The vendor of a gun, purchased to be used by purchaser and his sons, warranting it to be safe, is liable for injury to one of the sons from an explosion of the gun caused by its defective manufacture. *Langridge v. Levy, 2 Mee. & W. 519.*

One who sells a toy-pistol to a boy is liable to the boy's father for injury to him by its discharge while in the hands of a younger boy, who has picked it up from a place where the other boy has left it. *Binford v. Johnson, 82 Ind. 426; s. c., 42 Am. Rep. 508.*

5. Thus, where defendant sold naphtha, without notice, to a retailer whose purchaser was injured by its explosion, he was liable for the damage. *Wellington v. Downer Kerosene Oil Co., 104 Mass. 64.*

6. Thus, where a leaking package of nitro-glycerine, the contents of which were unknown to the carrier, was opened in the customary manner for examination as to the cause of the leakage, and exploded, the carrier was not liable for damage thereby caused to adjacent property. *Parrot v. Wells, Fargo & Co. (the Nitro-glycerine Case), 15 Wall. (U. S.) 524.*

containing a dangerous and explosive substance, to a carrier for transportation, without giving notice of its contents, is liable for damages caused by its explosion while the carrier is transporting it in ignorance of its contents, and with care adapted to its apparent nature.¹ He will be liable, not only to the carrier injured for want of such notice, but also for injuries to the carrier's servant.² But he will not be liable if he is ignorant of its character.³ He cannot be excused on the ground that the failure to give notice was the fault of his servant.⁴

Where the fumes of crude petroleum, carried in a tank on board a lighter used in the oil trade, escaped into a locker, which, on a night when the lighter lay at a pier with other vessels, with no watchman on board, was broken open by a thief, who, exploring with a lighted match, set fire to the gas, causing an explosion and fire which destroyed the lighter and another vessel, the owner of the lighter was not liable to the owner of such other vessel.⁵

IV. Master's Liability to Servant.—The servant assumes only the ordinary risk from explosions occurring in his employment. The master is liable for injury to him from unusual and unforeseen accident occurring through the negligence of the master, or of any one for whose conduct he is responsible.⁶

A laborer contracting to do blasting assumes the risk of per-

1. *Boston & A. R. Co. v. Shanly*, 107 Mass. 568; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 67.

Two substances, made by different manufacturers, were dangerously explosive in combination, and were ordinarily used together. A customer sent separate orders to the manufacturers for quantities of the respective substances, to be forwarded to him by a certain carrier, and directed one of them to make the substance which he was to furnish of higher explosive power than usual. The orders were filled, and the explosives delivered in apparently harmless packages to the carrier by the manufacturers, each of whom acted independently of the other, and was ignorant of the other's proceedings; and the carrier received no notice of the nature of the substances, or either of them. In the course of their careful transportation, having been stowed together, they exploded, injuring the property of the carrier, and of others in the carrier's possession, and also other property near which the vehicle was standing. The explosion was practically a single one, and it was impossible to ascertain how much of the damage was caused by either substance alone. *Held*, that the manufacturers, but not the customer, were jointly liable to the carrier and the third person respectively. *Boston & A. R. Co. v. Shanly*, 107 Mass. 568.

In an action of tort for injuries caused

to plaintiff by the explosion, in the vehicle of a common carrier, of substances which defendant had negligently delivered to plaintiff for transportation without notice of their dangerous qualities, an allegation that the injuries consisted in the destruction of "a certain building, and other property of great value belonging to the plaintiff," and situated near the place in which the vehicle was standing at the time of the explosion, is sufficiently definite as to damage. *B. & A. R. Co. v. Shanly*, 107 Mass. 568.

2. *Idem*.

3. *Brass v. Maitland*, 6 El. & Bl. 470.

4. *Barney v. Burstenbinder*, 7 Lans. (N. Y.) 210.

5. *Sofield v. Sommers*, 9 Ben. (U. S.) 526.

6. A slave employed by a railroad company as a section hand was directed by the company's agent to sleep in a certain house, which had (unknown to the company and to himself) an open keg of powder standing under a bed, placed there a day or two before, for temporary purposes, by a servant of a bridge contractor with the company: the slave was killed by explosion of the powder, caused, it was supposed, by fire from a torch carried by him. *Held*, that the company was chargeable with the negligence of the person who left the powder in such a position. *Allison v. Western N. C. R. Co.*, 64 N. C. 382.

sonal injury in the use of the ordinary appliances used in blasting, but not those risks attendant upon the use of an unusual, untested, and exceedingly dangerous article, which cannot be tamped without inevitable explosion, the dangerous quality of which is unknown to him.¹

The explosion of a defective boiler undergoing repair is not within the rule making the master liable to the servant for damage from defective machinery furnished for the servant's use.²

A railroad company is liable to the administrator of a fireman in its employ who was killed by the explosion of a boiler, caused by defects existing through the negligence of the foreman of the repair-shop.³

A laborer employed to remove hot slag from a furnace in proximity to water will not be presumed to know the dangers incident to the explosion sure to be caused by contact of the hot slag with the water, and he is entitled to notice of his danger.⁴

V. Rules governing Particular Explosives. — 1. *Illuminating-Gas.* — Gas-light companies are liable for damage caused by escaping gas, only on the ground of want of ordinary care and skill in its control.⁵ They are bound to use skill and diligence in conducting their operations, with reference particularly to explosions, proportioned to the nature of the business and its delicacy and difficulty.⁶ The law exacts of gas-light companies, in the care of an agency so dangerous, an active vigilance, and a frequent supervision of the districts through which their mains and pipes extend.⁷ If the

1. It is gross negligence to furnish to a laborer, for blasting, a new and dangerous explosive, without giving him information of its character, — whether the employer so furnishing is aware of its dangerous quality, or has failed to acquire information concerning it. *Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.) 151.

Where, in an action against a corporation by one of its laborers employed in blasting, for an injury caused by the premature discharge of a blast loaded with a newly invented powder, which he was directed to use by defendant's foreman or superintendent, the complaint alleged that the company furnished the powder for use in its ordinary and appropriate business; that its superintendent directed the use of such powder by plaintiff in such business; that it had never been used as an explosive in blasting, and was, in fact, unfit and unsafe for such use, and that plaintiff was ignorant of its dangerous properties, — a cause of action is stated. *Idem.*

Where, at the commencement of a servant's employment, ordinary blasting powder is used, and subsequently giant powder is substituted without information to him as to its proper use, the relation of master and servant does not absolve his employer from liability for injury to him from the

use of the giant powder. *Smith v. Oxford Iron Co.*, 42 N. J. L. 467; s. c., 36 Am. Rep. 537.

2. Where, in an action by a servant against his master for damages for injuries caused by the explosion of a boiler, plaintiff introduced evidence without objection, that there was no such fusible safety plug on the boiler as the statute required; and evidence of a custom among engineers not to use such plug was excluded; and the court instructed the jury that if the defendant knowingly used the boiler without the plug, and the want of it caused the accident, plaintiff was entitled to recover; and refused to instruct that if defendant used all of the appliances for safety ordinarily used in such establishments, he was not liable, — there was no error. *Cayzer v. Taylor*, 10 Gray (Mass.), 274.

3. *Stevenson v. Jewett*, 16 Hun (N. Y.), 210.

4. *McGowan v. The La Plate M. & S. Co.*, 3 McCrary, C. Ct. 393.

5. *Holly v. Boston Gas-Light Co.*, 8 Gray (Mass.), 123; *Hutchinson v. Boston Gas-Light Co.*, 122 Mass. 219.

6. *Chisholm v. Atlantic Gas-Light Co.*, 57 Ga. 28.

7. *Thomp. Neg.* chap. i. notes, § 11. Thus, a company will be liable for injury

company negligently, and in breach of its contract, allow gas to escape in a cellar, it is liable for an explosion caused by the entrance of a third person with a lighted candle.¹

A workman sent by the company to repair a leak caused by the tenant's negligence, is the servant of the company, not of the tenant; and the former is liable, where the explosion is caused by his incompetence or negligence, even if the repairing was gratuitously done.² But if the workman has left the company's employ, and is merely permitted by it to do the work at the consumer's request, the company is not liable.³

One who knows that gas has accumulated underground near a sewer or in a cellar, and who, nevertheless, goes near it with a light, is guilty of such contributory negligence that he cannot recover for injuries sustained from an explosion occurring thereby.⁴ In such a case it will be presumed that such person knew of the explosive character of ordinary illuminating-gas.⁵

The owner of a house cannot maintain an action against a gas company for an injury to his reversionary interest, caused by the negligence of the company in permitting gas to escape into the house, if the immediate cause of the injury was the explosion of the gas by the negligence of the tenant in possession.⁶

A municipality is not liable to a person injured by explosion of gas in a covered manhole constructed in a street by a private corporation which had acquired the right to lay steam-pipes in the streets, subject to municipal regulations, in the absence of any thing showing that proper precautions were not taken.⁷ (See GAS COMPANIES.)

2. *Explosives used in Blasting.*—Persons engaged in blasting

from an explosion in a main which had been leaking for several days, although it sent a man to repair it upon receiving notice, he having arrived too late. *Mose v. Hastings, etc., Gas Co.*, 4 Fost. & Fin. 324.

In an action against a gas company for negligently allowing the escape of gas from its main into premises where lights were known to be burning,—the gas having found entrance through an open window nearly level with the trench from the main for the insertion of the service-pipe,—it was held to be a question for the jury, whether the company's men might reasonably have foreseen it, and were bound to have the window closed. *Blenkiron v. Great Central Gas Co.*, 2 Fost. & Fin. 437.

1. A gas-pipe having, by the negligence of defendant, been broken, so that the gas escaped into plaintiff's cellar, and plaintiff having discovered that there was a leakage, and having called in a plumber to ascertain where it was, and the plumber having entered the cellar with a lighted candle, whereby an explosion was caused, held that plaintiff was not responsible for the plumb-

er's negligence, and could recover from defendant. *Schermerhorn v. Metropolitan Gas-Light Co.*, 5 Daly (N. Y.), 144.

The negligent act of a gas company's agent in turning off the gas from plaintiff's premises in such manner that when plaintiff's wife went into the cellar with a lighted candle an explosion occurred, was the proximate and necessary cause of the injury, and the company was bound for his negligence. *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432.

2. *Lannen v. Albany Gas-Light Co.*, 44 N. Y. 459, affirming s. c., 46 Barb. (N. Y.) 264.

3. *Flint v. Gloucester Gas-Light Co.*, 3 Allen, 343; 9 Allen, 552.

4. *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1; *Lanigan v. New York Gas-Light Co.*, 71 N. Y. 29.

5. *Lanigan v. New York Gas-Light Co.*, 71 N. Y. 29.

6. *Bartlett v. Boston Gas-Light Co.*, 117 Mass. 533.

7. *Hunt v. New York (N. Y.)*, 20 Am. & Eng. Corp. Cas. 380.

are bound to give notice in season to those who may be reasonably expected to be within range of the explosion; and in the absence of such notice, if any one is injured, the question of negligence is for the jury.¹

The owner of land blasting rocks thereon, so as to cast them upon another's premises and cause injury, is liable for the damage so occasioned, whether negligent in blasting, or not.² Injury from blasting to a house near by raises a presumption that the blast was not properly covered.³ That defendant superintended the blasting makes him *prima facie* liable.⁴ Failure to take precautions required by city ordinance fixes *prima facie* liability.⁵ A written notice sent to an adjacent owner of intention to blast fixes *prima facie* sender's liability to such owner for damages thereafter caused by blasting done upon sender's premises.⁶

Damages caused by blasting in the construction of a railroad are assessable under the statute as for land taken or damaged;⁷ but an action of tort will lie for damages not necessarily incident to such blasting, as where the company fails to remove loose rocks or stones which have been cast upon adjacent lands.⁸

A city is not liable where the blasting is done in a street by an independent contractor;⁹ nor a railroad company, where it is done on the right of way, and in the construction of the road by an independent contractor.¹⁰

An action for damages for injuries to a house caused by blasting upon adjacent premises may be brought either by the tenant or the owner, — the former, for injury to his possession;¹¹ the latter, for damage to his property.¹²

3. *Steam-Boilers.* — One who erects upon his premises a steam-

1. Driscoll v. Newark, etc., Co., 37 N. Y. 637.

A corporation blasting rocks with sand-blasts on its own land, forty feet below the surface, must warn persons passing over the land by a foot-path long used. *Idem*.

In an action for injury sustained by a passer on a highway on the lands of the A. Mining Company, by being struck by a stone hurled by the blasting of the B. Mining Company, evidence of an agreement between the companies that each might throw rocks on the other's adjacent premises in blasting is incompetent. *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163; s. c., 45 Am. Rep. 30.

2. Hay v. The Cohoes Co., 2 N. Y. 159; *Colton v. Onderdonk*, 69 Cal. 155.

3. Ulrich v. McCabe, 1 Hilt. 251.

Experts may be asked whether a blast, covered as prescribed by ordinance, could have thrown rocks a certain distance, equivalent to that at which the injury was done. *Koster v. Noonan*, 8 Daly (N. Y.), 231.

In an action for injury to plaintiff while passing along a highway, caused by defend-

ant's negligence in blasting without covering the mine, defendant cannot answer that the profits of the business do not warrant the expense of such covering. The question of its necessity is for the jury to determine. *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163; s. c., 45 Am. Rep. 30.

4. *Hardrop v. Gallagher*, 2 E. D. Smith, 523.

5. *Devlin v. Gallagher*, 6 Daly (N. Y.), 494.

6. *Gourdier v. Cormack*, 2 E. D. Smith, 200.

7. *Dodge v. County Comrs.*, 3 Metc. (Mass.) 380; *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208; *Sabin v. Vermont, etc., R. Co.*, 25 Vt. 363.

8. *Sabin v. Vermont, etc., R. Co.*, 25 Vt. 363.

9. *Pack v. New York*, 8 N. Y. 222.

10. *McCafferty v. Spuyten Duyvil, etc., R. Co.*, 61 N. Y. 178; *Edmundson v. Pittsburgh, etc., R. Co. (Pa.)* 3 East. Rep. 697.

11. *Ulrich v. McCabe*, 1 Hilt. (N. Y.) 251.

12. *Gourdier v. Cormack*, 2 E. D. Smith (N. Y.), 200; *Hardrop v. Gallagher*, 2 E. D. Smith (N. Y.), 523.

boiler, having in it no defect known to him, or which is discernible by the application of known tests, and who operates it with skill and care, is not liable to an adjacent proprietor for damages caused by its explosion.¹ The fact that defendant purchased the boiler of a reputable manufacturer tends to a justification, although not in itself conclusive.² The mere fact of the explosion is not evidence of negligence.³ One not the owner of the building where the boiler is set up, who experiments with the machinery it runs, is liable to the owner of an adjacent building which is injured by an explosion caused by mismanagement by his servants, together with defects in the materials composing the boiler.⁴

The manufacturer and vendor of a steam-boiler is liable to the purchaser, only for defective materials, or for any want of care and skill in its construction; and if, after delivery and acceptance, and while in use by the purchaser, an explosion occurs in consequence of such defective construction, to the injury of a third person, the latter has no cause of action against the manufacturer.⁵ The certificate of the government boiler inspector will not exonerate the owner from liability.⁶

4. *Gunpowder*. — The careless or negligent keeping of gunpowder in large quantities, and in or near dwelling-houses, or where the lives of persons are endangered thereby, is a nuisance at common law, and indictable as such.⁷ Great care and skill are required in the transportation of gunpowder.⁸ One who sells gunpowder to a young child, knowing him to have no experience or knowledge concerning its use, is liable for injuries to him from its explosion.⁹

5. *Fire-Arms*. — A very high degree of care is required from all persons using fire-arms in the immediate vicinity of others, no matter how lawful, or even necessary, such use may be.¹⁰

1. *Losee v. Buchanan*, 51 N. Y. 476; *Marshall v. Wellwood*, 38 N. J. L. 339.

2. *Losee v. Buchanan*, 51 N. Y. 476.

But where the circumstances are such that the owner is properly chargeable with defects which cause the explosion, he cannot hide behind the opinion of his vendor that the boiler was sufficient. *Spencer v. Campbell*, 9 Watts & S. (Pa.) 32.

3. *Young v. Bransford*, 12 Lea (Tenn.), 232. But it has been held that the explosion of a steamboat boiler is of itself sufficient to charge the owner with negligence. *Fay v. Davidson*, 13 Minn. 523.

4. *Witte v. Hague*, 2 Dow. & Ry. 33.

5. *Losee v. Clute*, 51 N. Y. 494.

6. *Swarthout v. New Jersey Steamboat Co.*, 48 N. Y. 209, affirming s. c., 46 Barb. 222; *Erickson v. Smith*, 2 Abb. Ct. App. Dec. (N. Y.) 64.

7. *Bradley v. People*, 56 Barb. (N. Y.) 72; *People v. Sands*, 1 John. (N. Y.) 78; *Myers v. Malcolm*, 6 Hill. (N. Y.) 292.

On the trial of such an indictment, proof

as to the manner of constructing arsenals is incompetent to show defendant's duty in keeping his powder. *Bradley v. People*, 56 Barb. (N. Y.) 72.

Whether a powder magazine is a nuisance *per se* is for the jury to determine, from the locality, the amount of powder stored, and from all the surrounding circumstances. *Heeg v. Licht*, 80 N. Y. 579; reversing s. c., 16 Hun (N. Y.), 257; *Heeg v. Licht*, 80 N. Y. 579; s. c., 8 Abb. N. Cas. (N. Y.) 355; s. c., 36 Am. Rep. 654.

8. In an action to recover for injuries sustained by plaintiff in consequence of the negligence of defendant in carrying gunpowder through the streets, evidence is competent to show that defendant submitted the powder for examination to experts familiar with its use in blasting, and was told by them that it was useless for explosive purposes, and that his action was governed by such advice. *Furth v. Foster*, 7 Rob. (N. Y.) 484.

9. *Carter v. Towne*, 98 Mass. 567.

10. *Shearman & Redfield*, Neg. § 587.

One handling a fire-arm is liable for injuries resulting from its accidental discharge,¹ unless the injury was inevitable, and utterly without fault on the part of the alleged wrong-doer.²

Officers commanding the militia at musters are liable for injuries to citizens caused by firing by the soldiers.³

One who has been washing a gun, and discharges it for the purpose of drying, is liable for injury caused by the fright of a horse at the report.⁴

The master of a steamboat is liable for injury from the discharge of a gun from the steamer, in his presence, and by his command.⁵

6. *Fireworks*.—The act of exploding fire-crackers in street of a city is wrongful and unlawful, and if injury to person or property results therefrom, the wrong-doer is liable therefor.⁶

Trespass and assault will lie for originally throwing a squib, which, after having been thrown about in self-defence by others, at last put out plaintiff's eye.⁷

The president of a political club who orders a display of fireworks in the street in front of a public building in which a meeting of the club is being held, the fireworks being paid for by individual subscriptions, is liable for injury caused by their explosion.⁸

In an action to recover damages for injury from a rocket fired by defendant while a political procession was passing, evidence that both plaintiff and defendant were members of a club which got up the procession, and published notices calling on citizens to illuminate their houses when the procession should pass, is inadmissible.⁹

To stand in a street watching an exhibition of fireworks is not such contributory negligence as will bar recovery for injury from a Roman candle.¹⁰

The authority given to a city by its charter to prohibit or remove any nuisance, or to prohibit the manufacture or sale of fireworks, is discretionary; and an action cannot be maintained against it for injuries caused by the explosion of a fireworks manufactory which had been established in the city for some time.¹¹

1. *Chataigne v. Bergeron*, 10 La. Ann. 699; *Underwood v. Hewson*, 1 Strange, 596; *Morgan v. Cox*, 22 Mo. 373.

One who owns a loaded gun, and sends a young child to fetch it, with directions to take out the priming, is liable to one injured by the child's pointing the gun at him, and discharging it by pulling the trigger. *Dixon v. Bell*, 5 Maule & S. 198.

To draw and present a loaded pistol with intention to use it, in a room containing many persons, is such gross recklessness as to render the person so doing liable to one injured by its discharge, though he is not the one with whom defendant was quarrelling, nor the one whom he intended to injure. *Chiles v. Drake*, 2 Met. (Ky.) 146.

2. *Morgan v. Cox*, 22 Mo. 373.

3. *Moody v. Ward*, 13 Mass. 299; *Castle v. Duryee*, 2 Keyes (N. Y.), 169.

If one trained soldier wound another in skirmishing for exercise, an action of trespass will lie, unless it shall appear that the defendant was guilty of no negligence, and that the injury was inevitable. *Weaver v. Ward*, Hob. 134.

4. *Cole v. Fisher*, 11 Mass. 137.

5. *Rhodes v. Roberts*, 1 Stew. (Ala.) 145.

6. *Conklin v. Thompson*, 29 Barb. (N. Y.) 218.

7. *Scott v. Shepherd*, 2 Black. W. 892.

8. *Jenne v. Sutton*, 43 N. J. L. 257; s. c., 39 Am. Rep. 578.

9. *Fisk v. Wait*, 104 Mass. 71.

10. *Bradley v. Andrews*, 51 Vt. 530.

11. *McDade v. City of Chester* (Pa. 1888), 20 Am. & Eng. Corp. Cas. 440.

EXPORT.¹

EX POST FACTO LAWS.—See also TITLES; CONSTITUTIONAL LAW; RETROACTIVE LAWS.

I. Definition, 525.

II. Classes of Ex Post Facto Laws, 526.

III. Classes of Laws not Ex Post Facto, 529.

IV. The Power to enact Ex Post Facto Laws, 532.

I. Definition.—An *ex post facto* law is one which is enacted after the offence has been committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage.²

1. To carry Out of a Port.—By 35 Vict. c. xiii. commissioners are empowered to levy dues of one penny per ton on "coals exported from the port." It was *held* that there being "nothing in the language of the act to show that the word 'export' was used in any other than its ordinary sense, namely, 'carried out of the port,' . . . coals carried away from the port, not on a temporary excursion, as in a tug or pleasure-boat, which intends to return with more or less of the coals on board, and which may be regarded as always constructively within the port, but taken away for the purpose of being wholly consumed beyond the limits of the port," must be considered as coals exported within the meaning of the act. *Muller v. Baldwin*, L. R. 92, B. 457.

To carry Out as an Article of Trade.—A statute of Delaware provided that if any person should "unlawfully export a slave from the State," the slave should become free. It was *held* that "the true meaning of the term 'export' in this connection, is the taking or carrying out as an article of trade or merchandise. It is a mercantile term. If a man carry his slave as a body-servant for his own use, and bring him back, it is not exporting." *State v. Turner*, 5 Harr. (Del.) 501.

To carry to a Domestic Port.—The British Parliament has, upon various occasions, used the word "exportation" in a sense less extensive than the exporting of commodities to foreign ports or places, and in the more restricted sense of carrying commodities from one port to another within the kingdom. *Barrett v. Stockton & Darlington R. Co.*, 2 Man. & Gr. 163; affirmed 3 Man. & Gr. 956; affirmed 11 Cl. & F. 590. As used in inspection laws of Pennsylvania, the word "exportation" was *held* to include the carrying of merchandise from a port within the State to a port in another State of the Union. *Shuster v. Ash*, 11 Serg. & R. (Pa.) 90; *Commonwealth v. King*, 1 Whart. (Pa.) 488.

¹ *Exports in Art. 1, sect. 10, cl. 2, of the Constitution.* See CONSTITUTIONAL LAW.

Merchant Exporter.—A license for the exportation of gunpowder was granted by the British Government on petition of A. B. on behalf of himself and others, on condition that the "merchant exporter" should give a certain security therein mentioned. A. B., the manufacturer of the gunpowder, sold it to C. D., and contracted to deliver it free on board a ship. It was *held* that the condition of the license was not complied with by A. B.'s giving the required security, he not being the "merchant exporter" within the meaning of the license. *Camelo v. Britten*, 4 B. & Ald. 184.

Period of Exportation.—Under the Act of Congress of March 3, 1851, which required the custom-house appraisers to ascertain the market value of the import "at the period of the exportation to the United States" where A. entered into a contract with T. & Co. for the transportation of iron from Wales to the United States, in pursuance of which, T. & Co. employed coasting-vessels to carry it from Wales to Liverpool, where it was transhipped on board their packets for Boston, it was *held* that the "period of exportation" at which the market value was to be ascertained, was the time when the iron left Liverpool. "The natural meaning of the words 'period of exportation' is," said the court, "termination of exportation. The period of exportation is that point of time when the act of exportation is complete. The subject-matter of the statute is the appraisal of goods exported from a foreign country, and imported into the United States; so that the inquiry in this case is, At what point of time was the act of exportation of this merchandise from the foreign country, England, complete? My opinion is, when it left Liverpool. Its transportation coastwise from one English port to another was not an exportation, from England." *Forman v. Peaslee* (U. S. C. C.), 11 Monthly Law Rep. N. S. 273; *Sampson v. Peaslee*, 20 How. (U. S.) 571.

² See *Kring v. Missouri*, 107 U. S. 221; s. c., 45 Am. Rep. 541; s. c., 4 Crim. L.

II. Classes of Ex Post Facto Laws. — *Ex post facto* laws are commonly classed as follows: ¹ —

1. Laws that make an act done before the passing of the law, and which was innocent when done, criminal, and punish such act.²

Mag. 550; s. c., 16 Cent. L. Jour. 308; United States v. Hall, 2 Wash. (U. S.) 366.

"An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed." Fletcher v. Peck, 6 Cranch (U. S.), 87; Sedg. on Stat. and Const. L. (2d ed.) 558; 1 Kent. Com. 409.

"A statute substantially imposing punishment for a previous act which, without the statute, would not be so punishable, is an *ex post facto* law." Moore v. State, 43 N. J. L. 203; s. c., 39 Am. Rep. 558; s. c., 2 Crim. L. Mag. 220, 376.

Looking at the natural signification of the constitutional words *ex post facto*, after the fact, and in the main at the actual adjudications, the meaning is abundantly plain and certain. According to which an *ex post facto* law is one making punishable what was innocent when done, or subjecting the doer to a heavier penalty than was then provided." 1 Bish. Cr. Law (7th ed.), sect. 281.

For other definitions, see Strong v. State, 1 Blackf. (Ind.) 196; Ratzky v. People, 29 N. Y. 124; Shepherd v. People, 23 How. Pr. (N. Y.) 337; Cummings v. Missouri, 4 Wall. (U. S.) 325; Calder v. Bull, 3 Dall. (U. S.) 386.

1. The classification of the first four classes was given originally in the leading case of Calder v. Bull, 3 Dall. (U. S.) 386. It has since been approved in many cases. State v. Bond, 4 Jones, L. (N. Car.) 9; Dickinson v. Dickinson, 3 Murphy (N. Car.), 327; s. c., 9 Am. Dec. 608; *Ex parte* Bethurum, 66 Mo. 295; Murray v. State, 1 Tex. App. 417; Dawson v. State, 6 Tex. 347; Boston v. Cummins, 16 Ga. 102; Davis v. Ballard, 1 J. J. Marsh. (Ky.) 563.

For criticisms on this classification, see Bouv. L. Dict.; 1 Bish. Cr. Law (7th ed.), sect. 281; State v. Johnson, 12 Minn. 378; Moore v. State, 43 N. J. L. 203; s. c., 39 Am. Rep. 558.

2. Commonwealth v. Edwards, 9 Dana (Ky.), 447; s. c., 5 Cr. Law Mag. 332.

A statute making the principal liable for an unauthorized sale of liquors by the agent was declared *ex post facto* as to past offences. State v. Bond, 4 Jones, L. (N. Car.) 9.

A law imposing a penalty for a failure to pay over money is void as to past failures. Woodruff v. State, 3 Pike (Ark.), 285.

A person cannot be made liable for damages for a breach of a contract void

at the time. Eno v. Mayor, 53 How. Pr. (N. Y.) 382.

The trustees of a town discontinued a road in 1813. In 1816 a house was built on the old roadway, after which the legislature declared it a public highway. It was held that the builder of the house could not be held guilty of maintaining a nuisance. People v. Lawson, 17 Johns. (N. Y.) 277.

An act of the legislature, which provided "that it shall be unlawful for any person, except physicians or surgeons, to engage in the practice of dentistry, unless such person has graduated and received a diploma from the faculty of a reputable institution where this specialty is taught, or shall have obtained a certificate from a board of examiners duly appointed and authorized by the provisions of this act to issue such a certificate," and which excepted from its operation those who had been in continuous practice for three years, was held void in its application to persons practising dentistry at the time of its passage, who had not been so engaged for three years prior to the passage of the act. Commonwealth v. Wasson, 12 Pitts. L. J. 434; s. c., 3 Crim. L. Mag. 726. Compare Fox v. Territory, 2 Wash. Ty. 297.

Test Oaths. — The test oaths of past loyalty to the government required of attorneys, teachers, ministers, and others, in some States at the close of the civil war, were void both as punishing what was not so punishable before, and as changing the rules of evidence by shifting the burden of proof. *Ex parte* Garland, 4 Wall. (U. S.) 333; Cummings v. Missouri, 4 Wall. (U. S.) 333; s. c., 6 Am. L. Reg. 394; *In re* Murphy, 41 Mo. 339; State v. Adams, 44 Mo. 570; State v. Heighland, 41 Mo. 388. Compare Cohen v. Wright, 22 Cal. 293; *Ex parte* Yale, 24 Cal. 241; State v. Garesche, 36 Mo. 256; *Ex parte* Quarrier, 4 W. Va. 210; *Ex parte* Hunter, 2 W. Va. 122; 6 Am. L. Reg. 410.

A similar test oath required of persons who sought to review judgments taken against them by default during the civil war, was declared void. Pierce v. Carskadon, 16 Wall. 234, overruling Peerce v. Carskadon, 4 W. Va. 234.

Retrospective laws affecting the qualification to hold public office have been declared valid. State v. Echeveria, 33 La. Ann. 709; State v. Woodson, 41 Mo. 227.

Test oaths of past loyalty as pre-requisites to the exercise of the elective fran-

2. Laws that aggravate a crime, or make it greater than it was when committed.¹

3. Laws which change the punishment, and inflict a greater punishment than the law annexed to the crime when committed.²

4. Laws that alter the legal rules of evidence, and receive less or different testimony than the law required at the time of the commission of the offence in order to convict the offender.³

chise have been upheld. *State v. Neal*, 42 Mo. 119; *Blair v. Ridgeley*, 41 Mo. 63; *Randolph v. Good*, 3 W. Va. 551; *Sedgw. Stat. & Const. Law* (2d ed.), 558. *Compare* *Gotchens v. Matheson*, 58 Barb. (N. Y.) 152; *Green v. Shumway*, 39 N. Y. 418; *Anderson v. Baker*, 23 Md. 531; *Rison v. Farr*, 24 Ark. 161; *Davies v. McKeeby*, 5 Nev. 369.

1. See 5 Crim. L. Mag. 333.

2. *Murray v. State*, 1 Tex. App. 417; *Maul v. State*, 25 Tex. 166.

A statute which changes the penalty for failure to ring a locomotive bell at crossings from fifty dollars absolutely to any sum not exceeding a hundred dollars is *ex post facto* as to past offences. *Wilson v. Ohio*, etc., Ry., 64 Ill. 542.

A law which provides that prisoners sentenced to be hanged shall pass a year in the penitentiary at hard labor before the infliction of such penalty has been pronounced *ex post facto* in its application to crimes committed before it took effect. *In re Petty*, 22 Kan. 334. See also *Hartung v. People*, 22 N. Y. 105; s. c., 26 N. Y. 167.

A law changing the punishment for murder from death or imprisonment for life to be fixed by the jury to death, the penalty to be pronounced by the court upon a verdict of guilty, is an *ex post facto* law as to offences committed before its passage. *Marion v. State*, 16 Neb. 349; s. c., 20 Neb. 236.

Costs.—A law increasing the costs on conviction of an offence, is void as to offences committed prior to its passage, though the trial and conviction take place thereafter. *Caldwell v. State*, 55 Ala. 133.

3. *Strong v. State*, 1 Blackf. (Ind.) 193; *Dawson v. State*, 6 Tex. 347; *Cooley's Const. Lim.* 265; *Sedgw. Stat. & Const. Law*, 557; *Story on Const.* 1345.

A statute which provided that a party to an action might move for the production of books and papers by the other party, and that upon his setting forth in his motion what he expected to prove by such books and papers, and the failure of the other party to comply with the order, the allegations of the motion might be taken as true, was held to be an *ex post facto* law as to past offences. *United States v. Hughes*, 8 Ben. (U. S.) 29.

A law allowing a conviction for stealing a "horse" on proof of the conviction of a gelding only, was amended by using the word "horse" in the generic sense. It was held that the amended law could not be applied in a trial for an offence committed under the old law. *Valesco v. State*, 9 Tex. App. 77.

A statute making indirect evidence proof of the commission of a crime which formerly could be proved by direct evidence only, was held *ex post facto* as to crimes committed before its passage. *State v. Johnson*, 12 Minn. 378.

Where a statute prohibiting a conviction on the uncorroborated testimony of an accomplice, was so changed as not to apply to trials for misdemeanors, it was held that the change did not apply to misdemeanors committed before the change was made, because such an application would make the law *ex post facto*. *Hart v. State*, 40 Ala. 32.

A statute providing that "where property is owned in common or jointly by two or more persons, the ownership may be alleged to be in either or all of them," was held to be "an innovation upon the rules of practice and evidence as they existed before its adoption," and to permit "different testimony to sustain a conviction than would have been held sufficient for that purpose under pre-existing laws." Consequently the law was declared inoperative as to offences committed before its passage. *Calloway v. State*, 7 Tex. App. 585; *Hannahan v. State*, 7 Tex. App. 664.

A provision in a State constitution which required a person, before officiating as a clergyman, to make oath that he had not done certain things before the adoption of the constitution, was declared to change the rules of evidence, and to assume guilt instead of innocence, and to be, therefore, an *ex post facto* law as to past offences. *Cummings v. State*, 4 Wall. (U. S.) 277. See note on Test Oaths, this title.

A statute providing that "in all questions affecting the credibility of a witness, his general moral character may be given in evidence," is merely a rule of practice, and not an *ex post facto* law as to crimes committed before the passage. *Robinson v. State*, 84 Ind. 452.

5. To the above may be added a fifth class, including some exceptional cases: laws that in relation to the offence or its consequences alter the situation of the party to his disadvantage.¹

1. A prisoner was convicted of murder in the first degree, and the judgment of condemnation was affirmed by the Supreme Court of Missouri. A previous sentence pronounced on his plea of guilty of murder in the second degree, and subjecting him to imprisonment for twenty-five years, had on his former appeal been reversed and set aside. By the law of Missouri in force when the homicide was committed, this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered, the law was changed, so that if a judgment on that plea be lawfully set aside, it shall not be *held* to be an acquittal of the higher crime. It was *held* that the new law was *ex post facto* as to this case, and that the prisoner could not be again tried for murder in the first degree. *Kring v. Missouri*, 107 U. S. 221; s. c., 45 Am. Rep. 541; s. c., 16 Cent. L. Jour. 308; 4 Crim. L. Mag. 550.

A statute enabled any person indicted for murder to avoid all risk of a capital sentence by pleading guilty. Under a subsequent statute the death penalty might be imposed notwithstanding a plea of guilty. It was *held* that the latter statute was *ex post facto* as to offences committed while the former statute was in force. *Garvey v. People*, 6 Col. 559; s. c., 45 Am. Rep. 531; s. c., 4 Crim. L. Mag. 715.

Statutes of Limitation.—A statute authorizing the punishment of a person for an offence previously committed, and as to which all prosecution and punishment were at its passage already barred, according to pre-existing statutes of limitation, is unconstitutional. *Moore v. State*, 43 N. J. L. 203; s. c., 39 Am. Rep. 558; s. c., 24 Alb. L. J. 306; s. c., 2 Crim. L. Mag. 376; *State v. Sneed*, 25 Tex. Supp. 66; *Woart v. Winnick*, 3 N. H. 473. Compare *Bish. Stat. Crimes*, sect. 180.

Where a statute extends the time of limitation for the prosecution of an offence, a defendant in whose favor the original time of limitation had not fully run at the passage of the act, may be indicted within the newly established time, although the original time has run at the time of finding the indictment. *Commonwealth v. Duffy*, 96 Pa. St. 506; s. c., 39 Am. Rep. 577; s. c., 2 Crim. L. Mag. 230; *State v. Miller*, 4 N. J. L. J. 252. Compare *People v. Lord*, 12 Hun (N. Y.), 282.

Statutes of limitation have no *ex post facto* operation, but time begins to run when the statute goes into effect. *Martin v. State*, 24 Tex. 61.

Amnesty.—One who has been pardoned under an amnesty act is not made liable to prosecution for past offences by the repeal of the act. *State v. Keith*, 63 N. Car. 140.

Like Cases.—Where a person was convicted of crime by a court-martial at a time when he was subject to be tried before civil tribunals only, and afterwards Congress passed a law seeking to validate such convictions, the law was declared *ex post facto*. *In re Murphy*, 1 Woolw. (U. S.) 141.

A statute provided that where in punishment of crime a fine only was assessed, the defendant might stay execution by putting in replevin bail, and that thereafter he should not be subject to arrest. An amendment of the law to the effect that upon failure of the defendant to pay the fine at the expiration of the time for which bail was given, he might be arrested, was *held* void as to cases where replevin bond had been given before the law took effect. *Dinckerlocker v. Marsh*, 75 Ind. 548.

Slaves.—Upon the abolition of slavery in the South, the former slaves were not punishable for past crimes under the special laws applicable to slaves on account of the change in their *status*, nor were they punishable under the laws applicable to white persons and freedmen, for the reason that they were slaves at the time of the commission of the offences. *Burt v. State*, 39 Ala. 617; *Nelson v. State*, 39 Ala. 667; *George v. State*, 39 Ala. 675. But such persons were liable to punishment for offences committed after they became freedmen, although the laws applicable to freedmen were enacted while they were slaves. *Eliza v. State*, 39 Ala. 693; *Witherby v. State*, 39 Ala. 702; *Ferdinand v. State*, 39 Ala. 706.

New Court.—If there is no court of competent jurisdiction to try an offence at the time it is committed, a statute erecting such a court afterwards is *ex post facto* as relates to the previous offence. *United States v. Starr*, 1 Hempst. (U. S.) 469; *State v. Dunkley*, 3 Ired. L. (N. Car.) 116. But an act reviving the jurisdiction of a superior court is not *ex post facto* in its application to offences committed during the time an inferior court had exclusive jurisdiction to try them. *State v. Sullivan*, 14 Rich. (S. Car.) 281; *State v. Shumpert*, 1 Rich. (S. Car.) U. S. 85; *State v. Moore*, 15 Rich. (S. Car.) 57; *Commonwealth v. Phillips*, 11 Pick. (Mass.) 28.

. **Classes of Laws not Ex Post Facto.** — The application of the *ex post facto* is limited to laws punishing crimes and imposing penalties.¹

According to some authorities, any change in the manner of punishing a crime which does not consist in remitting some separate part of the punishment, and which is not referable to prison discipline or penal administration, renders a law *ex post facto* as to offences;² but the prevailing doctrine appears to be, that a

Hoodgood v. Cammack, 5 Stew. & a. 276; *Aldridge v. Tuscumbia*, etc.,

Stew. & P. (Ala.) 199; *Holman v. of Norfolk*, 12 Ala. 369; *Taylor v. nor*, 1 Ark. 21; *Wilder v. Lumpkin*,

208; *Tucker v. Harris*, 13 Ga. 1; *v. Squires*, 26 Ia. 340; *Baughner v. n*, 9 Gill (Md.), 299; s. c., 52 Am.

94; *Anderson v. Baker*, 23 Md. 531; *n v. Hardesty*, 1 Md. Ch. 66; *Ex*

Bethurum, 66 Mo. 545; *Moore v. 43 N. J. L.* 203; s. c., 39 Am. Rep.

Suydam v. Bank of New Brunswick, Ch. (N. J.) 114; *Rich v. Flanders*, 39

304; *Dash v. Van Kleeck*, 7 Johns.) 484; s. c., 5 Am. Dec. 291; *Burch*

wbury, 10 N. Y. 374; *Municipality v. ler*, 10 La. Ann. 745; *Henderson*, etc.,

. *Dickerson*, 17 B. Mon. (Ky.) 173; 6 Am. Dec. 148; *Grim v. School Dis-*

57 Pa. St. 433; *Commonwealth v. , 6 Binn. (Pa.)* 266; *Evans v. Mont-*

y, 4 W. & S. (Pa.) 218; *Minge v. ur*, 1 Car. L. Repos. 34; *Evans v.*

son, 1 Car. L. Repos. 209; *Albee v. 2 Paine (U. S.)*, 74; *Watson v. Mer-*

Pet. (U. S.) 88; *Carpenter v. Penn-*

ia, 17 How. (U. S.) 456; *Ogden v. lers*, 12 Wheat. (U. S.) 213, 266; *Ex*

Mayer, 27 Tex. 715.

: limitation of the term *ex post facto*

laws has been criticised. See

t v. Lyell, 3 Call (Va.), 268; *Deim v. rap*, Cox (N. J.), 272; *Story*, Const.

345; *Sedgwick*, Stat. & Const. L. 557.

aw may be *ex post facto* though it does

clare the forbidden act to be criminal.

ufficient that it imposes a personal or

ary penalty or deprives of a valuable

McCowan v. Davidson, 43 Ga. 480;

noughue v. Aikin, 2 Duv. (Ky.) 478;

r v. Cockerill, 5 T. B. Mon. (Ky.)

Wilson v. Ohio, etc., Rd., 64 Ill. 542;

v. Williams, 2 Rich. (S. Car.) 418;

erte Garland, 4 Wall. (U. S.) 333;

ings v. Missouri, 4 Wall. (U. S.) 277;

y's Const. Lim. 266; *Sedgw. Stat. & . L.* 558.

prohibiting the sale of intoxicating

s is not *ex post facto* because it lessens

ue of liquors already in stock. *State*

1, 3 R. I. 185; *State v. Keeran*, 5 R. I.

Nor is a law imposing a retrospective

State v. Reed, 31 N. J. L. 133; *Locke*

v. New Orleans, 4 Wall. (U. S.) 172; *But-*

ler v. Toledo, 5 Ohio St. 225.

A law making the mortgagee of land

who takes possession thereof for the pur-

pose of foreclosure liable for all taxes then

due, is not *ex post facto*. *Andrews v.*

Worcester, etc., Co., 5 Allen (Mass.), 65.

A law taking away remedies for a breach

of contract or a tort is not *ex post facto*.

Lord v. Chadbourne, 42 Me. 429.

A constitutional provision of a State

prohibiting suits for acts done under mili-

tary authority is not void. *Drehman v.*

Stifle, 8 Wall. (U. S.) 595.

A statute making husband and wife com-

petent witnesses against each other is not

ex post facto as to past transactions. *South-*

wick v. Southwick, 49 N. Y. 510.

Divorce. — A law authorizing a divorce

for past offences is not *ex post facto*. *Car-*

son v. Carson, 40 Miss. 349; *Clark v. Clark*,

10 N. H. 380. Compare *Dickinson v. Dick-*

inson, 3 Murph. (N. Car.) 327; s. c., 9 Am.

Dec. 608.

A law which provided that on passing a

decree for divorce the court might also

decree that the guilty party should not

marry again, was held not to be *ex post facto*

when applied to cases in which the cause

for divorce arose before the passage of the

law. *Elliott v. Elliott*, 38 Md. 357.

2. *State v. Willis*, 66 Mo. 131; *Kuckler*

v. People, 5 Park. Cr. (N. Y.) 212; *Rob-*

erts v. State, 2 Overt. (Tenn.) 423. See

also *In re Petty*, 22 Kan. 334.

At the time of the commission of an

offence, the law provided therefor the in-

fliction of capital punishment within a

period of not less than four nor more than

eight weeks after sentence was pronounced.

The law was changed, so that capital pun-

ishment could not be inflicted under one

year, nor until the governor issued his war-

rant for that purpose; and it was provided

that until the infliction of the death penalty

the prisoner should be confined in the peni-

tentiary at hard labor. The court declared

the law *ex post facto*, because it increased

the severity of the punishment, and also

because it changed the law without dispens-

ing with any separable portion of it. *Hart-*

ung v. People, 22 N. Y. 105; s. c., 26 N. Y.

167. See also *Ratzky v. People*, 29 N. Y.

124; *Cooley's Const. Lim.* 272.

law is not *ex post facto* which mitigates the punishment in any manner whatever.¹

A law is not *ex post facto* because it provides that the punishment of future crimes shall be increased by reason of past offences.²

Where the punishment for arson was death at the time an offence was committed, it was *held* that the offender could not be punished under a subsequent statute fixing the penalty at imprisonment for life. *Shepherd v. People*, 25 N. Y. 406.

Where the punishment for destroying a dwelling-house or other building was imprisonment for not more than seven years, which was changed to a fine of \$1,000, or such imprisonment in the discretion of the court, it was *held* that the guilty party could not be punished under the latter law for the reason that it was *ex post facto*. *State v. McDonald*, 20 Minn. 136.

Prison Discipline.—Changing the place of imprisonment from one county to another does not increase the punishment, and such a law is not *ex post facto*. *Carter v. Burt*, 12 Allen (Mass.), 424.

Changes in the manner or kind of employment, or any change referable to prison discipline as its primary object, are not objectionable. *Helton v. Miller*, 14 Ind. 577; *Hartung v. People*, 22 N. Y. 105.

1. *State v. Kent*, 65 N. Car. 311; *Dolan v. Thomas*, 12 Allen (Mass.), 421; *McInturf v. State*, 20 Tex. App. 335; *United States v. Gibert*, 2 Sumn. (U. S.) 19, 101; *Wade on Retroactive Laws*, sect. 278.

Mitigation of Punishment.—Imprisonment for life in place of the death penalty is a mitigation of punishment. *Commonwealth v. Gardner*, 11 Gray (Mass.), 438; *Commonwealth v. Wyman*, 12 Cush. (Mass.) 237; *Cooley's Const. Lim.* 272.

Where, at the time a forgery was committed, the punishment was death, and before final judgment whipping and imprisonment were substituted, it was *held* that the new punishment was the milder. *State v. Williams*, 2 Rich. (S. C.) 418.

It has been *held* that whipping, imprisonment, and fine in place of the death penalty mitigate the punishment. *State v. Williams*, 2 Rich. L. (S. Car.) 418.

Imprisonment in the penitentiary has been *held* to be a milder punishment than the pillory and a fine. *Clarke v. State*, 23 Miss. 261.

A punishment of "fine or imprisonment not exceeding one year" was changed to "fine and imprisonment not less than three nor more than twelve months," except that where the prisoner showed that it was his first offence, he was to be punished by fine or imprisonment, but not both. The law was declared *ex post facto*. *Flaherty v. Thomas*, 12 Allen (Mass.), 428.

A robbery was committed at a time when the punishment was fixed at solitary confinement not to exceed six months, and confinement for life in the penitentiary at hard labor. The law entitled the prisoner to process to compel the attendance of witnesses, to have counsel assigned him, and to a copy of the indictment and a list of the jurors. Before the trial, the punishment was reduced to solitary confinement not to exceed six months, and to imprisonment in the penitentiary at hard labor for not less than seven nor more than thirty years. The new law gave the court the discretionary power to assign counsel and compel the attendance of witnesses; but the court refused to do more than assign counsel. It was *held* that the law was not *ex post facto* when thus applied, on the ground that the privileges denied were incidents to the greater severity of the former law. *State v. Arlin*, 39 N. H. 179. Compare *Cooley's Const. Lim.* (4th ed.) 327.

The punishment for an offence at the time it was committed, was whipping not exceeding one hundred stripes. By a change in the statute, a fine and imprisonment in the penitentiary were substituted for whipping. After the change, the prisoner was fined one dollar with costs, and sentenced to be confined in the penitentiary at hard labor for one year. It was *held* that the law was not *ex post facto*, because it did not increase the severity of the punishment. *Strong v. State*, 1 Blackf. (Ind.) 193.

Prisoner's Election.—In a case where the punishment was changed from thirty-nine stripes to confinement in the penitentiary for seven years, it was considered doubtful whether the latter punishment was the more severe, and the prisoner was allowed to make his choice between them. *Herber v. State*, 7 Tex. 69.

It is the practice in some States to allow the prisoner to elect what punishment he will undergo when it is doubtful which is the more severe. *Clarke v. State*, 23 Miss. 261; *McInturf v. State*, 20 Tex. App. 335.

2. Cumulative Sentences.—*State v. Woods*, 68 Me. 409; *Ross's Case*, 2 Pick. (Mass.) 165; *Rand v. Commonwealth*, 9 Gratt. (Va.) 738.

But if both offences occurred before the passage of the act, the punishment for second offence must not be increased by reason of the former offence. *Riley's Case*, 2 Pick. (Mass.) 172.

An act of the legislature which provided

A law which operates as a mere change of criminal procedure, without affecting any substantial right of the accused, is not *ex post facto* as applied to the trial of crimes committed before it took effect.¹

that cumulative terms of imprisonment adjudged at the same term of court should be so tacked that each subsequent term should begin at the expiration of the preceding term, was *held* to be an *ex post facto* law as to offences committed before its passage. *Hannahan v. State*, 7 Tex. App. 664.

A statute which provides that one who has been convicted of the offence of petit larceny who shall again commit the offence is to be deemed guilty of a felony, is not *ex post facto* when applied to one who committed the first offence prior to the taking effect of the act. *Ex parte Gutierrez*, 45 Cal. 430.

A law permitting evidence of the character of an alleged house of ill-fame before the passage of the law as tending to show its character after such law was passed, was declared valid. *Cadwell v. State*, 17 Conn. 467.

Where a State constitution of 1875 denied the privilege of voting to those "who shall have been convicted of treason, embezzlement of public funds, malfeasance in office," etc., it was *held* that one convicted of larceny in 1871 when no such constitutional provision existed, might be punished for such illegal voting in 1884. *Washington v. State*, 75 Ala. 582; s. c., 51 Am. Rep. 479.

1. Change of Procedure.—*State v. Carter*, 33 La. Ann. 1214.

But the distinction between retrospective laws which operate directly on the offence, and those which relate to the procedure, is unsound where the latter affect any substantial right. *Kring v. Missouri*, 107 U. S. 221; s. c., 45 Am. Rep. 541.

"The new remedy, tribunal, or mode of procedure must be equally efficacious, public, and not more burdensome than those existing at the date of the commission of the offence." *Mareh v. State*, 44 Tex. 64.

A law is not *ex post facto* because it changes the *place* of trial after the commission of the offence. *Gut v. State*, 9 Wall. (U. S.) 35; s. c., *State v. Gut*, 13 Minn. 315.

A statute giving the State seven peremptory challenges of jurors is not *ex post facto* as applied to past offences. *State v. Ryan*, 13 Minn. (343); *Walter v. People*, 32 N. Y. 147; *Stokes v. People*, 53 N. Y. 164; *Warren v. Commonwealth*, 37 Pa. St. 45; *Walston v. Commonwealth*, 16 B. Mon. (Ky.) 15.

Nor is a law objectionable because it reduces the number of peremptory chal-

lenges allowed the prisoner. *Dowling v. State*, 5 Sm. & M. (Miss.) 664. Compare *Reynolds v. State*, 1 Ga. 222. Nor because it changes the manner of summoning and making up the jury. *Perry v. Commonwealth*, 3 Gratt. (Va.) 602.

A statute is not *ex post facto* as applied to past offences, which allows amendments of pending indictments. *State v. Manning*, 14 Tex. 402. Or which prevents a defendant from taking advantage of variances in the indictment which are not prejudicial to him. *Commonwealth v. Hall*, 97 Mass. 570. Or which shortens the form of pleading. *Commonwealth v. Bean*, Thach. Cr. R. (Mass.) 85.

A law which attempts to validate pending indictments found by a grand jury illegally drawn, is an *ex post facto* law. *State v. Doherty*, 60 Me. 504; *State v. Fleming*, 66 Me. 151.

A statute authorizing the conviction of a defendant "of any offence, the commission of which is necessarily included in that charged," is not an *ex post facto* law when applied to a case in which the offence was committed and the indictment found prior to the taking effect of such statute, and the trial had thereafter, notwithstanding such conviction, was not authorized by the law in force at the time the offence was committed and indictment found. *State v. Johnson*, 81 Mo. 60.

Fixing Punishment.—A law is not void as to past offences because it permits the jury to fix the punishment at the trial, which, under the law in force at the time the offence was committed, was fixed by the court. *Holt v. State*, 2 Tex. 363.

At the time of the commission of a murder, the jury were the judges of the law; but before the time of trial, the law was changed by making the court the judge of the law. It was *held* that the change affected the procedure only, and the new law was applicable to the trial of the offence. *Marion v. State*, 20 Neb. 236.

A law which allowed the prisoner two counsel, who alternated with the State's counsel, was changed so as to give the State the opening and closing of the case. It was *held* not to be an *ex post facto* law. *People v. Mortimer*, 46 Cal. 114.

An act which required any court before whom a prisoner was brought on *habeas corpus*, for the purpose of releasing him from imprisonment under a sentence improper as to time or place of imprisonment, to sentence him for the proper time, or to

IV. The Power to enact Ex Post Facto Laws.—The English Parliament has the power to pass *ex post facto* laws.¹ By the Constitution of the United States, both Congress² and the States³ are forbidden to enact such laws.⁴ Similar prohibitions exist in the constitutions of nearly all the States.⁵ Corporations have no power to pass by-laws of an *ex post facto* nature.⁶ It seems that the prohibition against *ex post facto* laws does not apply to treaties between the National Government and foreign states.⁷

EXPOSE.—To remove from shelter; to place in a situation to be affected or acted on. In reference to pain,—to make liable, to subject; and (referring to the custom of some nations to expose their children) to cast out to chance; to place abroad, or in a situation unprotected.⁸ In a statute authorizing the “exposing to

the proper place, was declared to be not *ex post facto* when applied to the correction of erroneous sentences imposed before the passage of the act. *Ex parte Bethurum*, 66 Mo. 545.

1. See *King v. Thurston*, 1 Leon. 91; 1 Bla. Com. 160.

“There is a still more unreasonable method than this, which is called making of laws *ex post facto* when, after an action, indifferent in itself, is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust.” 1 Bla. Com. 46.

2. U. S. Const. art. 1, sect. 9.

3. U. S. Const. art. 1, sect. 10.

4. The national Constitution does not forbid retroactive laws which are not *ex post facto*, and which do not impair the obligation of contracts. *Bay v. Gage*, 36 Barb. (N. Y.) 447.

It is competent for a State to release any penalty that may have accrued to it, or a political subdivision. *Lewis v. Turner*, 40 Ga. 416; *Coles v. Madison County*, Breese (Ill.), 154; *Gaul v. Brown*, 53 Me. 496.

Saving Clause.—If a statute *ex post facto* as to offences previously committed contains no saving clause for the punishment of such offences under the old law, the offender must be acquitted. *State v. McDonald*, 30 Minn. 136; *Flaherty v. Thomas*, 12 Allen (Mass.), 428; *Garvey v. People*, 6 Col. 559; s. c., 45 Am. Rep. 531; *Roberts v. State*, 2 Overt. (Tenn.) 423. See, however, *Commonwealth v. Mott*, 21 Pick. (Mass.) 492; *Commonwealth v. Getchell*, 16 Pick. (Mass.) 452.

Where the original punishment for an offence was a fine of \$50 which was changed by a statute containing a saving clause to any amount not to exceed \$100 in the discretion of the court, it was held that the court might impose any fine not exceeding \$50 in punishment of an offence committed before the amended law took effect. *Chicago, etc., Rd. v. Adler*, 56 Ill. 344.

5. *Ex post facto* laws are forbidden by the constitutions of Alabama, Arkansas, California, Colorado, Florida, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin. There appears to be no express prohibition in the constitutions of Connecticut, Delaware, Georgia, Kansas, Louisiana, Massachusetts, Missouri, New Hampshire, New Jersey, New York, Ohio, Vermont, and Virginia. See 5 Crim. L. Mag. 327.

6. *People v. Fire Department*, 31 Mich. 458.

7. *In re D. Giacomo*, 12 Blatchf. (U. S.) 391.

Authorities.—Wade on Retroactive Laws; 5 Criminal Law Magazine, 325-358; Cooley on Constitutional Limitations, 264-273; Sedgwick on Statutory and Constitutional Law (2d ed.), 557-560; 1 Bishop's Criminal Law (7th ed.), chap. 17; Bishop on Statutory Crimes; Story on the Constitution, sects. 1345, 1373; 1 Wharton's Criminal Law.

8. Webst. Dict. quoted in *Shannon v. People*, 5 Mich. 90, a case arising on the construction of a statute imposing a penalty on “exposing” a child with intent to abandon it. The court said, “The difficulty arises upon the word ‘expose,’ and what shall be said to be a sufficient exposure of the child to bring the act within the prohibition of this section, is a question of some difficulty. The term ‘ex

sale at a public auction," the fair meaning of "expose" obviously is "to exhibit, to bring into view, display, to point out or show to the by-standers."¹ The statutory prohibition against the "exposing to sale" of merchandise on Sunday, is evidently directed against the public exposure of commodities to sale in the street, or in stores and shops, warehouses or market-places, and has no reference to mere private contracts, which are made without violating, or tending to produce a violation of, the public order and solemnity of the day.²

EXPOSURE. — See EXPOSE; EXPOSURE OF PERSON.

pose' in such a connection does not appear to have become a legal term, the meaning of which is settled by judicial decision, either in this country or in England. . . . The question, therefore, upon this point, is simply this: Did the acts of the party leaving or abandoning the child, viewed in connection with the time, place, and all the accompanying and surrounding circumstances, subject the child to the hazard of such personal injury? If so, this is an exposure. . . . This may be rendered more definite by saying, that if the child be left at such a time, in such a place, and under such circumstances, as would render a parent, or other person (to whom it is confided) of ordinary prudence and humanity, reasonably apprehensive of such injury to the child, then the hazard may be said to exist, and it is an exposure within the statute."

Manning, J., said, "I agree with my brethren, except in the construction given by them to the statute; and in that we differ but slightly. The word 'expose,' on which the construction of the section hinges, is here used, it seems to me, in the sense of 'to cast out to chance; to place abroad, or in a situation unprotected,' — one of the definitions given to the word by Webster; and that every abandonment, therefore, where there is no provision made for the protection of the child at the time of the abandonment, or previously, comes within the statute. Nothing short of this, I think, will satisfy the words of the statute, or fully meet the evil it was intended to suppress."

Expose to Danger. — A person who receives an injury in consequence of getting from the platform at a railroad depot upon the cars while in motion at a rate of speed less than that of a man walking, *held* not to "expose himself wilfully and wantonly to any unnecessary danger or peril," within the meaning of a policy of insurance. *Schneider v. Prov. Life Ins. Co.*, 24 Wis. 28.

Otherwise, where the assured died by falling from the platform of a railroad-car, between eleven and twelve o'clock at night,

when the train was in full motion, and he was either riding on the platform of the car, or passing from one car to another. *Sawtelle v. Ry. Passenger Ass. Co.*, 15 Blatchf. (U. S.) 216. The court said, "Negligence and 'exposure to unnecessary danger' are equivalent terms. . . . Negligence is the absence of that care which a reasonable and prudent man would exercise under the circumstances of the case."

Where an heir at law made a complaint that the administrator had, upon his appointment, taken possession of the estate, and had ever since held possession, but, though more than a year had elapsed, had never returned any inventory of the estate, and had in no manner discharged any of his duties as administrator, *held*, that it sufficiently appeared, without direct averment to that effect, that the complainant was "exposed to injury." *Treat's Appeal*, 40 Conn. 288.

"Exposed Places," in the provision of a city's charter giving it power, through its common council, "to compel or cause the making and repairing of railings at exposed places in the street," *held* to mean "dangerous places." *Hubbell v. Yonkers*, 104 N. Y. 440, where the street on which the accident occurred had a road-bed thirty feet wide, macadamized and in good condition, on one side of which, where the street was graded up about twelve feet, there was a sidewalk ten feet wide, separated from the road-bed by a curbstone eight inches high, and there was no fence, wall, or other obstruction to guard the outer edge of the sidewalk. This was *held* not an "exposed place" within the meaning of the charter.

1. *Adams Express Co. v. Schlessinger*, 75 Pa. St. 256, where it was *held* that this did not authorize a company to sell unclaimed trunks unopened and locked, and without exposing the contents.

2. *Boynnton v. Page*, 13 Wend. (N. Y.) 429; *Eberle v. Mehrbach*, 55 N. Y. 682.

"Exposed to View." — Where, by an act of incorporation, a turnpike company is required to keep its rates of toll "exposed to view," it is not sufficient that such rates

EXPOSURE OF PERSON.

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I. Definition.—Indecent exposure is such intentional exhibition, in a public place, of the naked human body, or such exposure of the private members, as is calculated to shock feelings of chastity, or corrupt the morals of those who witness it.¹

II. At Common Law.—The ground upon which the offence of indecent exposure is punishable at common law is, that every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is a public nuisance.²

III. Publicity.—It is necessary that the exposure should be made in a public place, where it may be seen by those present.³

be written and posted up in the toll-house: they should be exposed to the view of travellers passing the gate. *Centre Turnp. Co. v. Smith*, 12 Vt. 212.

A printed statement in an application for insurance against fire, that "all the *exposures* within ten rods are mentioned," held to be a warranty that no other *building* than those named therein existed within ten rods. *Chaffee v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 376.

1. 1 Bouv. Law Dict. (15th ed.) 634.

No Particular Definition is given, by the Statutes, of what constitutes this crime. The indelicacy of the subject forbids it, and does not require of the court to state what particular conduct will constitute the offence. The common sense of the community, as well as the sense of decency, propriety, and morality, which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it. *State v. Millard*, 18 Vt. 574; s. c., 46 Am. Dec. 170.

2. *State v. Rose*, 32 Mo. 560; *Knowle v. State*, 3 Day (Conn.), 103, 108; *Commonwealth v. Spratt*, 14 Phila. (Pa.) 365; s. c., 37 Leg. Int. 234; *Commonwealth v. Sharpless*, 2 Surg. & R. (Pa.) 101; s. c., 7 Am. Dec. 632; *Grisham v. State*, 2 Yerg. (Tenn.) 589; *Rex v. Crunden*, 2 Camp. 89, 4 Bl. Comm. 65, note.

"Public Indecency."—The term "public indecency" has no fixed legal meaning, is vague and indefinite, and cannot in itself imply a definite offence; and hence the courts, by a kind of judicial legislation, in England and the United States, have usually limited the operation of the term to public displays of the naked person, the publication, sale, or exhibition of obscene books and prints, or the exhibition of a monster,—acts which have a direct bearing on public morals, and affect the body

of society. *McJunkins v. State*, 10 Ind. 140, 145. See also *Ardery v. State*, 56 Ind. 328.

In *Britain v. State*, 3 Humph. (Tenn.) 203, a master who caused and permitted his slaves to pass about in public view indecently naked was found guilty of indecent exposure.

3. An Indecent Exposure in a Place of Public Resort, if actually seen only by one person, no other person being in a position to see it, is not a common nuisance. *R. v. Webb*, 1 Den. C. C. R. 338; s. c., 18 L. J. M. C. 39. And see *Reg. v. Farrell*, 9 Cox, C. C. 446. But this view of the law has since been doubted in the case of *Reg. v. Elliott*, L. & C. 103.

What is a Public Place.—It is not necessary, to constitute a public place, that the public in general should have an indiscriminate right of access. The offence may be committed in a place where the public is in the habit of trespassing. *Reg. v. Wellard*, 33 W. R. 156, 51 L. T. 604, 54 L. J. M. C. 14. Where a man urinated in a court where he was seen from the windows of two houses, it was held that he might be convicted of the offence of indecent exposure. *Van Houten v. State*, 46 N. J. L. (17 Vr.) 16; s. c., 4 Am. Cr. Rep. 272, affirming 3 Cr. L. Mag. 732.

Travelling Showmen who keep booths for the purpose of indecent exhibitions, and invite people to enter on payment of an admission fee, are guilty of the offence. *Reg. v. Saunders*, L. R. 1 Q. B. D. 15; s. c., 3 Am. Cr. Rep. 436.

Exposure in a Urinal which is open to the public, and can be seen from the window of a neighboring house, is exposure in a public place. *Reg. v. Harris*, 1 L. R. C. C. 282; s. c., 40 L. J. M. C. 67, overruling *Reg. v. Orchard*, 3 Cox, C. C. 248.

Where it appears that the defendant was seen to make an indecent exposure from

If it were possible to see, it is not necessary that the exhibition should have been actually seen.¹ The place need not be open to the general public, because a place which will ordinarily be deemed private may, by virtue of the circumstances under which the exposure is made, come within the meaning of the term.²

IV. How Many must be present.—An indecent exposure in the presence of one person, under such circumstances that it is capable of being seen by one person only, is not an offence at common law.³

an opposite window, and that people on the street might have seen him, although there is no evidence to show that any one on the street did see him, it is for the jury to say whether passers-by might have seen him from the street if they had happened to look; and if they are of that opinion, a conviction will lie. *Reg. v. Rouverard*, cited in *Reg. v. Webb*, 1 Den. C. C. 338; s. c., 18 L. J. M. C. 39, 2 C. & K. 933.

Exposure in a Public Omnibus for hire is exposure in a public place. *Reg. v. Holmes*, Dears. C. C. 207; s. c., 22 L. J. M. C. 122.

Exposure in a Railway Carriage under similar circumstances would be an exposure in a public place. See *Langrish v. Archer*, 52 L. J. M. C. 47.

In Parlor of Public House.—In *Reg. v. Bunyan*, 1 Cox, C. C. 74, it appeared that the prisoners had committed the acts alleged in a parlor in a public house, and that they were seen by a maidservant, who went for assistance, and brought a policeman and other witnesses, who also saw enough to constitute the offence. It was left to the jury to say whether the place was such that an occurrence of the kind was likely to be viewed by others. See also *Reg. v. Elliott*, Leigh & C. 103.

Exposure of the Person upon the Roof of a House, in the view of persons in a neighboring house, though not in view of any one on the street, is exposure in a public place. *Reg. v. Thallman*, L. & C. 326; s. c., 33 L. J. M. C. 58.

No Usage can justify an indecent exposure. Where there had been an immemorial usage to bathe at a particular place so near a public footway frequented by females that exposure must occur, it was held that such usage constituted no justification. *Reg. v. Reed*, 12 Cox, C. C. 1. It is an offence for a man to undress himself on the beach and bathe in the sea in the view of inhabited houses, although the houses had been recently erected, and until their erection it had been usual for men to bathe in great numbers at the place. *Rex v. Crunden*, 2 Campb. 89.

Unfrequented Roads.—On the other hand, it appears that a place usually public might, in some circumstances, lose its

public character, and that an offence committed there could not be said to have been committed in a public place. "A public road in the night-time, or in a remote and unfrequented part of the country, may be, and often is, such a place as that such an exhibition might be made there without being made 'in public' in the obvious meaning of the law." *Roberts, C. J.*, in *Moffit v. State*, 43 Tex. 346. This decision was rendered in an indictment under the Texas statute, but the reasoning would seem to apply to common-law offences.

1. Need not be Observed.—"There is no need that the exposure should be actually seen by any one, provided that it was made to be seen, and those who were there could have seen it if they had looked." *Van Houten v. State*, 46 N. J. L. (17 Vr.) 16, 18; s. c., 4 Crim. L. Mag. 272, 3 Cr. L. Mag. 732.

2. *Van Houten v. State*, 46 N. J. L. (17 Vr.) 16, 18; s. c., Cr. L. Mag. 272, affirming 3 Cr. L. Mag. 732.

In Private Room in House of Prostitution.—Where six women made an indecent exposure of their persons, for money, to five men present, and paying therefor, such exhibition made the room wherein it occurred a "public place" within the meaning of the New York statute, although it was a room in a house of prostitution, and not open to the general public. *People v. Bixby*, 67 Barb. (N. Y.) 221; s. c., 4 Hun, 636.

A Shop or other building, however, is the private property of its owner, unless he voluntarily so uses it as to give the public a right to enter it at will; and the owner of such a building may invite any number of his neighbors into his house or shop, and such assembly would not make such place a public place in the legal sense of that term. *Lorimer v. State*, 76 Ind. 495. In this case it was held that a blacksmith shop is not necessarily a public place; but no opinion was given as to the circumstances under which it might become public.

3. *Fowler v. State*, 5 Day (Conn.), 81, 84; *Reg. v. Farrell*, 9 Cox, C. C. 446; *Reg. v. Watson*, 2 Cox, C. C. 376; *Reg. v. Webb*, 1 Den. C. C. 338; s. c., 18 L. J. M. C. 39,

V. Intent.—To constitute the offence, it is necessary that the exposure should have been intentional.¹ But criminal intention may be inferred from the acts of the defendant when they amount to recklessness or negligence.²

VI. Extent of Exposure.—The exposure, to be indecent, must be of the private parts of a person, or such parts of the human body as shocks the sense of decency and morality, and tends to scan-

2 C. & K. 933. *State v. Racer*, 1 Dev. & B. (N. C.) 208, which holds that an indictment charging indecent exposure on a public highway, without averring that it was in the presence of any one, has been practically overruled in *State v. Pepper*, 68 N. C. 259, 261; s. c., 12 Am. Rep. 637. But see to the contrary, *State v. Millard*, 18 Vt. 574, 578; s. c., 46 Am. Dec. 170, criticising *Fowler v. State*, 5 Day (Conn.), 81, 84, on this point.

In *Van Houten v. State*, 46 N. J. L. (17 Vr.) 16; s. c., 4 Am. Cr. Rep. 272, affirming 3 Cr. L. Mag. 732, it was laid down that the exposure, if made in a public place with the intent to be seen, need not actually have been observed by any one in order to constitute the offence. The police justice, in his charge to the jury, instructed them that a conviction might be had upon a confession assuming no person to have seen the exhibition. It would seem to follow, as a necessary corollary, that any exhibition made in a public place with the intent to be seen, or with such recklessness that such intent might be inferred, is criminal, whether in the presence of any one or not. The English authorities seem to be uniform that an exhibition to one person is not criminal. Yet where the exposure was actually seen by one person, and might have been seen by more, a conviction for indecent exposure will be upheld. See *Van Houten v. State*, 46 N. J. L. (17 Vr.) 16; s. c., 4 Am. Cr. Rep. 272; Reg. v. Farrell, 9 Cox, C. C. 446.

In the case of *Reg. v. Webb*, 1 Den. C. C., the indictment charged that the defendant exposed his person "in a public place, in a certain victualling alehouse, in the presence of one M. A., the wife of E. C., and of divers others," etc. The evidence was, that the defendant exposed his person to the view of M. A., she alone being present. The court doubted about the sufficiency of the indictment, upon grounds not pertinent to the present point, and held that if the words "of divers others" had been omitted, it would have been bad; and, as this allegation was not proved, there was no evidence to support this conviction. See also *Rex v. Watson*, 2 Cox, C. C. 376. It is said in *State v. Pepper*, 68 N. C. 259; s. c., 12 Am. Rep. 637, that these cases establish that when the nuisance charged

is an offence to the sense of sight, it must be charged and proved that it was exposed to the view of divers persons.

Exposure to One Person.—In the case of *State v. Millard*, 18 Vt. 574; s. c., 46 Am. Dec. 170, the exposure by a man of his private parts, to one woman only, with solicitation of sexual intercourse, was held "open and gross lewdness and lascivious behavior," for which an indictment will lie. The court say, "That the conduct of the respondent in this case was lewd and lascivious is beyond question. A public exposure of himself to a female, in the manner this respondent did, with a view to excite unchaste feelings and passions in her, and to induce her to yield to his wishes, is lewd, and is gross lewdness, calculated to outrage the feelings of the person to whom he thus exposed himself, and to show that all sense of decency, chastity, or propriety of conduct was wanting in him, and that he was a proper subject for the animadversion of criminal jurisprudence. That this lewdness was open—which under this statute must be considered as undisguised, not concealed, and opposite to private, concealed, and unseen—also is evident. There was no desire or wish for concealment; and, so far as the female was in his view, he exposed himself to her with the intent and design that she should see him thus exposed. The crime cannot be made to depend on the number of persons to whom a person thus exposes himself, whether one or many. Indeed, the offence in this case is more glaring and gross than in the case of *Le Roy v. Sir Charles Sidley*, 1 Sid. 168; s. c., *sub nom.* *Sir Charles Sedley's Case*, 1 Keb. 620, or of the man who bathed in a public place. *Rex v. Crunden*, 2 Camp. 89. In those cases there was a disregard of decency without any design to outrage the feelings of any individuals, or to excite any improper desires or feelings in them."

1. The Intent is a material ingredient in the offence, and is a question of fact, under all the circumstances, for the jury. *Miller v. People*, 5 Barb. (N. Y.) 203, 204.

2. *Van Houten v. State*, 46 N. J. L. (17 Vr.) 16; s. c., 4 Am. Cr. Rep. 272, affirming 3 Cr. L. Mag. 732; *Miller v. People*, 5 Barb. (N. Y.) 203.

dalize or excite lascivious desires; ¹ the mere exposure of a person to the waist ² or of the limbs is not enough.

VII. Statutory Offence. — In many of the States indecent exposure of the person is prohibited by statute. These usually are in broader terms than the common law. Thus, under some of them the offence need not be committed in a public place,³ and in others the publicity contemplated is to be construed as having reference to persons who do see or can see, rather than to the place.⁴ So, too, under statutes against "lascivious carriage and behavior," the crime may be punishable though only one person be present.⁵ But under a statute prohibiting "open gross lewdness and lascivious behavior," such a crime cannot be committed in secret, even though it happen to be observed by an outsider.⁶

VIII. Indictment. — Although an indictment may be so framed as to fail to charge a crime punishable by statute, it may be good as an indictment for a misdemeanor at common law.⁷ An indictment for a statutory offence is usually sufficient if laid in the language of the statute.⁸ It would appear that where the offence

1. See *Ardery v. State*, 56 Ind. 328; *State v. Millard*, 18 Vt. 574; s. c., 46 Am. Dec. 170.

As to Extent of Exposure, see *Commonwealth v. Wardell*, 128 Mass. 52; s. c., 35 Am. Rep. 357; 19 Alb. L. J. 135; *Moffett v. State*, 49 Tex. 346; *Rex v. Sedley*, 10 St. Tr. App. 93; *Rex v. Gallard*, 1 Sess. Cas. 231; *Rex v. Farrell*, 9 Cox, C. C. 446.

2. In 1733 it was held that it was no offence for a man to run in the public way naked to the waist, — *Rex v. Fallard*, 2 Bar. 328, 345, — and in 1734 that a woman could not be convicted for so doing. *Rex v. Gallard*, W. Kel. 163.

3. *Fowler v. State*, 5 Day (Conn.), 81; *State v. Millard*, 18 Vt. 574; s. c., 46 Am. Dec. 170; *Commonwealth v. Wardell*, 128 Mass. 52; s. c., 35 Am. Rep. 357.

Under the Arkansas Statute against "Obscenity," rendering punishable "every person who shall make any obscene exhibition of his person," the place of exhibition need not be public, but the intent to make an obscene exhibition must be proved; the terms of the statute by implication requiring a criminal intent. *State v. Hazle*, 20 Ark. 156.

4. In Texas an indictment charged that the defendant did designedly make an obscene and indecent exhibition of his own person "in a public place; to wit, on a public road. It was held that this was not equivalent to charging an indecent exhibition "in public," as expressed in Pasch. Tex. Dig. art. 2030. The court say, "The publicity contemplated in the Code has reference to parties who do or can see it, rather than to the place. A public road

in the night-time, or in a remote and unfrequented part of the country, may be, and often is, such a place as that such an exhibition might be made there without being made 'in public' in the obvious meaning of the law. On the other hand, the place itself may be private, and yet the person be so exhibited to public view as to be an exhibition of the person in public in the meaning of the law." *Moffitt v. State*, 43 Tex. 346.

5. **Exposure to a Woman.** — **Vermont Statute.** — If a man indecently expose his person to a woman, and solicit her to have sexual intercourse with him, and persist in so doing, notwithstanding her opposition and remonstrance, this is "open and gross lewdness and lascivious behavior," for which an indictment will lie, under Vermont Revised Statutes, ch. 99, sect. 8. *State v. Millard*, 18 Vt. 574; s. c., 46 Am. Dec. 170. See also *Fowler v. State*, 5 Day (Conn.), 81; *Commonwealth v. Wardell*, 128 Mass. 52; s. c., 35 Am. Rep. 357. In the last case cited there was no solicitation, and the only person present was a girl eleven years of age.

6. *Commonwealth v. Catlin*, 1 Mass. 8.

In this case the defendant had sexual intercourse with a woman, believing that they were alone and unobserved. See *Commonwealth v. Wardell*, 128 Mass. 52; s. c., 35 Am. Rep. 357.

7. *State v. Rose*, 32 Mo. 560; *Knowles v. State*, 3 Day (Conn.), 103, 108.

An averment that the offence is contrary to statute may be rejected as surplusage, and will not vitiate. *Knowles v. State*, 3 Day (Conn.), 103, 108.

8. *State v. Gardner*, 28 Mo. 90; *State v.*

prohibited is an open and notorious act of public indecency, grossly scandalous, the indictment need not aver that the act was committed publicly or in a public place, if it charge that it was committed in the presence of some one.¹ And where exposure in a public place is a necessary ingredient of the crime, and the offence is charged to have been committed in a place not ordinarily public, it is sufficient if the indictment set out the place, and allege that it was public.² The indictment must set out particularly the circumstances of which the indecency consists,³ and must allege criminal intent.⁴ Where several persons join in committing the crime, each aiding and abetting the others, they may be jointly indicted.⁵

EXPRESS. (SEE IMPLIED, MALICE.) — Directly stated; not implied or left to inference.⁶ *Express trusts* are those created by the direct and positive acts of the parties, by some writing, deed, or will, or by the action of a court in the exercise of its authority to appoint executors and administrators.⁷ A *contract* is no less *express* because the price or amount that a party may receive is not agreed upon in advance, but is made to depend upon the uncertain result of some business venture, or upon some other contingency which will in future determine the compensation to be received.⁸ An *express corporation* is where an individual or body

Griffin, 43 Tex. 538; Moffit v. State, 43 Tex. 346; State v. Hazle, 20 Ark. 156.

1. State v. Gardner, 28 Mo. 90.

The indictment in this case charged exposure "in presence of a male and female at," etc.

2. In Lorimer v. State, 76 Ind. 495, an allegation that an act of indecent exposure was done "in a public place, to wit, in a blacksmith shop, . . . then and there a public place," was held sufficient, under 2 Ind. Rev. Stat. 1876, p. 466, sect. 22.

3. Knowles v. State, 3 Day (Conn.), 103, 108. In this case, the defendant was indicted for exhibiting a "monster," "which said monster was highly indecent and improper to be seen or exposed as a show." There was no other language in the indictment from which indecency could be inferred, and this was held to be insufficient.

4. An indictment for indecent exposure, which alleges that the defendant, "devising and intending the morals of the people to debauch and corrupt," at a time and place named, in a certain public building there situate, in the presence of divers citizens, etc., "unlawfully, scandalously, and wantonly did expose to the view of said persons present," etc., his body, etc., sufficiently alleges the intent with which the act was committed. Commonwealth v. Haynes, 68 Mass. (2 Gray) 72; s. c., 61 Am. Dec. 437. See also Commonwealth v. Reynolds, 80 Mass. (14 Gray) 91.

In Commonwealth v. Haynes, *supra*, the

court say, "The indictment would have been more full, and more in conformity with the precedents, if it had contained a second allegation of intent, succeeding the narrative of the events done by the defendant; but this would have been but a repetition of what was already alleged. That the material criminal intent may be, in a case like the present, thus found in the prefatory part of the indictment, seems to be assumed by *Ellenborough, C. J.*, in his opinion in the case of *Rex v. Philipps*, 6 East, 467. The case of *Miller v. People*, 5 Barb. (N. Y.) 203, is to the same effect."

5. *People v. Bixby*, 67 Barb. (N. Y.) 221; s. c., 4 Hun (N. Y.), 636. The defendants in this case were five prostitutes who made an exhibition of their persons for money in a house of prostitution, and it was held that they might be jointly indicted.

6. Webst. Dict.

7. *Lafferty v. Turley*, 3 Sneed (Tenn.), 172, quoting in part from Story's Eq. § 980.

"Express trusts are those which are created in express terms in the deed, writing, or will. The terms to create an express trust will be sufficient if it can fairly be collected upon the face of the instrument that a trust was intended." *Person v. Warren*, 14 Barb. (N. Y.) 493, quoting *Bouv. L. Dict.* And see *Brown v. Cherry*, 38 How. Pr. (N. Y.) 357.

8. *Voorheis v. Bovell*, 20 Bradw. (Ill.)

is expressly constituted and declared to be a body politic or corporate, by a given name, and for a specified object.¹

EXPRESS COMPANIES.—See also BAILMENTS; BILL OF LADING; COMMON CARRIERS; CARRIERS OF GOODS; CARRIERS OF LIVE-STOCK; STOPPAGE IN TRANSITU; WAREHOUSEMEN.

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The provision in a city charter that "no action against the city on a contract, obligation, or liability, express or implied, shall be commenced except in one year after the cause of action shall have accrued," was *held* not to include actions for torts, in *McGoffin v. City of Cohoes*, 74 N. Y. 387; s. c., 30 Am. Rep. 387, the court saying, "The words 'express or implied' apply only to contract obligations, and the use of these words is significant of an intent to confine the limitation to actions upon such obligations."

1. *Warner v. Beers*, 23 Wend. (N. Y.) 176. "Its essential powers, according to its nature and object, and within the enumeration of the statute, flow from this act of creation, and as incidents of the body created."

"Express Understanding," in an answer, was *held* an equivalent expression for "express contract" or "express agreement," in *Spence v. Spence*, 17 Wis. 448.

"Expressed in the Title,"—The constitutional provision as to certain bills, that they shall not embrace more than one subject, and that shall be "expressed in the title," means that "there must be but one subject, but the mode in which the subject is treated, or the reasons which influenced the legislature, could not and need not be stated in the title, according to the letter and spirit of the Constitution." *Sun Mut. Ins. Co. v. Mayor of N. Y.*, 8 N. Y. 253. And see *Edwards v. Police Jury*, 2 South. Rep. 804 (La.).

"The Constitution does not require that the title of an act should be the most exact expression of the subject which could be invented. It is enough if it fairly and reasonably announces the subject of the act. *In re Ferdinand Mayer*, 50 N. Y. 506. And see *Brewster v. Syracuse*, 19 N. Y. 116.

"The object of the constitutional provision was to require so clear an expression of the subject of the bill in the title that it would at once apprise legislators and others interested of the precise subject of the proposed legislation." *City of Kansas v. Payne*, 71 Mo. 162.

But a void and separable clause does not invalidate the whole statute. *Metrop. Gas-Light Co.*, 85 N. Y. 526; *State v. Exnicios*, 33 La. Ann. 253; *McGee's Appeal*, 8 Atl. Rep. 237 (Pa.).

"The principle to be readily deduced from these cases, and the authorities cited, is, that if any matter contained in a statute be objected to, as not referred to in the title, or that the bill contains more than one subject, the objection urged will not be held well taken, if the clause or section to which objection is raised be germane to the subject treated of in the title." *State v. Mead*, 71 Mo. 268. And see *People v. Briggs*, 50 N. Y. 553.

Nor where "the general title is not used as a cloak for legislating in one bill upon matters which cannot be considered, by fair intendment, to have a proper connection." *St. Louis v. Green*, 7 Mo. App. 472.

"Where the bill is local, there should be some reference in the title to the locality in which the law is to operate." *Durkee v. Janesville*, 26 Wis. 703.

"Express Business,"—The words "express business," in a United States statute, *held* not to cover what is done by a person who carries goods solely on call, and at special request, and does not run regular trips or over regular routes. "An 'express business' involves the idea of regularity, as to route or time, or both. Such is the definition in the lexicons." *Retzer v. Wood*, 109 U. S. 185.

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1. *For Coin lost*, 578.
2. *For Merchandise*, 578.

XXIX. Statutes, 579.**XXX. Intoxicating Liquors, 579.****XXXI. Postal Laws, 579.****XXXII. Sunday Laws, 579.****XXXIII. Stolen Property, 580.****XXXIV. Interstate Commerce, 580.****XXXV. Municipal License, 581.****XXXVI. Taxation, 582.**

I. Definition. — An express company is an association of persons, or a corporation, organized for the speedy transportation and personal delivery of personal chattels, and the collection of debts for the public, at a uniform compensation for the services rendered.¹

II. History. — Express [Fr. *exprès*, from Lat. *ex*, "out," and *premo*, *pressum*, to "press," to "urge"]. "A courier, or special messenger, charged to deliver important despatches, or to convey information of high importance; also any regular mode of conveyance for the speedy transmission of news, goods, or passengers, as an *express* train on a railroad."²

While formerly the word applied to a messenger sent on special service, it has now, by usage, in the United States, come to be applied to the *business* of taking and carrying packages of about all kinds, and delivering them to a designated person, at their destination. And the business has grown to such importance that corporations, called "express companies," have taken charge of it, and ingrafted it upon the system of railroads, and the transportation is largely done on the cars of the railroad companies.³

1. Definition. — An express company is a common carrier. Contracts of Carriers (Lawson), pp. 2 and 426; Kansas Pacific R. R. Co. v. Reynolds, 8 Kansas, 623; U. S. Express Co. v. Backman, 28 Ohio St. 144. Even though not owning the conveyance used for transportation. U. S. Express Co. v. Backman, 28 Ohio St. 144; Belger v. Dinsmore, 34 How. Pr. (N. Y.) 421; s. c., 51 N. Y. 166. See Chevallier v. Strahan, 2 Tex. 115; s. c., 47 Am. Dec. (note) 639; Christenson v. American Express Co., 15 Minn. 270.

The express business is one which the courts will take notice of as different from the business of transporting bulky freight. It is recognized as a necessity in the business that the goods forwarded by it should be in charge of an accompanying messenger. Dinsmore v. R. R. Cos., 10 Fed. Rep. 210; s. c., 3 Am. & Eng. R. R. Cas. 594.

That express companies do a peculiar business, has been recognized by Congress. The chief acts of recognition are those of July 1, 1862, 12 U. S. Statutes, 478; March 3, 1863, 12 U. S. St. 722; June 30, 1864, 13 U. S. St. 276; July 13, 1866, 14 U. S. St. 121; March 3, 1879, 20 U. S. St. 478; June 10, 1880, 21 U. S. St. 176, and also by the Federal and the State courts, Pensacola v. Western Co., 6 Otto, 9; Bank of Kentucky v. Adams Express Co., 3 Otto, 184; Express Co. v. Caldwell, 21 Wall. 264; Liverpool Ins. Co. v. Mass., 10 Wall. 566; Norwalk Bank v. Adams Express Co., 19 How. Pr. (N. Y.) 462; Marshall v. American Express Co., 7 Wis. 1; Southern Express Co. v. Crook, 44 Ala. 468; Sullivan v. Thompson, 99 Mass. 259; Witbeck v. Holland, 45 N. Y. 13.

2. Zell's Cond. Ency. p. 350.

3. "The early expresses (1833) were established by newspapers to obtain prompt news. In 1839, William F. Harnden first made a special business of carrying parcels between Boston and New York. The next year, P. B. Burke and Alvan Adams started a competing express, and W. B. Dinsmore came into the business, which, in 1841, extended to Philadelphia. Rapid progress was afterwards made in starting expresses, the first west of Buffalo being that of Wells, Fargo, & Dunning, in 1845. The consolidation of many individual concerns into stock companies began in 1850, with the formation of the American, followed, in 1854, by the Adams, and afterwards by the United States, the National, Wells, Fargo, & Co.'s, The Southern, and other express companies. The stock of four of these is represented by nearly forty million dollars capital. There are twenty thousand men wholly, and at least thirty thousand more partly, employed in the express business. Its revenues exceed those of the post-office. One of its largest branches is the conveyance of bank-notes, which under the present paper-money system reaches vast dimensions; another is the collection of bills on the delivery of goods, which has created an important division of mercantile business that dispenses with the risks of credit. In Europe the express system is principally confined to the carriage and delivery of parcels in cities. Johnson's N. U. Cyc. vol. 1, pt. 2, p. 1693. R. R. Cos. v. Express Cos., 118 U. S. 3; s. c., 23 Am. & Eng. R. R. Cas. 558.

III. The Rights of Express Companies. — 1. *In General.* An express company, *per se*, has no vested right to do business upon railroads.¹

1. St. Louis, Iron Mountain, and Southern R. R. Co. *v.* Southern Express Co., 118 U. S. 3; s. c., 23 Am. & Eng. R. R. Cas. 545. In this case, quoting from the syllabus, it is "*Held* (1), that while, as admitted by the railway companies, it was their duty to carry express matter for the public, yet that the companies could choose their own appropriate means (agencies) of such carriage, always providing they are such as to insure reasonable promptness and security.

"(2) That the express companies which did the express business on the railroads had done it only by permission under special contracts by which they had been given admission to the roads as a privilege, and not as a right.

"(3) That although the express companies had invested large sums of money, and had built up a large business under their contracts with the railway companies, they had done so understanding the uncertainty of their privileges arising from the fact that the contracts could be terminated upon notice, and that the stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them.

"(4) That while usage and the common law might compel a railway company to carry express matter, there was no usage that would compel it to employ particular companies to do its express business."

For a review of the authorities on the relation of express companies and railroad companies to each other, see a lengthy note at the end of R. R. Cos. *v.* Express Cos., 23 Am. & Eng. R. R. Cas. 545, *supra*. See also *Barney v. Oyster Bay Co.*, 67 N. Y. 301; s. c., 23 Am. Rep. 115; *Sargent v. Boston, etc., R. R. Co.*, 115 Mass. 416; *Cambloss v. Phila., etc., R. R. Co.*, 4 Brewster (Penn.), 563; *R. D. Martin, 11 Blatch. (U. S. C. C.)* 233; *The N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *2 Redfield, Am. Ry. Cas.* 70, note.

Prior to the cases decided in 118 U. S. 3, *supra*, the federal circuit courts had been holding that express companies had the right to do business upon railroads. *Express Cos. v. R. R. Cos.*, 10 Fed. Rep. 210; s. c., 3 Am. & Eng. R. R. Cas. 594; *Wells, Fargo, & Co. v. Oregon Ry. and Nav. Co.*, 8 Sawyer (U. S. C. C.), 600; s. c., 18 Fed. Rep. 517, and 16 Am. & Eng. R. R. Cas. 71, also 16 Am. & Eng. R. R. Cas. 87; *Dinsmore v. Louisville, etc., Ry. Co.*, 2 Fed. Rep. 465; *Southern Express Co. v. Louisville, etc., Co.*, 4 Fed. Rep. 481; *Texas Express Co. v. Texas, etc., Ry.*

Co., and same *v.* International, etc., Ry. Co., 6 Fed. Rep. 427; s. c., 1 Am. & Eng. R. R. Cas. 618; *Southern Express Co. v. Memphis, etc., R. R. Co.*, 8 Fed. Rep. 799; s. c., 2 Am. & Eng. R. R. Cas. 639. They also *held* that a railroad was bound to furnish facilities for the transaction of the express company's business, at a reasonable rate of compensation. *Express Cos. v. R. R. Cos.*, 10 Fed. Rep. 210; s. c., 3 Am. & Eng. R. R. Cas. 594; *Wells, Fargo, & Co. v. Oregon Ry. & Nav. Co.*, 8 Sawyer (U. S. C. C.), 600; s. c., 18 Fed. Rep. 517, and 16 Am. & Eng. R. R. Cas. 71; *Fargo v. Redfield*, 22 Fed. Rep. 373; s. c., 18 Am. & Eng. R. R. Cas. 463, and note at the end of the case. And that railroads as common carriers are not authorized to do an express business, or insist on doing exclusively such business on their roads, or give the exclusive right to any express company to do business on their railroads, but that all express companies must be received on the same terms. *Southern Express Co. v. Memphis, etc., R. R. Co.*, 8 Fed. Rep. 799; s. c., 13 Central Law Journal, 68; 2 Am. & Eng. R. R. Cas. 639; *Fargo v. Redfield*, 22 Fed. Rep. 373; s. c., 18 Am. & Eng. R. R. Cas. 463; *Southern Express Co. v. St. Louis, etc., R. R. Co.*, 10 Fed. Rep. 210; s. c., 13 Reporter (Boston), 354; 3 Am. & Eng. R. R. Cas. 594 and note. (See also a note beginning at bottom of p. 274 of 22 Am. & Eng. R. R. Cas., for further authorities.) The federal circuit courts, prior to the decision in 118 U. S. 3, also *held* that the railroad company could not fix an absolute demand against the express company for carriage. *Express Cos. v. R. R. Cos.*, 10 Fed. Rep. 210; s. c., 3 Am. & Eng. R. R. Cas. 594.

But it seems that the cases decided in 118 U. S. 3; s. c., 23 Am. & Eng. R. R. Cas. 545, overrule them all, and hold that express companies have no absolute rights upon railroads.

If we leave the federal courts with the question settled by the Supreme Court, and turn our attention to the State courts, it is ascertained that they are not in harmony on this proposition.

Some authorities hold that the relation between an express company and a railway company is that of shipper and common carrier; to wit, the carrier must furnish transportation to all that apply. That it must furnish to all applying and similarly situated equal facilities and rates of carriage, and that the charges therefor must be reasonable in amount. *Sanford v. Rail-*

2. *Their Rights as to Other Carriers.*—Express companies sometimes carry many small packages together in a large box, or in bundles; and it has been questioned whether the officials of the railroad company can lawfully demand an inspection of the boxes or bundles, in order to charge for the carriage of each package separately.¹ But the current of opinion is to the effect that no such demand is lawful, and the railroad company must charge for the carriage of the closed box or bundle.² Yet the latest expression of the federal courts is to the effect that the relation existing between express companies and railroad companies is derived from contract giving permission, and does not spring from usage or custom giving a right to express companies to go upon and use the cars of the railroad companies in the transaction of express business. And the whole matter is one of contract.³

IV. The Duties of Express Companies.—1. *Their Duty to receive Goods.*—It is the duty of an express company to receive all goods offered for transportation upon being paid, or tendered its proper charges therefor;⁴ and it must have adequate facilities for carrying goods within a reasonable time, and cannot be exonerated for delay on account of an increased expense not unforeseen and not entirely unreasonable;⁵ and on receiving perishable property for shipment, it is the duty of the company to forward it at once; and, if it cannot transport it immediately, it is its duty to refuse to receive the property.⁶ It is the duty of the company, when goods

road Co., 24 Pa. St. 378; New England Express Co. v. Maine Cent. R. R. Co., 57 Me. 188; s. c., 9 Am. L. Reg. (N. S.) 728; McDuffee v. Railroad Co., 52 N. H. 439. (This last case is under a statute requiring the railway company to furnish "all persons . . . equal . . . facilities.") See also some English cases: *Marriott v. London Co.*, 1 C. B. N. S. 87; *Parkinson v. Great Western Co.*, L. R. 6 C. P. 554; *Gaston v. Bristol R. Co.*, 6 C. B. N. S. 639; *Baxendale v. North Devon Co.*, 3 C. B. N. S. 324; *Baxendale v. Great Western Co.*, 5 C. B. N. S. 345.

Upon the contrary, there are many decisions holding that the railway companies are not bound to furnish facilities for express companies, or other companies or persons, to do business upon their lines; or, in other words, that common carriers may regulate their own business affairs, so long as the regulation does not interfere with their duty to the public. *Sargent v. Boston & Me. R. R. Co.*, 115 Mass. 416; *Barney v. Oyster Bay, etc., Co.*, 67 N. Y. 301; s. c., 23 Am. Rep. 115; *Story on Bailments*, § 591, note 3; *U. & P. R. R. Co. v. Miles*, 55 Pa. St. 209, *Commonwealth v. Powers*, 1 Am. R. Cas. 389. See also *Burgess v. Clemens*, 1 M. & S. 306, 314; *Fell v. Knight*, 8 M. & W. 269. See further, *N. J. Steam Nav. Co.*, 6 How. 344; *Cambloss v. Phila.*, etc.,

R. R. Co., 4 Brewster (Penn.), 563; *Jencks v. Coleman*, 2 Sumner (U. S. C. C.), 224; *R. D. Martin*, 11 Blatch. (U. S. C. C.) 233; *Railroad Cos. v. Express Cos.*, 118 U. S. 3, *supra*; s. c., 23 Am. & Eng. R. R. Cas. 545; and review of authorities in note, page 570.

1. *Cambloss v. Phila.*, etc., R. R. Co., 4 Brewster (Penn.), 563; s. c., 9 Phila. 411.

2. *Dinsmore v. Louisville, etc., R. R. Co.*, 2 Fed. Rep. 593; *Dinsmore v. R. R. Cos.*, 10 Fed. Rep. 210; s. c., 3 Am. & Eng. R. R. Cas. 594.

3. *Railroad Cos. v. Express Cos.*, 118 U. S. 3; s. c., 23 Am. & Eng. R. R. Cas. 545.

4. *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Messenger v. Penn. R. R. Co.*, 8 Vroom (N. J.), 531; 18 Am. Rep. 754; *East Tenn.*, etc., R. R. Co. v. *Nelson*, 1 Cold. (Tenn.) 271; *Jordan v. Fall Riv. R. R. Co.*, 5 Cush. (Mass.) 69; *Contracts of Carriers* (Lawson), p. 270, and ch. iii. p. 18.

5. *Condict v. Grand Trunk R. R. Co.*, 54 N. Y. 500.

6. *Tierney v. N. Y. Cent. & H. R. R. R. Co.*, 76 N. Y. 305. In this case it is said, "But if the charge of the trial judge is construed as instructing the jury that the pressure of non-perishable property should not excuse the delay, I am of the opinion that

reach the place of destination, to deliver them as soon as practicable within business hours of the place.¹

2. *When they may refuse to receive Goods.* — When perishable property is offered to an express company for transportation, if it has not the means for carrying the property it must refuse to receive it; for on receiving perishable property for transportation, it is the duty of the company to forward it at once.²

An express company may lawfully refuse to receive goods for transportation when its carriage is full, or when it has not the means of carrying the goods on account of an unusual pressure of business.³

But the company cannot refuse to receive goods because the consignor will not assent to a special contract limiting the company's common-law liability.⁴

The company may refuse to receive dangerous articles for transportation, and, if it has a reasonable suspicion, examine them.⁵

3. *Their Duty to carry Goods.* — It is the duty of an express company to carry for any and all persons any of the kind of goods which it professes to transport, upon being paid, or tendered, the lawful compensation charged by the company for carrying such goods; and if it refuse so to do, it is liable, in damages to the applying party, for such refusal.⁶

4. *Their Duty to deliver Goods.* — It is the duty of an express company to deliver, or tender, the consignment to the consignee at his place of business or residence; and until this is done, it is not relieved from liability as a common carrier.⁷ But when the consignment safely reaches its place of destination, and the consignee is not found after a reasonable effort to find him, the company may relieve itself from further liability by depositing the goods in a suitable place for the owner.⁸

he was right, and the principle of law enunciated by him sound." The instruction referred to is, "It was the duty of the defendant to transport the property in question to New York by the first train, unless a reasonable and proper excuse for the delay is shown. And in case there was a pressure of freight-cars, the car in question should be forwarded before forwarding ordinary non-perishable property. They made this contract in regard to perishable property, and it was their duty to forward it by the first train, unless there was such a pressure upon them of property of a similar kind to be transported, and which had arrived before this, to make it impossible."

The company is bound to provide road-worthy vehicles. *Alden v. N. Y. Cent. R. R. Co.*, 26 N. Y. 102.

1. *Marshall v. American Express Co.*, 7 Wis. 1.

2. *Tierney v. New York Cent. & H. R. R. Co.*, 76 N. Y. 305. What is

perishable property? See *Illinois R. R. Co. v. McClellan*, 54 Ill. 58.

3. Story on Bailments, § 508; *Lane v. Cotton*, 1 Ld. Raymond, 646, 652; *Morse v. Slue*, 1 Ventris, 190, 238; *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 245; *Condict v. Grand Trunk R. R. Co.*, 54 N. Y. 500; *Ill. Cent. R. R. Co. v. Cobb*, 64 Ill. 128; *Lake Shore, etc., R. R. Co. v. Perkins*, 25 Mich. 329.

4. *Kirby v. Adams Express Co.*, 2 Mo. (App.) 369; *Southern Express Co. v. Moon*, 39 Miss. 822.

5. *Nitro-glycerine Case*, 15 Wall. 524; *Boston, etc., R. R. Co. v. Shanley*, 107 Mass. 568.

6. *Hutchinson on Carriers* (ed. 1882), § 47; *Contracts of Carriers* (Lawson), p. 270; *Fish v. Clark*, 49 N. Y. 122; *Fish v. Chapman*, 2 Ga. 349.

7. *Witbeck v. Holland*, 45 N. Y. 13.

8. *Witbeck v. Holland*, 45 N. Y. 13. In *Fisk v. Newton*, 1 Den. (N. Y.) 45, the court said, "The wharf was the place of

5. *What will excuse Delivery.*—If the consignment has been taken from the company by regular and valid process of law¹ or by *stoppage in transitu*,² or the goods have been delivered during the carriage to the real owner under a lawful claim of right,³ any one of these having been done, the company is thereby discharged from its liability to deliver the goods to the consignee.

6. *When the Consignee refuses the Goods.*—If the consignee neglects or refuses to take the property, it remains in the company's hands, subject only to its liability as a warehouseman.⁴ And if the goods are to be delivered to a carrier next in line of transportation, and it refuses or neglects to receive them, the company, after a reasonable time, must store them, and notify the consignor.⁵

7. *When Consignee cannot be found.*—If the consignee cannot be found, after a reasonable effort, the company may shield itself from liability by depositing the property in a suitable place for the owner.⁶

8. *When Goods are perishable.*—If two kinds of property—one perishable, and the other non-perishable—are delivered to the company at the same time, and it is unable to carry all the property, it is its duty, in transportation, to give preference to that which is perishable.⁷ And in such a case the pressure of non-perishable property should furnish the company no excuse. The company knows its ability to handle freight, and, on receiving

delivery. *H. S. Field*, the person to whom, from the directions of the plaintiff, the goods were to be delivered. Field was unknown to the carrier. He did not call at the place of delivery for the goods. The consignor had omitted to inform the defendant of the particular residence of Field, or of his occupation or place of business. He was a mere clerk, having no place of business, his name not in the city directory, and was not discovered by the carrier, although reasonable efforts were made to find him. The consignor had misinformed Field as to the line by which the goods had been sent, and the person to whose care they were directed to be delivered, by reason of which Field did not receive the goods. The defendant put the goods in store with a responsible third person for, and on account of, the owner, according to the usage of the trade at that place under such circumstances. Then the goods are lost through the insolvency of the storehouse keeper, occurring several months after the delivery. I think the risk of the carrier, from the facts in the case, ceased on the delivery of the goods in store, and that the plaintiff failed in his action." *North Penn. R. R. Co. v. Commercial Bank of Chicago*, 25 Reporter, 385.

1. *Ohio, etc., R. R. Co. v. Yohe*, 51 Ind. 184; *Barnard v. Kobbé*, 54 N. Y. 516;

Walker v. Detroit, etc., R. R. Co., 47 Mich. 338; s. c., 9 Am. & Eng. R. R. Cas. 251; *Bliven v. Hudson R. R. Co.*, 36 N. Y. 403.

2. *Stiles v. Howland*, 32 N. Y. 309; *Harris v. Pratt*, 17 N. Y. 249; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; s. c., 17 Wend. (N. Y.) 504; *Palmer v. Hand*, 13 Johns. (N. Y.) 434.

3. *Blivin v. Hudson R., etc., R. R. Co.*, 36 N. Y. 403; *Rosenfield v. Express Co.*, 1 Woods (U. S. C. C.), 131. See "Carriers of Goods," *ante*, vol. ii. p. 899.

4. *Gibson v. American, etc., Express Co.*, 1 Hun (N. Y.), 387; *Marshall v. American Express Co.*, 7 Wis. 1; *Contracts of Carriers (Lawson)*, p. 220; *Williams v. Holland*, 22 How. Pr. (N. Y.) 137.

5. *Rawson v. Holland*, 59 N. Y. 611.

When the consignor, at the time of shipment, does not disclose his name and residence, there is no negligence, if the company does not notify him of the refusal of the consignee to take the goods, and that the goods are stored. *Williams v. Holland*, 22 How. Pr. (N. Y.) 137.

6. *Fisk v. Newton*, 1 Den. (N. Y.) 45; *Witbeck v. Holland*, 45 N. Y. 13; *Williams v. Holland*, 22 How. Pr. (N. Y.) 137.

7. *McAndrew v. Whitlock*, 52 N. Y. 40; *Marshall v. N. Y. Cent. R. R. Co.*, 45 Barb. (N. Y.) 502; s. c., 48 N. Y. 660.

perishable property, it is its duty to forward it at once; and, if it cannot do so, it is its duty to refuse to receive the property.¹

9. *When Unforeseen Delay or Damage occurs.* — It is the duty of the company, after an unforeseen delay or damage occurs, to act energetically to save the consignment, and to act as a prudent and skilful man would do under the circumstances.²

V. Their Liability. — An express company receiving goods for transportation by it, in the absence of a special contract limiting its liability, *insures* the safe and speedy personal delivery³ of the goods at the place of destination, if on its own route;⁴ but if the place designated for delivery be beyond its own route, then it *insures* the safe and seasonable delivery at the end of its own route to the carrier next in the line of transportation,⁵ unless, in

1. *Tierney v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 305; *Peet v. R. R. Co.*, 20 Wis. 594.
2. *Browne on Carriers*, 95; *Read v. Spaulding*, 30 N. Y. 630; *R. R. Co. v. Reeves*, 10 Wall. 176; *Nashville, etc., R. R. Co. v. David*, 6 Heisk. (Tenn.) 261; *Harmony v. Bingham*, 12 N. Y. 99. But where animals are killed, the company is not obliged to deliver their dead bodies. *Lee v. Marsh*, 28 How. Pr. (N. Y.) 275.

But in all events the company must be diligent in preserving goods. *Chouteaux v. Leech*, 18 Pa. St. 224; *The Maggie Hammond*, 9 Wall. 435.

3. Express companies were established to extend to the public the advantages of a personal delivery of goods. *Witbeck v. Holland*, 45 N. Y. 13.

4. In *Contracts of Carriers* (Lawson), the writer says, "The maxim that common carriers are liable for all losses except those caused by the act of God, or by the public enemy, is convenient enough for common use; but on a closer examination it will be found to be inaccurate, and hence, to some extent, misleading. More correctly, it may be said that the carrier is not liable, *First*, For losses caused by the act of God. *Second*, Losses caused by the public enemy. *Third*, Losses caused by the inherent defect, quality, or vice of the thing carried. *Fourth*, Losses caused by the seizure of goods or chattels in his hands, under legal process. *Fifth*, Losses caused by some act or omission of the owner of the goods. With these exceptions the liability of the carrier is unconditional. To hold otherwise, it is said, would be to afford opportunities for collusion between carriers and robbers or thieves, and to open a way for false pretences on the part of carriers which could not be disproved." *Contracts of Carriers*, p. 5, § 3. "For example, he is the insurer of the goods in his care against fire, robbery, other thefts, and all casualties short of those which proceed from the act of God, or the

public enemy . . . though not a word on the subject has passed between him and the owner." *Bishop on Contracts* (1st ed.), p. 217, § 605; *Joyce v. Kennard*, Law Report, 7 Q. B. 78; *Klauber v. American Express Co.*, 21 Wis. 21; *Bac. Abr.* (Bouvier's ed.) tit. "Carriers," p. 152; *Gales v. Hailman*, 11 Pa. St. 515; *Hall v. Railroad Co.*, 13 Wall. 367; *Siordet v. Hale*, 4 Bing. 607; *Agnew v. Contra Costa*, 27 Cal. 425; *Forward v. Pittard*, 1 Term Rep. 27; *Merritt v. Earle*, 29 N. Y. 115; *Hays v. Kennedy*, 41 Pa. St. 378; *Albright v. Penn.*, 14 Tex. 290; *Stephen's Transportation Co. v. Tuckerman*, 33 N. J. Law, 543. *Compare* *Lake Shore & Mich. S. R. R. Co. v. Bennett*, 89 Ind. 475; s. c., 6 Am. & Eng. R. R. Cas. 391.

Money Packages. — *United States v. Pacific Express Co.*, 15 Fed. Rep. 867; *United States Express Co. v. Hutchins*, 38 Ill. 44; *St. John v. Express Co.*, 1 Woods (U. S. C. C.), 612; *Wells v. American Express Co.*, 55 Wis. 23; *Southern Express Co. v. Craft*, 49 Miss. 480.

The company must make inquiry as to the value of the package delivered to it, and the owner must answer at his peril: if such inquiries are not made, and the package is received for such price of transportation as is asked with reference to its bulk and appearances, it is liable for the loss, whatever its value may be. *Gorham Mfg Co. v. Fargo*, 45 How. Pr. (N. Y.) 90.

5. *Hadd v. United States, etc., Express Co.*, 52 Vt. 335; s. c., 6 Am. & Eng. R. R. Cas. 443; *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594; *Mulligan v. Illinois R. R. Co.*, 36 Iowa, 180; *Babcock v. Lake Shore, etc., R. R. Co.*, 49 N. Y. 491; *American Express Co. v. Second Nat. Bank*, 69 Pa. St. 394; *St. Louis, etc., R. R. Co. v. Piper*, 13 Kas. 505; *Pendergast v. Adams Express Co.*, 101 Mass. 120; *Martin v. American Express Co.*, 19 Wis. 336; *United States Express Co. v. Rush*, 24 Ind. 403; *Gibson v. American Express*

either case, the consignment be lost by the act of God, or the public enemy.¹ But the goods must be delivered to, and received by, the express company *for transportation*.² Leaving the goods with the company to be held until further orders,³ or sending goods in the *care* of the company, does not bring it within the rule.⁴ The liability of the company is fixed by custom and the common law.⁵

1. *Safe and Speedy Transportation*.—The express company must transport the goods in reasonable time after receiving,⁶ and is liable for an unreasonable delay in forwarding the goods.⁷ In the absence of an express contract, the law implies an agreement to transport the consignment in a reasonable time;⁸ and if this is not done, by reason of the company's negligence, it is responsible for the loss occurring.⁹ But an express agreement may be made to transport the property within a limited time, and, in the absence of such an agreement, the company is not liable for delays occur-

Co., 1 Hun (N. Y.), 387. And if the carrier next in line of transportation refuses or neglects to receive the goods, the company must, after a reasonable time, store them, and notify the consignor. *Rawson v. Holland*, 59 N. Y. 611.

1. "The meaning of this is, some manifestation of nature to which man has not contributed, and which he cannot overcome, such as lightning and the fire it kindles, or a tempest, but not a fire from an ordinary accident; or, the ravages or restraints of war, but not of a robber or a mob." *Bishop on Contracts* (1st ed.), p. 221, § 612; *Nichols v. Marsland Law Rep.*, 10 Ex. 255; *Chicago, etc., R. R. Co. v. Sawyer*, 69 Ill. 285; *Price v. Hartshorn*, 44 N. Y. 94; *Brousseau v. Hudson*, 11 La. Ann. 427; *Forward v. Pittard*, 1 T. R. 27-34; *Elliott v. Norfolk*, 4 T. R. 789; *Sugarman v. The State*, 28 Ark. 142. *Compare* *Lake Shore & Mich. S. R. R. Co.*, 6 Am. & Eng. R. R. Cas. 391.

Stipulation in receipt limiting liability for loss by act of God, public enemy, mobs, riots, etc., and requiring notice of loss construed. *Southern Express Co. v. Glenn*, 1 S. W. Rep. 102.

The general rule is, that common carriers are liable for all damage to the consignment, unless caused by the act of God or the public enemy. *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Merritt v. Earle*, 29 N. Y. 115.

In *Read v. Spaulding*, 30 N. Y. 645, it is said, "A common carrier, in order to claim exemption from liability for damage done to goods in his hands, in course of transportation, though injured by what is deemed the act of God, must be without fault himself; his act or neglect must not concur and contribute to the injury. If he departs from the line of duty, and violates his con-

tract, and while thus in fault, and in consequence of that fault, the goods are injured by the act of God, which would not otherwise have caused damage, he is not protected." See *Browne on Carriers*, 95; *Michaels v. New York Cent. R. R. Co.*, 30 N. Y. 563. *Compare* *R. R. Co. v. Reeves*, 10 Wall. 176; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; *McClary v. Sioux City R. R. Co.*, 3 Neb. 44; *Morrison v. Davis*, 20 Pa. St. 171. See ACT OF GOD, vol. i.

2. *O'Neill v. N. Y. Cent. & H. R. R. R. Co.*, 60 N. Y. 138; *Rogers v. Wheeler*, 52 N. Y. 262; *Nelson v. H. R. R. R. Co.*, 48 N. Y. 504.

3. *The Pittsburgh, Cin. & St. L. Ry. Co.*, 36 Ohio St. 448; s. c., 3 Am. & Eng. R. R. Cas. 256; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85; *Clark v. Burns*, 118 Mass. 275; *O'Neill v. N. Y. Cent. & H. R. R. R. Co.*, 60 N. Y. 138; *Little Rock, etc., R. R. Co. v. Hunter*, 42 Ark. 200; s. c., 18 Am. & Eng. R. R. Cas. 527.

4. Goods shipped by railroad, consigned to purchaser *in care* of express company's agent, and which goods do not come to the agent's possession, but are delivered by the railroad to purchaser, and neither the company nor its agent are in fault, the bill of goods sent to agent for collection is not paid, but is promptly returned, no liability of the express company is created. *Wells v. American Express Co.*, 44 Wis. 342.

5. *Merritt v. Earle*, 29 N. Y. 115.

6. *Harris v. North Ind. R. R. Co.*, 20 N. Y. 232.

7. *Livingston v. N. Y. Cent. & H. R. R. R. Co.*, 76 N. Y. 631.

8. *Ward v. N. Y. Cent. R. R. Co.*, 47 N. Y. 29.

9. *Ward v. N. Y. Cent. R. R. Co.*, 47 N. Y. 29.

ring without its fault.¹ A reasonable time must depend upon the circumstances existing at the time the goods are received for transportation.²

a. When it begins. — The liability of the company, as a carrier, immediately begins on receiving the property for transportation, unless there are directions not to forward, or some special agreement as to when they shall be shipped; and if the goods are lost after receipt for transportation, and before the transit actually begins, the company is liable, even though the goods are in the warehouse awaiting transportation.³

b. When it ends. — The relation of carrier continues from time of receiving goods for shipment until the goods are delivered.⁴

VI. Limiting their Liability. — 1. *By Express Contract.* — In England,⁵ regardless of their statutes,⁶ in the federal courts⁷ of America, and in most of the States,⁸ the rule is that common

1. *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 245.

2. *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 245.

3. *Pittsburgh, Cin. & St. L. R. R. Co. v. Barrett*, 3 Am. & Eng. R. R. Cas. 256; 36 Ohio St. 448; 2 *Parsons on Contracts* (5th ed.), p. 175, note and cases cited.

4. *McGregor v. Kilgore*, 6 Ohio, 358; s. c., 27 Am. Dec. 260; *De Mott v. Laraway*, 14 Wend. (N. Y.) 225; 28 Am. Dec. 523; 2 *Parsons on Contracts* (5th ed.), p. 183, note and cases cited.

5. *Nicholson v. Willan*, 5 East, 507; *Munn v. Baker*, 2 Stark. 255; *Clarke v. Gray*, 6 East, 564; *Beck v. Evans*, 16 East, 244; *Wyld v. Pickford*, 8 M. & W. 443; *Carr v. Lancashire R. R. Co.*, 7 Ex. 707. Even from their negligence. *Maving v. Todd*, 1 Stark. 72; *Leeson v. Holt*, 1 Stark. 186. See also *York, etc., R. R. Co. v. Crisp*, 14 C. B. 527; *Great Western R. R. Co. v. Glenister*, 29 L. T. N. S. 422.

6. 17 & 18 *Victoria*, ch. 31; 11 *Geo. IV.*; 1 *Wm. IV.* ch. 68.

7. But in the federal courts the contract for exemption from liability must be just and reasonable in the eye of the law. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Earnest v. Express Co.*, 1 Woods (U. S. C. C.) 573; *Express Co. v. Kountze*, 8 Wall. 342.

8. *Southern Express Co. v. Armstead*, 50 Ala. 350; *Hooper v. Wells*, 27 Cal. 11; *Merchants' Despatch Co. v. Cornforth*, 3 Colo. 280; *Welch v. Boston R. R. Co.*, 41 Conn. 333; *Wallace v. Sanders*, 42 Ga. 486; *Ill. Cent. R. R. Co. v. Frankenberg*, 54 Ill. 88; *Adams Express Co. v. Frederick*, 38 Ind. 150; *Kallman v. U. S. Express Co.*, 3 Kan. 205; *Sprague v. Mo. Pac. R. R. Co.*, 34 Kan. 347; *Adams Express Co. v. Guthrie*, 9 Bush (Ky.), 78; *Simon v. The Fung Shney*, 21 La. An. 363; *Little*

v. Boston, etc., R. R. Co., 66 Me. 239; *Brehme v. Adams Express Co.*, 25 Md. 328; *Buckland v. Adams Express Co.*, 97 Mass. 124; *American Transp. Co. v. Moore*, 5 Mich. 368; *Christenson v. Adams Ex. Co.*, 15 Minn. 270; *Ketchum v. American, etc., Express Co.*, 52 Mo. 390; *Barter v. Wheeler*, 49 N. H. 9; *Lee v. Raleigh, etc., R. R. Co.*, 72 N. C. 236; *United States Express Co. v. Backman*, 28 Ohio St. 144; *Laing v. Colder*, 8 Pa. St. 479. In Pennsylvania, the carrier may limit its liability for loss or injury to goods carried by it as to every cause of injury, except that arising from negligence. *Grogan v. Adams Express Co.*, 30 Am. & Eng. R. R. Cas. 9; *Porter v. Southern Express Co.*, 4 S. C. 135; *Olwell v. Adams Express Co.*, 1 Cent. Law Jour. 186; *Farmers' Bank v. Champlain Transp. Co.*, 18 Vt. 131; *Wilson v. Chesapeake R. R. Co.*, 21 Gratt. (Va.) 654; *Boorman v. American Express Co.*, 21 Wis. 152.

In West Virginia the rule of limitation is peculiar to that State, and extends to all degrees of negligence short of fraud. *Baltimore R. R. Co. v. Rathbone*, 1 W. Va. 87.

In New York it is held that "common carriers may limit their liability for negligence in almost any respect by express contract, for such consideration as will be satisfactory to passenger or freighter, and that such contracts are not against public policy." *Lee v. Marsh*, 28 How. Pr. (N. Y.) 275; *Westcott v. Fargo*, 61 N. Y. 542; *Nicholas v. N. Y. Cent. & H. R. R. Co.*, 89 N. Y. 370; *Wilson v. N. Y. Cent. & H. R. R. Co.*, 97 N. Y. 87; *Magnin v. Dinsmore*, 56 N. Y. 168. In Iowa the statute declares that "No contract, receipt, rule, or regulation shall exempt such railroad or other company, person, or firm from the full liabilities of a common car-

carriers may limit their liabilities by special contract.¹ And the general rule is, that where the value of the goods is stated in the contract, in case of loss, other than from negligence, the value to be recovered is that fixed in the bill of lading, or contract, by the parties, even though goods are of greater value.² And the company may limit its liability by special contract for delay, damage, or loss.³

2. *By Express Contract on Connecting Lines.* — As the law does not require an express company to transport goods beyond its route, it may contract not to be liable for any loss or damage except on its own route;⁴ but it must act with reasonable promptness in delivering the goods to the connecting carrier.⁵ If the connecting carrier refuses to receive them after a reasonable time, the first company may store them as a warehouseman.⁶ But an express company can contract to carry beyond its own route, and render itself responsible as a common carrier for the entire distance with the rights of limiting its liability as over its own route.⁷

3. *Cannot contract to limit their Liability for Negligence.* — An express company cannot by special contract limit its liability for negligence or misconduct.⁸ And this is the general rule in most

rier, which, in the absence of any contract, receipt, rule, or regulation would exist with respect to such persons or property." Laws 1866, ch. 13. This statute is construed in *Mulligan v. Ill. Cent. R. R. Co.*, 36 Iowa, 180; *McDaniel v. Chicago, etc., R. R. Co.*, 24 Iowa, 412. In Texas the statute provides that carriers of goods, etc., "shall not limit or restrict their liability, as it exists at common law, by any general or special notice, nor by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, nor in any other manner whatever; and no special agreement made in contravention of the foregoing provisions of this section shall be valid." Act of 1860.

1. A statement in the contract that "It is not to be held liable for any loss or damage whatever, unless claim be made therefor within ninety days from delivery to it," held, this did not limit the liability of company in an action on the contract for the non-delivery of the goods. *Porter v. Southern Express Co.*, 4 S. C. 135. As to pleading limitation, see *Westcott v. Fargo*, 61 N. Y. 542.

2. *United States Express Co. v. Backman*, 28 Ohio St. 144; *Kirby v. Adams Express Co.*, 2 Mo. App. 370; *Munser v. Holland*, 17 Blatchford (U. S. C. C.), 412; *Magnin v. Dinsmore*, 62 N. Y. 35. Compare *Baldwin v. Liverpool & G. W. S. S. Co.*, 74 N. Y. 125; *Earnest v. Express Co.*, 1 Woods (U. S. C. C.), 573; *Oppenheimer v. United States Express Co.*, 69 Ill. 62.

3. For riots and strikes, *Wertheimer v.*

Penn. R. R. Co., 17 Blatch. C. Ct. 421; s. c., 9 Reporter, 234; *Hall v. Penn. R. R. Co.*, 1 Fed. Rep. 226; s. c., 9 Reporter, 306. See *Lake Shore & Mich. S. R. R. Co. v. Bennett*, 89 Ind. 475; s. c., 6 Am. & Eng. R. R. Cas. 391.

4. *Contracts of Carriers* (Lawson), p. 344, § 236, and cases there cited. *Babcock v. Lake Shore, etc., R. R. Co.*, 49 N. Y. 491; *Read v. U. S. Express Co.*, 48 N. Y. 462; *St. Louis, etc., R. R. Co. v. Piper*, 13 Kan. 505; *Cin., etc., R. R. Co. v. Pontius*, 19 Ohio St. 221; *Martin v. American Express Co.*, 19 Wis. 336; *Snider v. Adams Express Co.*, 63 Mo. 376; *Atchison, T. & S. F. R. R. Co. v. Roach*, 35 Kan. 740.

5. *Fowles v. Great Western R. R. Co.*, 7 Ex. 699; *Kent v. Midland R. R. Co.*, L. R. 10 Q. B. 1; *Rawson v. Holland*, 59 N. Y. 611.

6. *Rawson v. Holland*, 59 N. Y. 611; *Gibson v. American Merchants' Union Express Co.*, 3 T. & C. (N. Y.) 501. When an express company contracts as a common carrier, it cannot, by declaring or stipulating that it is not such, divest itself of its legal responsibility as such. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174.

7. *Contracts of Carriers* (Lawson), p. 343, § 235; *Redfield on Carriers*, §§ 190-197; *Brice on Ultra Vires* (Green's ed.), 673.

8. *Southern Express Co. v. Hunnicutt*, 54 Miss. 566; *Boscowitz v. Adams Express Co.*, 93 Ill. 523; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Muser v. American Express Co.*, 74 Mo. 538; s. c., 1 Fed. Rep. 382; *Harvey v. T. H. & I. R.*

of the States except New York, and, it may be said, West Virginia.¹ The federal courts have adopted substantially the rule prevailing in most of the States.²

4. *By Notice.*—By statute,³ in England, the carrier cannot limit his liability by notice, but must, if he desires to limit his liability, enter into a special contract in writing, which must be signed by the owner or sender of the goods; and even then the limitation must be, in the opinion of the court or a judge, "just and reasonable."⁴ In this country it is said to be "well settled that a common carrier may qualify his liability by a general notice to all who may employ him of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid accordingly."⁵

R. Co., 6 Am. & Eng. R. R. Cas. 293; Whitworth v. Erie R. R. Co., 87 N. Y. 413; s. c., 6 Am. & Eng. R. R. Cas. 349.

1. Cragin v. N. Y. Cent. R. R. Co., 51 N. Y. 61; Knell v. U. S., etc., Steamship Co., 33 N. Y. (Sup. Ct.) 423; Holsapple v. Rome, U. & O. R. R. Co., 86 N. Y. 275; s. c., 3 Am. & Eng. R. R. Cas. 487; Hart v. Penn. R. R. Co.; 7 Fed. Rep. 630. But the contract, to have that effect in New York, must be clear and unmistakable in its terms. Condict v. Grand Trunk R. R. Co., 54 N. Y. 500; Nicholas v. New York Cent. & H. R. R. Co., 89 N. Y. 370; s. c., 9 Am. & Eng. R. R. Cas. 103.

2. Earnest v. Express Co., 1 Woods (U. S. C. C.) 573; Express Co. v. Kountze, 8 Wall. 342; Grand Trunk R. R. Co. v. Stevens, 95 U. S. 655; Bank of Kentucky v. Adams Express Co., 93 U. S. 174; Muser v. Holland, 17 Blatchford (U. S. C. C.), 412; Muser v. American Express Co., 1 Fed. Rep. 382.

As to the State cases, see Southern Express Co. v. Armstead, 50 Ala. 350; Southern Express Co. v. Crook, 44 Ala. 468; Hooper v. Wells, Fargo & Co., 27 Cal. 11; Merchants' Despatch, etc., Co. v. Cornforth, 3 Colo. 280; Welch v. Boston R. R. Co., 41 Conn. 333; Ill. Cent. R. R. Co. v. Adams Express Co., 42 Ill. 474; Boscowitz v. Adams, 93 Ill. 523; United States Express v. Harris, 51 Ind. 127; Adams Express Co. v. Fendrick, 38 Ind. 150; Adams Express Co. v. Reagan, 29 Ind. 21. In Iowa by statute, Mitchell v. United States Express Co., 46 Iowa, 214; Kallman v. United States Express Co., 3 Kan. 205; Orndorff v. Adams Express Co., 3 Bush (Ky.), 194; Pendergast v. Adams Express Co., 101 Mass. 120; Christenson v. American Express Co., 15 Minn. 270; Southern Express Co. v. Hunnicutt, 54 Miss. 566;

Kirby v. Adams Express Co., 2 Mo. App. 369; Atchison, etc., R. R. Co. v. Washburn, 5 Neb. 117; Lee v. Raleigh, etc., R. R. Co., 72 N. C. 236; Union Express Co. v. Graham, 26 Ohio St. 595; American Express Co. v. Sands, 55 Pa. St. 140; Adams Express Co. v. Sharpless, 77 Pa. St. 516; American Express Co. v. Second Nat. Bank, 69 Pa. St. 394; Southern Express Co. v. Womach, 1 Heisk. (Tenn.) 256; Olwell v. Adams Express Co., 1 Cent. Law Jour. (Tenn.) 186.

In Texas the matter is regulated by statute. In West Virginia the contract between the parties governs except in case of fraud only. Baltimore, etc., R. R. Co. v. Skeels, 3 W. Va. 556; Louisville & Nashville R. R. Co. v. Brownlee, 8 Reporter, 144.

3. 17 & 18 Victoria, ch. 31. See Hodgman v. Western Midland R. R. Co., 6 B. & S. 560.

4. Peck v. North. Staffordshire R. R. Co., 10 H. L. Cas. 473; London & Northwestern R. R. Co. v. Dunham, 18 C. B. 826.

5. 2 Greenleaf on Ev. § 215; McMillan v. Mich., etc., R. R. Co., 16 Mich. 79; Fish v. Chapman, 2 Ga. 349; Cole v. Goodwin, 19 Wend. (N. Y.) 251; Kallman v. United States Express Co., 3 Kan. 205; Magnin v. Dinsmore, 62 N. Y. 35; West. Transp. Co. v. Newhall, 24 Ill. 466; Boscowitz v. Adams Express Co., 93 Ill. 523. (Compare Oppenheimer v. United States Express Co., 69 Ill. 62; Adams Express Co. v. Stettaners, 61 Ill. 184.) Moses v. Boston R. R. Co., 24 N. H. 71; Farmers' Bank v. Champlain Transp. Co., 23 Vt. 186. "The methods by which carriers have sought to convey to the public the terms on which they desire to accept goods for transportation, are (1), by advertisement

5. *By Custom.*—An habitual course of dealing between a shipper and an express company, in respect to contracts for carriage of goods, is a material and important element in arriving at the construction of the contract between them.¹

6. *By Fraud of Consignor.*—In order to know what risk the company takes on itself, it has a right to know the value of the consignment; and the consignor, if he is asked, must truly state its value.² And the consignor must not mislead the company, though no questions are asked.³ But he is not obliged to state the value unless he is asked to do so.⁴ If he is asked to state the value of the consignment, and does not truly answer, or he misleads the company, it is a fraud in law, and the company is not liable.⁵

7. *By Receipt.*—The limitations and provisions usually found in receipts or bills of lading, may be said to be offers or proposals for contracts, and generally they must be assented to by the consignor before they are contracts.⁶ Hence it is important to know what is equivalent to the assent of the consignor: an assent to the notice by the consignor is equivalent to an express contract.⁷ The mere fact of having seen the notice is not an assent to it.⁸ But taking a receipt containing words of limitation of liability without dissent by the consignor, is evidence of assent to its terms.⁹

either in newspaper or hand-bill; (2), by exhibiting or posting notices, as placards, etc.; (3), by notices printed upon bills of lading, receipts, checks and tickets." Contracts of Carriers (Lawson), p. 99, § 97. As to (1), see Mich. Cent. R. R. Co. v. Hale, 6 Mich. 243; Judson v. West. R. R. Co., 6 Allen (Mass.), 486. As to (2), see Kerr v. Willan, 6 M. & S. 150; Brooke v. Pickwick, 4 Bing. 218; Gleason v. Goodrich Transp. Co., 32 Wis. 85; Lake Shore, etc., R. R. Co. v. Greenwood, 79 Pa. St. 373; Peck v. Weeks, 34 Conn. 145. As to (3), see Riley v. Horne, 5 Bing. 217; Rowley v. Horne, 3 Bing. 2; Shelton v. Merchants' Dispatch Co., 59 N. Y. 258. These last citations are taken from Contracts of Carriers (Lawson), in which will be found a very full chapter on "Notices and their Effect," pp. 81 to 128, discussing the cases, and fully citing them.

1. Shelton v. Merchants' Dispatch Transportation Co., 59 N. Y. 258; Gibson v. Culver, 17 Wend. (N. Y.) 305; McMasters v. Penn. R. R. Co., 69 Pa. St. 374; Rawson v. Holland, 59 N. Y. 611.

2. Boscowitz v. Adams Express Co., 63 Ill. 523; s. c., 5 Cent. Law Jour. 58; Phillips v. Earle, 8 Pick. (Mass.) 182; Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 85; s. c., 24 Am. Dec. 129.

3. Earnest v. Express Co., 1 Woods (U. S. C. C.), 573; Belger v. Dinsmore, 51

N. Y. 166; Everett v. Southern Express Co., 46 Ga. 303; Oppenheimer v. United States Express Co., 69 Ill. 62.

4. Southern Express Co. v. Crook, 44 Ala. 468; Gorham Mfg. Co. v. Fargo, 45 How. Pr. (N. Y.) 90.

5. Earnest v. Express Co., 1 Woods (U. S. C. C.), 573; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 85; Everett v. Southern Express Co., 46 Ga. 303; American Express Co. v. Perkins, 42 Ill. 458; St. John v. Express Co., 1 Woods (U. S. C. C.), 612.

6. Farmers' Bank v. Champlain Transp. Co., 23 Vt. 186; Little v. Boston R. R. Co., 66 Me. 239; Mobile R. R. Co. v. Weiner, 49 Miss. 725.

7. Blumenthal v. Brainerd, 38 Vt. 402. Where there are limitations in a receipt, and the consignor assents to them, it is his contract as fully as if signed by him. U. S. Express Co. v. Haines, 67 Ill. 137.

8. Buckland v. Adams Express Co., 97 Mass. 124; Moses v. Boston R. R. Co., 24 N. H. 71.

9. Steele v. Townsend, 37 Ala. 247; Lake v. Hurd, 38 Conn. 536; Robinson v. Merchants' Dispatch Transp. Co., 45 Iowa, 470; Cin., etc., R. R. Co. v. Pontius, 19 Ohio St. 221; Adams Express Co. v. Sharpless, 77 Pa. St. 516; Boorman v. American Express Co., 21 Wis. 152. The

A stipulation in a receipt that the company shall have notice of claims for loss or damage within a specified time named, is reasonable, and must be complied with.¹

Where no receipt is given when goods are delivered to company, the company cannot limit its liability by giving a receipt afterwards, when the evidence negatives all presumption of knowledge of consignor of limitation in the receipt, or that the limitation was claimed.²

VII. Agents and Messengers. — As between the express company and its agents, the agent is not a common carrier, but his liability to the company is simply that of an agent.³ An express company is primarily liable under a contract made with a shipper; and a shipper seeking to hold the agents of the company liable, he can do so only through the contract of himself and the company.⁴ A package addressed to consignee in care of the agent of the express company does not relieve the company, and make its agent the agent of the consignee on the goods reaching him.⁵ An express company employing a railroad company to carry goods contracted to be transported by it, becomes liable to the consignor for the acts of the railroad company: the railroad company becomes the agent of the express company.⁶ But where the railroad company itself carries on an express business, the messenger on

presumption is that the consignor reads the receipt. *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; *Kirkland v. Dinsmore*, 62 N. Y. 171.

The general rule is, that when an express company receives goods for transportation, and gives to the consignor a receipt, it is the duty of the consignor to examine the bill of lading or receipt to ascertain its contents; and if he accepts it without objecting, he is bound by its terms, and they cannot be varied by parol testimony. *Germania Fire Ins. Co. v. Memphis, etc., R. R. Co.*, 52 N. Y. 90.

In the absence of fraud, concealment, or improper practice, provisions in a receipt limiting the liability of the company are presumed to be known to the party receiving it, and it operates as a contract. *Belger v. Dinsmore*, 51 N. Y. 166; *Magnin v. Dinsmore*, 62 N. Y. 35; *Magnin v. Dinsmore*, 70 N. Y. 410.

1. *Express Co. v. Caldwell*, 21 Wall. 264; *Weir v. Express Co.*, 5 Phila. (Pa.) 355; *United States Express Co. v. Harris*, 51 Ind. 127; *Southern Express Co. v. Hunnicutt*, 54 Miss. 566; *Porter v. Southern Express Co.*, 4 S. C. 135; *Westcott v. Fargo*, 61 N. Y. 542. Compare *Southern Express Co. v. Caperton*, 44 Ala. 101; *Adams Express Co. v. Reagan*, 29 Ind. 21.

2. *American Express Co. v. Spellman*, 90 Ill. 455.

3. An agent's bond was conditioned that

he should "well and truly perform all the duties required of him in any position or place to which he may be assigned in said employment, and well and truly account for all money and property of every description which may come into his possession or control, or for which he may have given his receipt by reason of said employment, and make good all loss or damage which may happen to such money or property while under his control, for which he may be legally responsible, and indemnify and save harmless the said company from all liability on account of his fault or neglect." *Held*, that as between the company and the messenger, his liability was not that of a common carrier, but that of an agent, and depended on his diligence or negligence. *Southern Express Co. v. Frink*, 67 Ga. 201.

4. *St. Louis Ins. Co. v. St. Louis V. & T. H. R. R. Co.*, 6 Reporter, 231. And the company is liable for actual damage caused by the acts of its agent, in the scope of his employment, but is not liable for wanton and malicious damage done by its agent. *Mendelsohn v. The Anaheim Lighter Co.*, 40 Cal. 657.

5. *Russell & Annis v. Livingston & Wells*, 16 N. Y. 515.

6. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Boscowitz v. Adams Express Co.*, 93 Ill. 523; *Hooper v. Wells*, 27 Cal. 11.

its trains is a fellow-servant with the other subordinates on train.¹

VIII. The Consignor.—The consignor is one who makes a consignment to another.²

1. *The Consignor must deal fairly* and honestly with the company.³ If the consignor does not disclose his name and residence

1. Where a railroad company does its own express business, one who accepts service with the company as a messenger is to be considered as a fellow-servant with the engineer and other subordinate employees engaged in operating the train on which he is carried, and is employed as such express messenger. *Balt. & O. R. R. Co. v. McKenzie*, 81 Va. 71; s. c., 24 Am. & Eng. R. R. Cas. 395.

In *Blair v. The Erie Ry. Co.*, the action was by administrator of N. P. Blair, deceased, for damages against defendant for causing Blair's death.

Blair was at the time acting as express messenger of the United States Express Company on defendant's car. Blair's death was caused by a collision of defendant's trains through negligence of train operators. The defendant sought to escape liability by means of the provisions of two contracts between it and the express company, by the first of which it was provided *inter alia* that the defendant was without charge to carry the company's money-safe, contents, and messenger, the defendant "assuming no liability whatever in the matter;" and by the second contract the first one was continued, but a little modified, and some additions made, to wit: "It is further agreed that the Erie Railway shall assume the annual risks taken by railroads on the express matter of the parties of the second part, excepting that the railway company shall not assume any risk or loss on any money, . . . and for which, with the express company's safes and messengers, no charge for carriage is to be made by said railway company." The court held these contracts no defence; submitted only the question of damages, — verdict and judgment for plaintiff, — which on appeal was affirmed. *Blair v. The Erie Ry. Co.*, 66 N. Y. 313; s. c., 23 Am. Rep. 55.

2. *Bouvier's Law Dict.*

3. *Orange County v. Brown*, 9 Wend. (N. Y.) 85; s. c., 24 Am. Dec. 129, in which the general rule, in the absence of notice or special acceptance, is stated to be that "the carrier is bound to make inquiry as to the value of the box or article received, and the owner must answer truly, at his peril; and if such inquiries are not made, and it is received at such price for transportation as is asked with reference to its bulk, weight, or external appearance,

the carrier is responsible for the loss, whatever may be its value." *Walker v. Jackson*, 10 M. & W. 168; *Baldwin v. L. & G. W. S. Co.*, 74 N. Y. 125.

In *Magnin v. Dinsmore*, 62 N. Y. 35, it is decided that when the carrier by contract limits his liability to an expressed amount, and the value is not stated by the shipper, silence alone on the part of the shipper, when the value of the goods is greater than the amount specified, is a fraud in law which will "discharge the carrier from liability at least for ordinary negligence, and this upon the ground that the carrier is thereby deprived of his proper reward, and is misled as to the degree of care and security which he should provide." *Baldwin v. L. & G. W. S. Co.*, 74 N. Y. 125. The mere failure to inform the company of value of the goods is not *per se* such fraud as releases the company from liability. A consignor need not disclose the value of the goods unless he is asked concerning it, or something is done equivalent to asking. *Gulf, etc., R. R. Co. v. Clark*, 18 Am. & Eng. R. R. Cas. 628; *Adams Express Co. v. Boscowitz*, 107 Ill. 660; s. c., 16 Am. & Eng. R. R. Cas. 102; *Texas Express Co. v. Scott*, Tex. Ct. App. 1883; 16 Am. & Eng. R. R. Cas. 111.

In *Dispatch Line v. Glenny*, 41 Ohio St. 166, the court said, "Glenny & Co. understood that they must prove the contract and delivery, and began to do so. The witness who shipped the case marked it 'rough glass,' although he knew it contained plate glass; did not inform the carrier that it contained plate glass; took the carrier's blank receipt with its plain notification that 'the actual contents' must be stated 'on this receipt;' filled in the words 'one case rough glass,' and obtained the assent of the carrier to such receipt.

"Said *Baron Parke* in *Walker v. Jackson*, 6 Mees. & Wel. 169, 'And I take it to be perfectly well understood, according to the majority of opinions upon the subject, that if any thing is delivered to a person to be carried, . . . it is the duty of the person who receives it to ask questions. If they are answered improperly, so as to deceive him, then there is no contract between the parties.' The printed notice in the receipt asked, 'What are the actual contents of this package?' Haughey's handwriting on the receipt, and his mark on the case, answered, 'Rough glass.' That this

at the time the goods are received by the company for transportation, and the goods are carried, but the consignee, on presentation to him of the goods, refuses to receive them, there is no negligence on the part of the company in not giving the consignor notice of the refusal and of the subsequent storing of the goods.¹

If the consignor raises the bill of lading by alteration, the company is not rendered liable for loss occasioned by the forgery of the shipper in raising the bill of lading.²

A fraudulent concealment by the consignor discharges the company from liability.³

IX. The Consignment. — A consignment is the goods or property sent by a common carrier from one, or more persons called consignors, from one place, to one or more persons called consignees, who are in another.⁴

It is the duty of an express company to receive, carry, and deliver all goods offered for transportation by any person or persons, upon receiving the price therefor, unless it has a reasonable ground for refusing.⁵ It cannot, like a tradesman, receive or reject a customer at pleasure, or charge different prices as it may demand, but must have for all a uniform and reasonable price.⁶

1. *What may be consigned.* — As a general proposition, any kind of personal chattels may be transported by an express company,

materially deceived the carrier, is made sure by the same deposition. The case was received 'subject to the conditions contained in the bills of lading of the Great Western Dispatch.' Under those conditions the carrier's pay for transporting plate glass would be larger than for rough glass: such a case, loaded in box-cars, would be at 'owner's risk of breakage' unless he could prove actual negligence by the carrier or its employees. The carrier had a right to know the nature of the goods in order to determine the amount of care required to defeat any charge of negligence. The trial court permitted the witness to relate so much of what was said and done in the attempt to deliver as tended to support the petition, and refused to allow the jury to hear the remainder of his history of that delivery. To complete a contract or a delivery, something must be done by both sides. One party alone cannot complete either. If a shipper secretly places a package in a freight-car, and it is lost or destroyed, he cannot, on those facts alone, establish a contract liability on the part of the carrier. If he hands to a freight agent a box marked 'Fifty pounds sugar,' and takes a bill of lading, or receipt, so describing the package, can he hold the carrier responsible on contract for diamonds concealed in the sugar in case of loss? It seems clear to us that at the trial below the defence had full right to show all that was said and done material to the questions, 'Was there a de-

livery of plate glass?' — 'Was plate glass received by the carrier?' — 'Did he undertake to transport plate glass?' Upon the state of facts shown by Haughey's deposition, these questions ought to have been answered in the negative. Although plate glass was actually in the carrier's hands, it was there without his knowledge or consent. Hence the defendant did not 'receive' it."

1. *Williams v. Holland*, 22 How. Pr. (N. Y.) 137.

2. *Lehman v. Cent. R. R. & Banking Co.*, 12 Fed. Rep. 595.

3. *Houston & T. C. R. R. Co. v. Burke*, 9 Am. & Eng. R. R. Cas. 59; s. c., 55 Texas, 323.

4. *Bouvier's Law Dict.*

5. *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 231-239; *American Merchants' Union Express Co. v. Wolfe*, 79 Ill. 430.

The company may refuse to receive dangerous articles; and if there are reasonable grounds for suspecting their character, the company may demand an inspection of them; but without reasonable grounds for suspicion, it cannot compel the consignor to disclose their nature. *Nitro-glycerine Cases*, 15 Wall. 524; *Boston, etc., R. R. Co. v. Shamley*, 107 Mass. 568; s. c., 12 Am. Law Reg. (N. S.) 500.

6. *Crouch v. London, etc., R. R. Co.*, 25 Eng. Law & Eq. 287; *Ex parte Benson*, 18 S. C. 38; 44 Am. Rep. 564.

and the common-law liability of a common carrier attaches.¹ "Also, if a common carrier who is offered his hire, and who hath convenience, refuses to carry goods, he is liable to an action in the same manner as an innkeeper who refuseth to entertain a guest."²

X. The Consignee.—The consignee is one to whom a consignment is made.³

Although an express company avails itself of carriage by rail, yet it must make a personal delivery of the goods carried by it⁴ to

1. Animals.—In England, where a carrier takes living animals for transportation, it is not regarded as a common carrier. *Palmer v. Grand J. R. R. Co.*, 4 M. & W. 749; *Carr v. Lancashire R. R. Co.*, 7 Ex. 712; *McManus v. Lancashire R. R. Co.*, 4 H. & N. 328; *Pardington v. South Wales R. R. Co.*, 38 Eng. Law & Eq. 432.

The same rule has been adopted in Michigan, unless, by special contract, the common carrier's liabilities are assumed. *Mich. S. & N. Ind. v. McDonough*, 21 Mich. 165; *Lake Shore R. R. Co. v. Perkins*, 25 Mich. 329.

Birds.—Whether birds are to be considered "common-law freight" for an express company in Michigan, *query?* *American Union Express Co. v. Phillips*, 29 Mich. 515.

In Kentucky the strict common-law rule is modified to the extent that carriers of live-stock are not insurers, but there is a presumption of negligence against the carrier in case the animals are injured. *Louisville, etc., v. Hedger*, 9 Bush (Ky.), 645; *Hall v. Renfro*, 3 Met. (Ky.) 51.

In general, the carrier of live animals is held, in most of the States, to be a common carrier thereof, and an insurer to the same degree as in carrying any other property. In the case of *Kansas Pac. Ry. Co. v. Reynolds, Brewer, & Co.*, in delivering the opinion of the court, says, "An idea seems to be obtaining in some directions, that, so far as regards the transportation of live-stock, railroads are not common carriers. This is countenanced by the *dicta* of several judges, and by some decisions. To this doctrine we cannot give our assent. It seems to us that whenever, and in so far as, they assume to transport property, they do so as common carriers." *Kansas Pacific R. R. Co. v. Reynolds*, 8 Kan. 623.

The following cases will show what has been decided in many of the States concerning the transporting of living animals by common carriers. *Kansas Pac. R. R. Co. v. Nichols & Co.*, 9 Kan. 235; *Ritz v. Penn. R. R. Co.*, 3 Phila. (Pa.) 82; *Cragin v. New York, etc., R. R. Co.*, 51 N. Y. 61; *Penn. v. Buffalo & Erie R. R. Co.*, 49 N. Y. 204; *Kimball v. Rutland, etc., R. R. Co.*, 26 Vt.

247; *Atchison, etc., R. R. Co. v. Washburn*, 5 Neb. 117; *Agnew v. Contra Costa*, 27 Cal. 425; *German v. Chicago, etc., R. R. Co.*, 38 Iowa, 127; *McCoy v. K. & D. M. R. Co.*, 44 Iowa, 424; *Wilson v. Hamilton*, 4 Ohio St. 722; *Welsh v. Pittsburgh, etc., R. R. Co.*, 10 Ohio St. 65; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142; *Rixford v. Smith*, 52 N. H. 355; *St. Louis, etc., R. R. Co. v. Dorman*, 72 Ill. 504; *South Ala., etc., R. R. Co. v. Henlein*, 52 Ala. 606; *Powell v. Penn. R. R. Co.*, 32 Pa. St. 414; *East Tenn., etc., R. R. Co. v. Whittle*, 27 Ga. 535.

But the company may show that the consignment was lost by some internal defect without any fault on its part. For example, horses are carried, and, in consequence of their nature, some are kicked by the others and killed. *Gabay v. Lloyd*, 3 B. & C. 793; *Lawrence v. Aberdeen*, 5 B. & A. 107; *Penn. v. Buffalo & Erie R. R. Co.*, 49 N. Y. 204. "The common-law liabilities of carriers attach to the carriers of animals, modified only so far as the cause of damages for which recompense is sought, is a consequence of the conduct or propensities of the animals undertaken to be carried." *Myrard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; *Bac. Abr. (Bouvier's ed.)* p. 151.

And the company is liable for a failure to feed or properly water the animals transported; and where the cattle stood in a car on a side track for two or three days without food, *held* not negligence, but a failure to perform contract. *Keeney v. Grand Trunk R. R. Co. of Canada*, 47 N. Y. 525; *Harris v. Northern Ind. R. R. Co.*, 20 N. Y. 232. See *CARRIERS OF LIVE-STOCK*, vol. iii. p. 1.

2. *Bac. Abr. tit. "Carriers"* (Bouvier's ed.), p. 152.

3. *Bouvier's Law Dict.*

4. *Redfield on Railways*, 127; *Witbeck v. Holland*, 45 N. Y. 13, in which it is said, "These [express companies] were established for the purpose of extending to the public the advantages of personal delivery enjoyed in all cases of land carriers prior to the introduction of transportation by rail." Courts take notice that express companies differ from other carriers in that the packages they carry are not bulky

the consignee, at his residence or place of business.¹ If the consignee cannot be found, after reasonable effort, the company may shield itself by depositing the property in a suitable place for the owner.² But where the goods are sent "C. O. D.," arrive safe, and the consignee has notice thereof, and promises to pay for and take the goods in a few days, and the delay is caused from it, during which the goods are destroyed, the company is not liable for the goods.³ But the company will not be liable for a delay in delivery caused by the consignee.⁴

XI. Directions of the Consignor. — 1. *General Directions.* — The company must follow the instructions of those who employ it.⁵ And if any thing should transpire during the transit that would make it impossible to follow the directions of the consignor, the company should notify him of that fact, place the goods in a warehouse if necessary, and await the order of the owner of the goods.⁶

2. *Special Directions.* — When an express company receives a consignment for transportation with directions from the owner to carry it in a particular way, or by a designated route, it is bound by such directions; and if it attempts to perform the contract in a manner different from its agreement, it is an insurer, and cannot have the benefit of the exceptions in the contract;⁷ and if it be impossible to ship the goods by that particular way or route, the company is not for that reason authorized to forward them "by any other usual, customary, and proper mode of conveyance." The company's duty is to notify the owner of the impossibility, and wait for instructions. The shipment by a different way, a loss, and the receipt of insurance money upon the lost goods, is not a ratification of the company's unauthorized act.⁸

articles. *Dinsmore v. R. R. Cos.*, 10 Fed. Rep. 210; s. c., 3 Am. & Eng. R. R. Cas. 594.

1. 2 Kent's Com. 605; *Gibson v. Culver*, 17 Wend. (N. Y.) 305; *Witbeck v. Holland*, 45 N. Y. 13. And it is the company's duty to deliver within usual business hours of the place, as soon as practicable. *Marshall v. American Express Co.*, 7 Wis. 1.

2. *Fisk v. Newton*, 1 Den. (N. Y.) 45; *Witbeck v. Holland*, 45 N. Y. 13.

3. *Weed v. Barney*, 45 N. Y. 344.

4. *Whitworth v. Erie R. R. Co.*, 87 N. Y. 413.

5. *Johnson v. N. Y. Cent. R. R. Co.*, 33 N. Y. 610.

6. *Goodrich v. Thompson*, 44 N. Y. 324; *Fisk v. Newton*, 1 Den. (N. Y.) 45; *Sager v. Portsmouth, etc.*, R. R. Co., 31 Me. 228.

7. *Maghee v. Camdem & Amboy R. R. Co.*, 45 N. Y. 514; *Danseth v. Wade*, 2 Scam. (Ill.) 285; *Hastings v. Pepper*, 11 Pick. (Mass.) 41.

8. *Goodrich v. Thompson*, 44 N. Y. 324. In the case of *Johnson v. N. Y. Central R. R. Co.*, 33 N. Y. 610, the court said, "The defendant undertook to transport the flax to Albany, and to forward it thence to New York, by the People's Line of steamboats. On the refusal of that line to receive it, the defendant's obligation as a carrier ceased: it was in the character of agent for the owner of the property. In the absence of instructions as to the mode of transportation from Albany, it owed no duty to the plaintiff, beyond the delivery of the property, in the usual course of business, to safe and responsible carriers, for transmission to its destination. *Brown v. Dennison*, 2 Wend. 593; *Van Santvoord v. St. John*, 6 Hill, 157. But when the forwarding agent is instructed as to the wishes of his principal, and elects to disregard them, he is guilty of a plain breach of duty. When he sends goods in a mode prohibited by the owner, he does it at his own risk, and incurs the liability of an insurer. *Ackley v. Kellogg*, 8 Cow. 223.

XII. Bill of Lading. (See that title.)—1. *As a Receipt.*—There is no general law requiring an express company in this country to have the contract limiting its liabilities to be in writing.¹ “The difficulty of proving an express agreement to waive any part of the carrier’s duties in any case, renders it necessary that negotiations of this character should be evidenced by something more definite than mere words. It has, therefore, become the almost universal practice for the carrier at the time of the receipt of the goods to put in writing the terms upon which they are received for transportation. Such writings are commonly called ‘bills of lading.’”²

Such a writing assented to by both parties cannot be varied by parol.³ But a bill of lading is both a receipt and a contract; and in so far as it is a receipt, it may be contradicted or varied by parol.⁴

2. *Bill of Lading as a Contract.*—The bill of lading as a contract is the only evidence, primarily, of the undertaking; “and all antecedent agreements or undertakings are merged therein, and extinguished thereby.”⁵

3. *As Notice of Conditions therein.*—As the bill of lading is

“It appears, in the present case, that the contract was made with the freight agent of the defendant, who suggested that it would be better to forward the hemp by tow-boat from Albany; but the plaintiff replied, in substance, that it was so late in the season, that he would not send it, unless it could go by the People’s Line. This proof tends to show that the defendant received the property with an express understanding that the hemp was not to be forwarded to New York, unless by People’s Line. If this was so, the defendant was clearly liable. On the refusal of the steamboat proprietors to receive the property, the company should either have communicated the fact to the plaintiff, and awaited further instructions, or it should have relieved itself from liability by depositing the hemp for safe keeping in a suitable warehouse. *Forsythe v. Walker*, 9 Penn. St. 148; *Goold v. Chapin*, 20 N. Y. 259; *Fisk v. Newton*, 1 Den. 451.

“There is a class of cases in which an agent is justified, by an unexpected emergency, in deviating from his instructions, where the safety of the property requires it. In this instance, no such exigency arose. The only inconvenience which would have resulted to the owner, from compliance by the carrier with his known wishes, would have been mere delay in transmitting the hemp to market; and he had notified the company that he would rather submit to this delay than to the hazard of tow-boat transportation at the close of the season of navigation. The primary duty of the agent is to observe the instruc-

tions of his principal, and when he departs from these, he must be content with the voluntary risk he assumes. 1 Pars. on Cont. 69; *Forrestier v. Bordman*, 1 Story, 43; *Ackley v. Kellogg*, 8 Cow. 223.”

When the consignment cannot be sent according to shipper’s directions, at the terminus of company’s route, it is the duty of the company to store it, and notify either the consignor or consignee. *Johnson v. N. Y. Cent. R. R. Co.*, 39 How. Pr. (N. Y.) 127.

1. *Shelton v. Merchants’ Dispatch Co.*, 59 N. Y. 258; *American Transp. Co. v. Moore*, 5 Mich. 368.

2. *Contracts of Carriers* (Lawson), p. 131, § 111.

3. *Wayland v. Mosby*, 5 Ala. 430; *Oppenheimer v. United States Express Co.*, 69 Ill. 62; *Southern Express Co. v. Dickson*, 94 U. S. 549; *Collender v. Dinsmore*, 55 N. Y. 200.

4. *Meyer v. Peck*, 28 N. Y. 590, in which it is said, “It is well settled that an ordinary bill of lading is not conclusive, as between the original parties, either as to the shipment of the goods named in it, or as to the quantity said to have been received; and any mistake or fraud in the shipment of the goods may be shown on the trial. (*Howard v. Tucker*, 1 B. & Ad. 712; *Berkley v. Watkins*, 7 Ad. & E. 29.)” *Babcock v. May*, 4 Ohio, 334.

5. *Contracts of Carriers* (Lawson), 131; *Southern Express Co. v. Dickson*, 94 U. S. 549; *Long v. N. Y. Cent. R. R. Co.*, 50 N. Y. 76; *Hinckley v. N. Y. Cent. R. R. Co.*, 56 N. Y. 429; *May v. Babcock*, 4 Ohio, 334.

conclusive evidence of the terms of transportation, the taking of it by the consignor is sufficient evidence of the acceptance of its terms,¹ and, without fraud, the presumption is, that the consignor does his duty, and reads the bill of lading.²

4. *As Title to the Goods.* — The effect of an executed and delivered bill of lading depends on whether the consignor is, or is not, the consignee. Where he is not, and he forwards the bill of lading to the consignee, thereby the consignment becomes the property of the consignee, is, at his risk, subject only to the consignor's right of stoppage *in transitu*.³

The bill of lading is the evidence of the owner's title while the goods are out of his actual possession for transportation; and by the transfer of it, the ownership and right to possession of the consignment may be changed.⁴

XIII. The Carriage. — 1. *When it begins.* — The beginning of the carriage of the consignment, so far as the company is concerned, takes place as soon as the goods are delivered to, and received by, it unconditionally for transportation.⁵

2. *When it ends.* — The end of the carriage of the consignment takes place with the personal delivery of the consignment to the consignee, if the place of destination be on the route of the company;⁶ but if the point of delivery be beyond the route of the company, in the absence of a special through contract, then the carriage ends, so far as the company is concerned, with the safe and seasonable delivery of the consignment to the carrier next in line of transportation.⁷ However, the company, by special contract, may make itself liable for the personal delivery of the con-

1. *Steele v. Townsend*, 37 Ala. 247; *The Emily v. Carney*, 5 Kan. 645; *Taylor v. Little Rock R. R. Co.*, 32 Ark. 393.

2. *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; *Blossom v. Dodd*, 43 N. Y. 264.

3. 2 *Parsons on Contracts* (5th ed.), p. 291. *Walley v. Montgomery*, 3 East, 585; *Stanton v. Eager*, 16 Pick. (Mass.) 467; *McCauley v. Davidson*, 13 Minn. 162. In *Krulder v. Ellison*, 47 N. Y. 36, it is said, that where "a merchant in New York received from N. & T. of Rochester, an order in writing for certain goods to be sent them 'via canal,' the goods were delivered to defendants, common carriers upon the canal, consigned to N. & T. pursuant to the order. The goods were lost *en route*. Held, that upon the delivery to the carrier, the title passed absolutely to the consignees, subject only to the right of stoppage *in transitu*, and that plaintiff, the consignor, could not maintain an action for their loss."

4. *Hatfield v. Phillips*, 9 M. & W. 649; *Seewell v. Burdick*, 52 L. T. 445; *Skilling v. Bollman*, 6 Mo. App. 76; *Chandler v. Belden*, 18 Johns. (N. Y.) 157. See tit. "Bill of Lading," this work, vol. ii p. 233.

5. *Merriam v. The Hartford R. R. Co.*, 20 Conn. 354; *Brind v. Dale*, 8 C. & P. 207; *Rogers v. Wheeler*, 52 N. Y. 262; *Merrill v. Old Colony R. R. Co.*, 11 Allen (Mass.), 80; *Pitts, Cin. & St. L. Ry. Co. v. Barrett*, 36 Ohio St. 448; s. c., 3 Am. & Eng. R. R. Cas. 256; *Marquette R. R. Co. v. Kirkwood*, 45 Mich. 51; s. c., 9 Am. & Eng. R. R. Cas. 85.

6. *Witbeck v. Holland*, 45 N. Y. 13; *Hyde v. T. & M. Nav. Co.*, 5 T. R. 389; *Gibson v. Culver*, 17 Wend. (N. Y.) 305; *Ostrander v. Brown*, 15 Johns. (N. Y.) 39; *McHenry v. R. R. Co.*, 4 Harr. (Del.) 448.

7. *Hadd v. U. S. Express Co.*, 52 Vt. 335; s. c., 6 Am. & Eng. R. R. Cas. 443; *R. R. Co. v. Androscoggin Mills*, 22 Wall. 594; *Mulligan v. Ill. R. R. Co.*, 36 Iowa, 180; *Babcock v. Lake Shore, etc., R. R. Co.*, 49 N. Y. 491; *Pendergast v. Adams Express Co.*, 101 Mass. 120; *United States Express Co. v. Rush*, 24 Ind. 403. If the connecting carrier refuses or neglects to receive the goods, the company must, after a reasonable time, store them, and notify the consignor. *Rawson v. Holland*, 59 N. Y. 611.

signment to the consignee, although the carriage may extend over the routes of one or more connecting carriers.¹

XIV. Stoppage in Transitu. — 1. *When it may be exercised.* — Stoppage *in transitu* is the name of the act of the vendor of goods sold upon credit, who, on learning that the buyer has failed, resumes the possession of the goods while they are in the hands of a carrier or middleman, and before they get into his actual possession.² The right can exist only when the vendor parts with the goods: if he still has them, he has a lien for their price, but not the right of stoppage.³ Insolvency of the vendee is necessary to create the right, and only in such case can it be exercised.⁴

2. *By whom it can be exercised.* — The right to stoppage is for the vendor of the consignee; and agent of the vendor, having a claim for money advanced for the purchase of the goods, has not the right.⁵ Persons not vendors of the consignee, and having no privity of contract with consignee, cannot stop goods *in transitu*.⁶

3. *How exercised.* — The right exists as long as the goods are in transit, and they are in transit till they are delivered to the vendee.⁷ The right is exercised by giving notice to the company not to deliver the consignment. And this notice not to deliver constitutes part of the carrier's contract.⁸ The notice is sufficient if the company is clearly informed that it is the intention and desire of the seller to exercise the right of stoppage *in transitu*.⁹ If the company deliver the goods to the consignee after notice to stop them has been given, the company is liable.¹⁰

1. Contracts of Carriers (Lawson), p. 343, § 235; Redfield on Carriers, §§ 190-197; Brice on Ultra Vires (Green's ed.), 673.

2. Bouvier's Law Dict. "The stoppage of goods *in transitu* does not of itself rescind the contract. 1 Atk. 245; *6 East, 27 n. The seller, therefore, may, upon offering to deliver them, recover the price. 1 Campb. 109; 6 Taunt. 162."

3. Parks v. Hall, 2 Pick. (Mass.) 206; McEwan v. Smith, 2 H. of L. Cas. 309; Jones v. Bradner, 10 Barb. (N. Y.) 193. Examine Babcock v. Bonnell, 80 N. Y. 244.

4. Rogers v. Thomas, 20 Conn. 54; Newson v. Thornton, 6 East, 17; Benedict v. Schaeffle, 12 Ohio St. 515. The mere inability of the vendee to pay for the goods, even after their shipment, is sufficient to justify stoppage *in transitu*. Adams Express Co., 1 C. S. C. R. 142; Jordan v. James, 5 Ohio, 88. The right does not exist except in cases of insolvency, and can be exercised only when the property, by the shipment, is vested in the consignee. Jordan v. James, 5 Ohio, 88; Bloomingdale v. Memphis, etc., R. R. Co., 6 Lea (Tenn.), 618; s. c., 6 Am. & Eng. R. R. Cas. 371.

5. Gwyn v. Richmond, etc., R. R. Co.,

85 N. C. 429; s. c., 6 Am. & Eng. R. R. Cas. 452; 1 Pars. on Cont. (5th ed.) 600.

6. Memphis, etc., R. R. Co. v. Freed, 38 Ark. 614; s. c., 9 Am. & Eng. R. R. Cas. 212.

7. See title "Carriage," *supra*.

8. Adams Express Co. v. Wentworth, 1 C. S. C. R. 142.

9. Bloomingdale v. Memphis, etc., R. R. Co., 6 Lea (Tenn.), 618; s. c., 6 Am. & Eng. R. R. Cas. 371. As to whom the notice may be served on. Adams Express Co. v. Wentworth, 1 C. S. C. R. 142. When there is no general agent, notice to a local agent is sufficient. Poole v. Houston, etc., R. R. Co., 58 Tex. 134; s. c., 9 Am. & Eng. R. R. Cas. 197.

10. Bloomingdale v. Memphis, etc., R. R. Co., 6 Lea (Tenn.), 618; s. c., 6 Am. & Eng. R. R. Cas. 371. The notice of stoppage must be given to such persons, and under such circumstances, and at such times, that the company, by using diligence, may send the necessary orders to its servants to stop the goods. See note in 6 Am. & Eng. R. R. Cas. 378. The seizure of the goods by vendee's creditors by legal process does not destroy the right of stoppage, and the vendor may maintain an action against the officer seizing them for their value. Calahan v. Babcock, 21 Ohio St. 281; Dickman

4. *Duty of Company when it is exercised.* — It is the duty of the company, when notified by the vendor, to stop the goods, and hold them subject to his order; for delivery after notice is wrongful, and renders the company liable.¹

5. *When it ceases.* — The right of stoppage *in transitu* ceases upon actual delivery of the consignment to the vendee or his agent, which ends the *transitu*.²

XV. Loss of Consignment. — An express company is bound to exercise reasonable care and prudence in transporting property; and if, from a failure to do so, a loss occurs, it is liable therefor.³

1. *By Negligence.* — If an express company confides a part of its duty to a railroad company, and through the negligence of the railroad company the consignment is lost, the express company is liable.⁴ An express company is liable for the value of the consignment lost through its negligence, even if the bill of lading provides a limitation to a certain sum named in it, if the parties understood the sum named to be less than the value of the goods.⁵ And a clause in the contract, that the goods are of the value of fifty dollars, unless the contract shows their value, and that in case of a loss the company's liability should not exceed fifty dollars, does not relieve the company from liability for full value if the goods are lost through its fault.⁶ And a presumption of negligence arises from the mere fact of loss.⁷ But a limiting clause in a receipt is valid, in the absence of negligence; and where the statement is, that the value of the goods is fixed at fifty dollars, "unless its value is otherwise stated," and if the property lost is of greater value, but the receipt does not show it, the liability of the company is limited to the fifty dollars.⁸

2. *By Fire.* — *a. Relation of Express Company and Underwriter.* — An express company, in the absence of a special contract limiting such liability, is an *insurer* of the chattels in its case against fire, unless the fire is caused by lightning;⁹ but this insurance

v. Williams, 50 Miss. 500; *Durgy Cement Co. v. O'Brien*, 123 Mass. 12; *Hays v. Mouille*, 14 Pa. St. 48.

1. *Adams Express Co. v. Wentworth*, 1 C. S. C. R. 142.

2. *Scott v. Pettit*, 3 B. & B. 469; *Rowe v. Pickford*, 8 Taunt. 83; *Harris v. Pratt*, 17 N. Y. 249; *Guilford v. Smith*, 30 Vt. 49; *Cabeen v. Campbell*, 30 Pa. St. 254; *Wood v. Yeatman*, 15 B. Mon. (Ky.) 270; *Durgy Cement Co. v. O'Brien*, 123 Mass. 12.

3. *Canfield, etc., v. Baltimore & Ohio R. R. Co.*, 93 N. Y. 532; *McGraw v. Balt. & Ohio R. R. Co.*, 18 W. Va. 361; s. c., 9 Am. & Eng. R. R. Cas. 188. In this case, potatoes were delivered for transportation on Feb. 13, to be shipped on Feb. 14, from Parkersburg to Grafton; there was a daily train between these points; weather was mild on 13th and 14th; the potatoes

did not reach their destination until the 16th, and then were frozen and worthless, it having turned cold on the 15th and 16th. *Held*, the company was liable for the loss.

4. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Muser v. American Express Co.*, 1 Fed. Rep. 382.

5. *United States Express Co. v. Backman*, 28 Ohio St. 144.

6. *Kirby v. Adams Express Co.*, 2 Mo. App. 370.

7. *Kirby v. Adams Express Co.*, 2 Mo. App. 370; *Adams Express Co. v. Stettaners*, 61 Ill. 184; *Grogan v. Adams Express Co.*, 114 Pa. St. 523; s. c., 60 Am. Rep. 360.

8. *Muser v. Holland*, 17 Blatchford (U. S. C. C.), 412; *Magnin v. Dinsmore*, 62 N. Y. 35; *Earnest v. Express Co.*, 1 Woods (U. S. C. C.), 573.

9. *Forward v. Pittard*, 1 T. R. 27; *Union Express Co. v. Ohleman*, 92 Pa. St. 323;

springs from the law, and not from a special contract, and is an insurance which the custody of the chattels accompanies. "When goods in the hands of a carrier have been lost, he cannot sue an insurance company which had insured them for the owner for contribution."¹ In such case the liability of the carrier is primary, and that of the underwriter is only secondary.^{2, 3}

b. During Transit. — The transit of the goods begins when the goods intended for shipment are delivered to, and received by the express company for the purpose of transportation,⁴ and does not end until the company delivers the goods to the consignee; and if during that time the goods are destroyed by fire, unless by a fire caused by the act of God or the public enemy, the company is responsible for the loss of the consignment.⁵

c. At Warehouse. — The liability of the express company does not end until the goods have reached the place of their destination, and are delivered to the consignee,⁶ or he is notified of the arrival of the goods; and the delivery must be made, under all the circumstances, in reasonable time,⁷ and within business hours,⁸ and at the residence or place of business of the consignee;⁹ and if

Moore v. Mich. Cent. R. R. Co., 3 Mich. 23; Cox v. Peterson, 30 Ala. 608; Hall v. Cheney, 36 N. H. 26; Miller v. Steam Navigation Co., 10 N. Y. 431; Patton v. McGrath, 31 Am. Dec. 552 and note.

1. Gales v. Hailman, 11 Pa. St. 515.

2. Hall v. R. R. Co., 13 Wall. 367; Hart v. Western R. R. Co., 13 Met. (Mass.) 99.

3. Contract of Carriers (Lawson), p. 4. But in Mercantile Mutual Ins. Co. v. Calebs, 20 N. Y. 173, the court says, "If the case had stopped here, the plaintiffs would bring themselves within the decision in the case of the Atlantic Ins. Co. v. Storow (5 Paige, 285), where the Chancellor, 'upon an abandonment and payment, or upon a recovery as for a total loss, the underwriters are entitled to subrogation, at least in equity, to all the rights and remedies which the assured has to the property which is not actually destroyed, including the *spes recuperandi* from any other source, unless the underwriters have relinquished that right by a stipulation in the policy;'" and the court further says, "It has long been determined, both in England and in this country, that such an agreement [limiting carrier's common-law liability as an insurer] is valid and binding, and in the absence of fraud can, at all times, be enforced. It is equally well settled, that common carriers have an insurable interest in the goods they transport, and can contract for the benefit of insurance effected by the owners." And in this case, that was the contract, and it defeated a recovery of the insurance company, against the carrier, after the insurance company had paid the loss to the

owner on its policy. See also M. & M. Ry. Co. v. Jurey, 111 U. S. 584; s. c., 16 Am. & Eng. R. R. Cas. 132; Rintoul v. N. Y. C. & H. R. R. Co., 20 Fed. Rep. 313; s. c., 16 Am. & Eng. R. R. Cas. 144; Carstairs v. Mechanics, etc., Ins. Co., 18 Fed. Rep. 473; s. c., 16 Am. & Eng. R. R. Cas. 142.

4. 2 Parsons on Contracts (5th ed.), 175 to 183; Adams Express Co. v. Sharpless, 77 Pa. St. 516.

5. 2 Parsons on Contracts (5th ed.), 161; Adams Express Co. v. Sharpless, 77 Pa. St. 516; Forward v. Pittard, 1 T. R. 27; New Orleans, etc., R. R. Co. v. Faler, 58 Mass. 911; s. c., 9 Am. & Eng. R. R. Cas. 96; Union Mutual Ins. Co. v. Indianapolis, etc., R. R. Co., 1 Disney (Ohio), 480. Where, without fault of express company, the cars went through an opening in a bridge, caused by a freshet, and the consignment was burned, *held*, on the agreed statement of facts, and a letter of the agent, that the company was liable for the loss. Fox v. Adams Express Co., 116 Mass. 292.

6. Hyde v. Trent, 5 T. R. 389; Wardell v. Mowrill, 2 Esp. 693; Ostrander v. Brown, 15 Johns. (N. Y.) 39; Gibson v. Culver, 17 Wend. (N. Y.) 305; Union Express Co. v. Ohleman, 92 Pa. St. 323; American Merchants' Union Express Co. v. Wolfe, 79 Ill. 430; Wells v. American Express Co., 44 Wis. 342.

7. Marshall v. American Express Co., 7 Wis.; Wibert v. N. Y. & Erie R. R. Co., 12 N. Y. 249.

8. Marshall v. American Express Co., 7 Wis. 1.

9. Witbeck v. Holland, 45 N. Y. 13.

the consignee refuses to take them, it is the duty of the company to secure them for the owner.¹ The company is liable for loss of the consignment by fire after they arrive at place of delivery, but before the lapse of a reasonable time for their removal by consignee;² and it is also liable when the goods are in the warehouse, which have been received for transportation before the transit is actually begun, unless there is a special agreement otherwise, or some direction as to time of shipment.³

3. *By Act of God.*—Just what is the meaning of the expression "act of God," is not clear from the authorities. By the term "act of God" is meant "those losses that are occasioned exclusively by the *violence of nature*—by that kind of force of the elements which human ability could not have foreseen or prevented."⁴ (See ACT OF GOD, Vol. I.)

1. *Witbeck v. Holland*, 45 N. Y. 13; *Fisk v. Newton*, 1 Den. (N. Y.) 45; *Gibson v. American, etc., Express Co.*, 1 Hun (N. Y.), 387.

2. *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *Goold v. Chapin*, 20 N. Y. 259. It was decided that the placing of consignment on a floating barge, for the convenience of transshipment, did not relieve the carrier from responsibility as such, even though the connecting carrier unreasonably delayed in accepting the goods.

The carrier must deposit the goods in a warehouse when he can, or in some other way clearly indicate his renunciation of the relation of carrier. Compare *Fenner v. Buffalo, etc., R. R. Co.*, 44 N. Y. 505.

3. *Pittsburg, St. L. & Cin. R. R. Co. v. Barrett*, 36 Ohio St. 448; s. c., 3 Am. & Eng. R. R. Cas. 256; *Moses v. Boston & M. R. R. Co.*, 24 N. H. 71; s. c., 55 Am. Dec. 222; *Eagle v. White*, 6 Whart. 505; s. c., 37 Am. Dec. 434.

4. *Smith's Leading Cases*, vol. i. pt. i. (8th ed.) p. 422. In a note to *Baltimore & Ohio R. R. Co. v. Sulphur Springs*, 96 Pa. 65; s. c., 2 Am. & Eng. R. R. Cas. 166, it is said, "The question as to exactly what is an 'act of God,' is not readily answered. It is, according to some authorities, an occurrence which it is beyond the bounds of human ability to prevent, and is therefore to be considered as a phrase tantamount to 'inevitable accident.' It is viewed in this way by Sir William Jones, in his work on Bailments, 104-5; and he is followed by Mr. Justice Story, in his treatise on same topic, 489. See also *Fish v. Chapman*, 2 Ga. 349; *Neal v. Sanderson*, 2 Smed. & M. 572, and *Walpole v. Bridges*, 5 Blackf. 222.

"On the other hand, many authorities aver that this is not an adequate definition, but that an 'act of God' can only occur from natural causes, and includes, therefore, only storms, rains, winds, frosts, excessive

heats, and the like; and to this opinion the balance of authority inclines. *Trent & Mersey Nav. Co. v. Wood*, 4 Dougl. 290; *McArthur v. Sears*, 21 Wend. 190; *Hays v. Kenedy*, 41 Pa. St. 378; *Merritt v. Earle*, 29 N. Y. 115; *McHenry v. R. R. Co.*, 4 Harr. (Del.) 448; *Chicago R. R. Co. v. Shea*, 66 Ill. 471; *Forward v. Pittard*, 1 T. R. 27.

"The subject has been very fully discussed and commented upon in an able opinion by the late Chief Justice Cockburn, in the case of *Nugent v. Smith*, L. R. C. P. Div. 423."

An unusual freshet by which a railroad bridge was swept away, causing a delay in carrying perishable property, will not be such negligence, of itself, on the part of the railroad company, as will make the express company liable for the loss of the property. *American Express Co. v. Smith*, 33 Ohio St. 511.

Where, without fault of express company, cars went through an opening in a bridge, and the consignment was burned, *held*, on the agreed statement of facts and an agent's letter, that the company was liable for the loss. *Fox v. Adams Express Co.*, 116 Mass. 292.

The loss of the consignment by an accidental fire or conflagration of a city, without fault of the company, does not exempt it from liability, and does not fall within the exception. 2 Kent's Com. 602; *Story on Bailments*, §§ 507, 511, 528; *Hyde v. Trent Nav. Co.*, 5 T. R. 389; *Gatliffe v. Bourne*, 4 Bing. N. C. 314; *Miller v. Steam Nav. Co.*, 10 N. Y. 431.

"Where the loss sustained by the act of God is not a total one, it is the duty of the company to preserve such portions as may still possess some commercial value. . . . In any event, the carrier will always be answerable for that amount of the damage which is the result of his own want of diligence." *Contracts of Carriers* (Law-

4. *By Public Enemy.*—If the property received for transportation is destroyed by the army in time of war, the company is not liable.¹ "Public enemies are those with whom the nation or State is at open war, and pirates on the high seas."² But a loss by thieves or robbers,³ or by embezzlement, or by rioters or insurgents,⁴ is not within the exception, unless the insurrection assumes the magnitude of an international war, as was the case in the late civil war in this country.⁵ . . . If a loss by a public enemy is incurred through the negligence of the carrier, he will be liable."⁶

5. *By Riots or Strikes.*—It is the duty of an express company to transport the consignment to its destination without unreasonable delay; and any injurious interruption in the transit by the refusal of the company's servants to do their duty, is a breach of duty imputable to the company; and for any such delay, or for any loss of the consignment, caused by such interruption, the company is liable in damages to the owner of the consignment.⁷ This liability, however, may be limited by a special contract.⁸ The liability is not affected by the fact that the express company uses the cars of a railroad company for transportation: in such case the railroad company is the agent of the express company.⁹

6. *By Legal Process.*—The express company is not liable for the consignment when it is taken from the possession of the company by legal process.¹⁰ But the company must at once notify the consignor of the seizure.¹¹ The company is not liable, even if the consignment is thus taken from it for a third person's debt, under process in an action to which the consignor is not a party: the

son), § 12, p. 14; *Day v. Ridley*, 16 Vt. 48; *R. R. Co. v. Reeves*, 10 Wall. 176; *Chouteaux v. Leech*, 18 Pa. St. 224.

1. *Nashville C. St. L. R. R. Co. v. Estes*, 10 Tenn. 749; s. c., 3 Am. & Eng. R. R. Cas. 492.

2. *Contracts of Carriers (Lawson)*, 14.

3. *Boon v. The Belfast*, 40 Ala. 184; *Coggs v. Bernard*, 2 Ld. Ray. 909; s. c., *Smith's Leading Cases*, vol. i. pt. i. p. 369; *Hall v. Cheney*, 36 N. H. 26; *Schiffelin v. Harvey*, 6 Johns. (N. Y.) 170; *Watkinson v. Laughton*, 8 Johns. (N. Y.) 213.

4. *Forward v. Pittard*, 1 T. R. 27; *Coggs v. Bernard*, 2 Ld. Ray. 909.

5. *Hubbard v. Harnden Express Co.*, 10 R. I. 244; *Smith v. Brazelton*, 1 Heisk. (Tenn.) 44.

6. *Forward v. Pittard*, 17 R. 27; *Contracts of Carriers (Lawson)*, 14 and 15, from which the above quotation and citations are taken.

7. *Blackstock v. N. Y. & Erie R. R. Co.*, 20 N. Y. 48; *Hall v. Pennsylvania R. R. Co.*, 1 Fed. Rep. 226; s. c., 9 Reporter, 306.

8. *Hall v. Pennsylvania R. R. Co.*, 1 Fed. Rep. 226; s. c., 9 Reporter, 306; s. c., 3 Am.

& Eng. R. R. Cas. 274; *Wertheimer v. Penn. R. R. Co.*, 9 Blatch. C. Ct. 421; s. c., 9 Reporter, 234. Compare *The Lake Shore and Mich. S. R. R. Co. v. Bennett*, 89 Ind. 475; s. c., 6 Am. & Eng. R. R. Cas. 391.

9. *Buckland v. Adams Express Co.*, 97 Mass. 124; *Christensom v. American Express Co.*, 15 Minn. 270; *Baldwin v. American Express Co.*, 23 Ill. 120; *Southern Express Co. v. Newby*, 36 Ga. 635; s. c., 91 Am. Dec. 783; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Boscowitz v. Adams Express Co.*, 93 Ill. 523; s. c., 9 Cent. Law Jour. 389; 107 Ill. 660; 16 Am. & Eng. R. R. Cas. 102; *Hooper v. Wells*, 27 Cal. 11; *Contracts of Carriers (Lawson)*, § 233. See *CARRIERS OF GOODS*, vol. ii.

10. *Bliven v. Hudson River R. R. Co.*, 36 N. Y. 403; *Burton v. Wilkinson*, 18 Vt. 186; *Ohio R. R. Co. v. Yohe*, 51 Ind. 181. Also see *Stiles v. Davis*, 1 Black. (U. S. S. C.) 101. Compare with it, *Edwards v. White Line Transit Co.*, 104 Mass. 159. Examine *Contracts (Lawson)*, § 18, p. 19.

11. *Scranton v. Farmers' Bank*, 24 N. Y. 427; *Bliven v. Hudson R. R. Co.*, 36 N. Y. 403; *Ohio R. R. Co. v. Yohe*, 51 Ind. 118.

right to have the consignment under the process must be settled by a court of competent jurisdiction, and the remedy for a wrongful seizure of the consignment under legal process is not against the company.¹ The company must see that process is regular and valid, and, if it is so, the company is exonerated.²

XVI. The Measure of Damages.—Under the common law, or under a special contract between the shipper and the company, if the company fails to perform its obligations concerning the goods offered for, or received for, transportation, it is liable for the breach thereof. If the company fails to carry the goods, or delays the goods in transit an unreasonable time, or permits the goods to be damaged, or the goods are wholly lost, the recovery in all actions should be for what is lost, whether by breach of contract, — express or implied, — or by a tort;³ and what the law permits to be recovered for the breaches of the company's obligations is known by the name of "The Measure of Damages," and, in general terms, is all the damages sustained by the interested party by reason of the company's breach of contract "which were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract;"⁴ and this is the general rule in England⁵ and in this country.⁶

The misdelivery of the goods is itself a conversion thereof; and the measure of damages is the market value of the goods at the time of conversion, and interest less the freight.⁷ But when the goods have become worthless by reason of bad packing, a misdelivery renders the company liable for nominal damages only.⁸

I. *For Failure to carry.*—An express company must transport

1. *Stiles v. Davis*, 1 Black. (U. S. S. C.) 101.

2. *Bliven v. Hudson R. R. Co.*, 35 Barb. (N. Y.) 188; *Ohio R. R. Co. v. Yohe*, 51 Ind. 181.

Attachment.—The seizure of goods consigned, by an officer under legal and valid process, constitutes a good excuse for non-delivery of the consignment. *Savannah, etc., R. R. Co. v. Wilcox*, 48 Ga. 432; *The Idaho*, 93 U. S. 575; *Furman v. Chicago, etc., R. R. Co.*, 57 Iowa, 42; s. c., 6 Am. & Eng. R. R. Cas. 280.

As to Garnishment.—*Bates v. Chicago, etc., Ry. Co.*, 60 Wis. 296; s. c., 14 Am. & Eng. R. R. Cas. 700.

But if the goods have been improperly attached by legal process, the taking and detention is no defence. *Kiff v. Old Colony, etc., R. R. Co.*, 117 Mass. 591; *Faust v. South Carolina R. R. Co.*, 8 S. C. 118.

See also *Western Trans. Co. v. Barber*, 56 N. Y. 544.

3. See *Actions—In Tort—post*. *Magnin v. Dinsmore*, 62 N. Y. 45; *Kellogg v. Sweeney*, 46 N. Y. 291.

4. *Sedgwick on Measure of Damages* (3d ed.), p. 79; *Hamilton v. McPherson*,

28 N. Y. 72; *Balt. & O. R. R. Co. v. Pumphrey*, 59 Md. 390; 9 Am. & Eng. R. R. Cas. 33, and note to case.

5. *Hadley v. Baxendale*, 9 Ex. 341; 26 Eng. L. & Eq. 398; *Fletcher v. Tayleur*, 17 C. B. 21; *Le Peintur v. The Southeastern Railway Co.*, 2 L. T. (N. S.) 170.

6. *Griffin v. Colver*, 16 N. Y. 489; *Hamilton v. McPherson*, 28 N. Y. 72; *Crater v. Binniger*, 4 Vroom (N. J.), 513; *Richardson v. Chynoweth*, 26 Wis. 656; *Abbott v. Gatch*, 13 Md. 314; *Humphreysville Copper Co. v. Vt. Copper Mining Co.*, 33 Vt. 92; *Ashe v. De Rossett*, 5 Jones (N. C.), 299; *Meade v. Rutledge*, 11 Tex. 44; *Adams Express Co. v. Egbert*, 36 Pa. St. 360; *Page v. Ford*, 12 Ind. 46; *Phelan v. Andrews*, 52 Ill. 486.

7. *Forbes v. Boston & Lowell R. R. Co.*, 133 Mass. 154; s. c., 9 Am. & Eng. R. R. Cas. 76.

8. *Baldwin & Co. v. London, etc., R. R. Co.*, Law R. 92 Q. B. 582; s. c., 9 Am. & Eng. R. R. Cas. 175; *Forbes v. Fitchburg R. R. Co.*, 133 Mass. 154; s. c., 9 Am. & Eng. R. R. Cas. 82, where there is a discussion of the law of misdelivery, and a great number of cases cited.

the consignment in reasonable time,¹ and what is a reasonable time depends on the circumstances at the time the goods are received for transportation by it.² And if the company fails to so carry and deliver the consignment, it is liable in damages; and the *measure of damages* in such cases is "the difference in its value at the time and place it ought to have been delivered; and the time of its actual delivery."³ The mere omission to carry in a reasonable time does not render the company liable for the value of the consignment; and the owner cannot refuse to receive the consignment, and maintain an action for a conversion.⁴

2. *For Delay in Transit.*—The delay in transit does not *ipso facto* make the company liable for the value of the consignment if it is still applicable for its intended use.⁵ When goods are delayed, and, on arrival, it is necessary to incur expense to put them in salable condition, the company must bear the expense;⁶ and if from delay the goods decay, the measure of damages is the difference in the market value of the goods when they should have arrived, and their actual value when they do arrive, less the cost of carriage; and some courts allow interest also.⁷

3. *For Failure to deliver.*—In an action for value of goods delivered to an express company, and no explanation is given for

1. Harris v. North. Ind. R. R. Co., 20 N. Y. 232.

2. Wibert v. N. Y. & Erie R. R. Co., 12 N. Y. 245.

3. Ward v. N. Y. Cent. R. R. Co., 47 N. Y. 29.

4. Scoville v. Griffith, 12 N. Y. 509.

In this case the court says, "There is no evidence of a refusal to deliver, nor, indeed, that the plaintiff ever demanded the property, or gave the defendant notice that it had not been received. They were not bound to do either to give them a right of action; but the judge could not say to the jury, as matter of law, that there had been a conversion, nor does it appear that the property had deteriorated in condition, or had seriously depreciated in value, nor was it lost." See a very full note in 9 Am. & Eng. R. R. Cas. 334.

5. Hackett v. B. C. & M. R. R. Co., 35 N. H. 390. In very full notes at the end of the case of Baltimore & Ohio R. R. Co. v. Pumphrey, 59 Ind. 390; 9 Am. & Eng. R. R. Cas. 336, it is said, "Many important questions have arisen where special damages have been occasioned by loss or delay in determining how far these special circumstances may be taken into account. The rule upon this point is thus laid down in Medbury v. New York & Erie R. Co., 26 Barb. 564: 'Compensation for the actual loss sustained is the fundamental principle upon which our law bases the allowance of damages. It will not, indeed, make this allowance upon a calculation of

speculative profits; for this would be proceeding upon contingencies, and would involve the subject in too much uncertainty. It would be too difficult for practical application. Nor will the law indemnify for remote or indirect losses: the loss must be the natural and proximate consequence of the act; and when this can be ascertained without uncertainty, the principle of compensation will be adopted.' " And also in the same notes it is said, *where goods are sold*, "Where goods are forwarded by a carrier in pursuance of a contract of sales between the consignor and consignee, the contract price furnishes the measure of damages in case of loss or delay. Illinois Central R. Co. v. McClellen, 54 Ill. 58; Medbury v. New York & Erie R. Co., 26 Barb. 564. And where, in consequence of such delay, the vendee refuses to accept the goods, and in consequence they have to be subsequently sold, the measure of damages is the difference between the contract price and the value on the day when they are actually delivered. Deming v. Grand Trunk Railroad Co., 48 N. H. 455." See also Magnin v. Dinsmore, 62 N. Y. 35. See CARRIERS OF GOODS, this work, vol. ii. p. 850.

6. Winne v. I. C. R. R. Co., 31 Iowa, 583.

7. B. & O. R. R. Co. v. Pumphrey, 59 Md. 390; s. c., 9 Am. & Eng. R. R. Cas. 335; Lindley v. Richmond & Danville R. R. Co., 88 N. C. 547; s. c., 9 Am. & Eng. R. R. Cas. 31.

its failure to deliver them, it may be inferred that they are still in the company's hands, withheld from the owner, and the company is liable for the actual value of the goods.¹

4. *For Damage to Goods.* — Where the goods are damaged, the rule of damages is, in case the goods are delivered in a damaged condition, the difference between the value of the consignment, of the kind and quality it was, and in the condition it was, for any purpose for which it may ordinarily be expected to be used, and the value of the consignment in the condition in which it was delivered for any uses to which it can ordinarily be put.²

5. *When Goods are wholly lost.* — The measure of damages, in actions against express companies for loss of goods, is the value of the consignment at the place of destination, and not at the place of shipment;³ and company is liable for punitive damages for gross and tortious breaches of its legal obligations.⁴

Stated correctly, the general rule is, that the measure of damages is the value of the consignment at the place of delivery, in the condition the company contracted to deliver it, at the time it should have been delivered, according to the agreement, less the compensation due the company for carriage and delivery.⁵

1. *Adams Express Co. v. Holmes* (Pa.), 1887; s. c., 30 Am. & Eng. R. R. Cas. 14; *Grogan v. Adams Express Co.* (Pa.), 30 Am. & Eng. R. R. Cas. 9.

2. *Mo. Pac. Ry. Co. v. Nevin*, 31 Kan. 385, in which it is said, "Plaintiff shipped a car-load of ear-corn over the road of defendant. The petition alleged that it was carefully selected for its particular use as seed-corn, and while in transportation the defendant, without the knowledge or consent of plaintiff, caused it to be run through an elevator, and shelled, thus materially diminishing its value. *Held*, that it was not error to permit plaintiff to introduce testimony that he notified defendant before shipment that the corn was selected for seed purposes, and notwithstanding there was no allegation in the petition of such notice." See CARRIERS OF GOODS.

3. 2 *Estee's Pleading* (3d ed.), 18; *Ringgold v. Haven*, 1 Cal. 108; *Whitney v. Chicago & N. W. R. R. Co.*, 27 Wis. 327; *Dean v. Vaccaro*, 2 Head (Tenn.), 488; *Wardon v. Greer*, 6 Watts (Penn.), 424; *King v. Shepherd*, 3 Story (U. S. C. C.), 349; *Cushing v. Wells, Fargo & Co.*, 98 Mass. 550. (*Compare* with last case, *Kellogg v. Sweeney*, 46 N. Y. 291.) *Gay's Gold*, 13 Wall. 358; *The Vaughn*, etc., 14 Wall. 258; *Atkisson v. Steamboat Castle Garden*, 28 Mo. 124; *Mich. So. & N. I. R. R. Co. v. Caster*, 13 Ind. 164; *Taylor v. Collier*, 26 Ga. 122; *Whitney v. Beckford*, 105 Mass. 267.

4. *Mendelsohn v. The Anaheim Lighter Co.*, 40 Cal. 657.

5. *Sturges v. Bissell*, 46 N. Y. 462; *Sedgwick on Measure of Damages* (6th ed.), pp. 424-426; *Spring v. Haskell*, 4 Allen (Mass.), 112; *New Orleans, etc., R. R. Co. v. Moore*, 40 Miss. 39; *Mo. Pac. R. R. Co. v. Nevin*, 31 Kas. 385. In *Louis v. Steamboat Buckeye*, 1 Handy (Cin. Sup. Ct.), 150, it is said, "If goods were intended to be reshipped for some other point than that at which the carrier contracted to deliver them, loss of property on a sale which might have been made at the ultimate point of destination is neither a natural nor proximate consequence of the breach of contract." And in *Sedgwick on Measure of Damages*, p. 426, note 1, speaking of goods destined beyond terminus, the writer says, "In such a case the destination of the goods, as regards the carrier on one of the several routes over which they are transported, is the terminus of his particular route; and their value at that point, and not at their ultimate place of consignment, usually defines his responsibility. . . . But circumstances may modify this rule; and in fixing the amount, reference is to be had to the ultimate destination intended for the goods." When goods are shipped to consignee, giving him an option to take the goods at a fixed price, pay for, or return them, and a loss occurs, the measure of the carrier's liability is, at most, the price fixed with interest from a day at which the goods would have reached the consignee, and been accepted, in the ordinary course of transportation; *Magnin v. Dinsmore*, 62 N. Y. 45.

XVII. Delivery of Consignment.—It is the duty of the express company to deliver the consignment to the consignee at his residence or place of business.¹ And when goods are addressed to two persons jointly, although they may not be a firm, a delivery to one of them is a delivery to both.² A high degree of care is required of an express company in the delivery of goods,³ and delivery to the wrong or unauthorized person renders the express company liable for the goods;⁴ and the goods must be delivered in the condition in which they were received.⁵ The company, from the address on a money-package, with no other notice of ownership, may treat the consignee as the one to control the manner of delivery. Any delivery releasing the company as to the consignee is good as to the consignor.⁶

1. *To Whom.*—The consignment must be delivered to the consignee. An express company, at its peril, must be careful to deliver to the right person; and if by mistake, or fraud of others, the delivery is to the wrong person, it would be treated as a conversion by the company.⁷ Goods delivered to a stranger,

1. *American Merchants' Union Express Co. v. Wolf*, 79 Ill. 430; *American Merchants' Union Express Co. v. Milk*, 73 Ill. 24; *Witbeck v. Holland*, 45 N. Y. 13; 2 *ars. on Cont.* (5th ed.) 188. In *Sweet v. Barney*, 23 N. Y. 335, the facts of the case were, *Sweet et al.* were bankers at Danville, and they delivered a money package to an express company, directed to People's Bank, New York. The package was taken to New York, and delivered at company's office to Messenger, an employee of People's Bank, who had been for several years accustomed to receive money packages for the bank at the company's office and at a clearing-house, and of the company when delivered money packages at the bank, and gave receipts for them for the bank. Messenger did not take the package away, at requested the company to keep the package at their office for the bank until he called for it. After that, other money packages for the bank were delivered to Messenger for the bank, and receipted for by him, without objection. Then the package in question was delivered to Messenger, and stolen from him. *Held*, "that a delivery to an agent of the bank, authorized by it to receive the package, at any place other than the bank, would discharge the company."

2. *Wells v. American Express Co.*, 44 Wis. 342.

3. *Southern Express Co. v. Van Meter*, 17 Fla. 783.

Money Packages.—*St. John v. Express Co.*, 1 Wood (U. S. C. C.), 612; *Wells v. American Express Co.*, 55 Wis. 23; *Southern Express Co. v. Craft*, 49 Miss. 480; *United States v. Pacific Express Co.*, 15

Fed. Rep. 867; *U. S. Express Co. v. Hutchins*, 67 Ill. 348.

4. *Southern Express Co. v. Van Meter*, 17 Fla. 783; *Southern Express Co. v. Dickson*, 94 U. S. 594; *American Merchants' Union Express Co. v. Milk*, 73 Ill. 224. In *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, 32 Fed. Rep. 51, the shipper attached bill of lading to draft, consignee paid it while in transit, the company delivered the goods to the shipper; the company was held liable to consignee.

5. A railroad company received for transportation a carload of corn in the ear, and afterwards shelled it and delivered it. *Held*, liable for its failure to deliver it as it received it. *Mo. Pac. R. R. Co. v. Nevin*, 31 Kan. 385.

6. *Sweet v. Barney*, 23 N. Y. 335.

7. *McEntee v. New Jersey S. Co.*, 45 N. Y. 34; *Duff v. Budd*, 3 Brod. & Bing. 177. In *McEntee v. New Jersey Steamboat Co.*, *supra*, it is said, "The duties of carriers may be varied by the differing circumstances of cases as they arise; but it is their duty in all cases to be diligent in their efforts to secure a delivery of the property to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith, and solely with a view to a proper delivery." See also *Guillaume v. Hamburg & Am. P. Co.*, 42 N. Y. 212.

"E., doing business at P., ordered some canned goods of the plaintiff, to whom he was unknown. Plaintiff delivered the goods to defendant, a common carrier consigned to himself, and received two

without evidence of identity, makes the company liable to the consignor for the value of the goods.¹ Goods consigned to order of consignor should not be delivered to another without distinct order from consignor.² When goods are received by the company, consigned to a person designated in the bill of lading, they must be delivered to him; and if the company deliver to any other person, even by the direction of the consignor, after the goods are received by the company for transportation, when the designated consignee has been notified of the shipment to him, having advanced money on the goods, the company is liable to him for conversion.³

2. *When.* — It is the duty of the company, when the consignment reach the place of destination, to deliver them as soon as practicable, within business hours of the place.⁴

3. *Where.* — The consignment must be delivered to the consignee at his residence or place of business,⁵ unless he authorizes and directs a delivery at some other place;⁶ and he is under no obligations to call at the company's office for the package, or do more than notify it of his residence, place of business, or where he may be found, after he has received notice from the company of the arrival of the goods, and that, upon inquiry, it has not been able to find either his residence or place of business.⁷

XVIII. Compensation. — The common-law liability of an express company does not rest in contract, but is imposed upon it by the law.⁸ Hence, when goods are offered the company for transportation, it must receive them on being paid or tendered the reasonable rates for carriage.⁹ And the consignor has a right to insist on a simple receipt for the goods, unincumbered by restrictions or conditions; and the company cannot refuse the consignment because the consignor will not assent to limitations in the receipt.¹⁰

shipping receipts: one receipt, indorsed to E., attached to a draft upon E. for the value of the goods, was sent to a bank at P. for collection; the other receipt was sent directly to E. without an indorsement by the plaintiff. E., upon presentation of the receipt, received the goods from the defendant, who had no knowledge of the other receipt and draft. *Held*, that the possession by E. of the receipt clothed him with such an apparent right to the goods as relieved the defendant of liability upon the refusal of E. to pay for the goods, and his subsequent insolvency." *Weyland v. A. T. & S. F. R. R. Co. (Iowa)*, 30 Am. & Eng. R. R. Cas. 102.

1. *Price v. Oswego & Syracuse R. R. Co.*, 50 N. Y. 213. In this case, the goods were ordered in the name of a fictitious firm, and were shipped innocently by the consignor in compliance with the order

directed to the fictitious firm, and, on arrival at place of delivery, were delivered to a stranger without requiring proof of identity; and the carrier was held liable to consignor for the value of the goods.

2. *Viner v. New York, etc., Steamship Co.*, 50 N. Y. 23.

3. *Bailey v. Hudson R. R. Co.*, 49 N. Y. 70.

4. *Marshall v. American Express Co.*, 7 Wis. 1.

5. *Witbeck v. Holland*, 4 N. Y. 13.

6. *Sweet v. Barney*, 23 N. Y. 335.

7. *Witbeck v. Holland*, 38 How. Pr. (N. Y.) 273.

8. *Merritt v. Earle*, 29 N. Y. 115.

9. *The Mercantile Mutual Ins. Co. v. Chase*, 1 E. D. Smith (N. Y.), 115; *Kirby v. Adams Express Co.*, 2 Mo. App. 369.

10. *Southern Express Co. v. Moon*, 39 Miss. 822.

The rates of compensation should be fair and reasonable. Existing rates are *prima facie* reasonable.¹

The performance of an act which a party is compelled by the law to do is not a consideration for a contract.² Therefore the mere agreement of the company to carry the consignment does not constitute a sufficient consideration for a contract limiting its common-law liability, when the same compensation is charged as it would be entitled to when there is no limitation upon its responsibility, or what it customarily charges for like service.³

1. *Paid in Advance*.—About the only question that can arise after the consideration for the carriage is paid to the company receiving the consignment for transportation is the one concerning the consideration where the consignment is to be carried over one or more connecting routes. If an express company receives goods from another carrier, with knowledge that a through contract has been made, and the price of transportation to the point of destination paid in advance, it can make no further charge for the carriage of the goods over its route.⁴

The company, in all cases, is entitled to demand the price of carriage before it receives the goods, and it may refuse to take them if it be not paid.⁵

2. *Paid on Delivery*.—If the compensation be not paid in advance, and the company receives and carries the goods, it is not bound to deliver them until the price of carriage is paid; and this right to hold the consignment for unpaid charges is called a "lien."⁶ The charges demanded must be strictly connected with the carriage,⁷ and cannot include charges for keeping goods till after tender to consignee,⁸ who is entitled to inspect the goods before paying charges.⁹ But if the owner or consignee fails or refuses to receive the goods, the company may store them, and demand warehouse charges before delivering the consignment.¹⁰

If the consignment passes through the hands of connecting carriers, the last carrier may, in connection with his charges for carriage on his route, demand and have paid to him also any lawful charges for freight properly advanced by him for transportation by the other carriers, before he can be compelled to surrender the consignment.¹¹

1. *Southern Express Co. v. St. Louis R. R. Co.*, 13 Reporter, 353, 3 McCrary (U. S. C. C.), 147.

2. 1 Addison on Contracts (Morgan's ed.), p. 13.

3. "The Question of Consideration as affecting Contracts limiting Liability," chap. ix. p. 270 of Contract of Carriers—Lawson.

4. *Marsh v. Union Pacific Ry. Co.*, 9 Fed. Rep. 873; s. c., 6 Am. & Eng. R. R. Cas. 359.

5. *Fitch v. Newbury*, 1 Doug. (Mich.) 11.

6. *Bouvier's Law Dict.*

7. *Steamboat v. Kraft*, 25 Mo. 76.

8. *Somes v. Shipping Co.*, 8 H. L. 338; *Lambert v. Robinson*, 1 Esp. 119; *Steamboat v. Kraft*, 25 Mo. 76.

9. *Lanata v. Grennell*, 13 La. Ann. 24.

10. *The Eddy*, 5 Wall. 481; *Alden v. Carver*, 13 Iowa, 253; *Western Trans. Co. v. Barber*, 56 N. Y. 544.

11. *Wells v. Thomas*, 27 Mo. 17; *Cooper v. Lane*, 19 Wend. (N. Y.) 386; *Dawson v. Kittle*, 4 Hill (N. Y.), 107; *Steamboat v. Kraft*, 24 Mo. 76; *Potts v. N. Y. & N. Eng. R. R. Co.*, 131 Mass. 455; s. c., 3 Am. & Eng. R. R. Cas. 425.

3. *Lien for.* — The company has a lien upon the consignment for charges on every part of it; a delivery of part of the goods does not discharge or waive the lien upon the remainder without proof of such an intention. And where goods are consigned to be carried over the route of the company, and thence to be delivered to a connecting carrier, the second carrier has a lien for his own charges and for "back charges" paid by it to the first company. If the consignor exercises the right of stoppage *in transitu*, the company has still its lien for all charges.¹

The company's lien is prior to any claims against the owner or the consignee.²

In the absence of statutory authority, the lien cannot be enforced by selling the goods: legal proceedings must be instituted, and a decree of sale procured.³

If goods are sent contrary to contract, or if there is a prepayment of compensation for the whole distance, and the carriers have knowledge of that fact, there is no lien.⁴ If the company receives goods from a tortious holder, it has no lien on them against the owner; but if the goods are received by the company from one who, by the act of the owner, has apparent authority, it has a lien for compensation against the owner.⁵

XIX. Goods sent "C. O. D." — 1. *Definition of "C. O. D."* — "The letters 'C. O. D.' refer to the value or price of the package which, as marked on it, is to be *collected on delivery*, and transmitted to the consignor. They have nothing to do with the transportation charges, nor do they affect the character of the shipment; the duty to transport safely remains the same. But if the consignee neglects or refuses to take the property and pay the money, the former remains in the carrier's hands, subject only to his liability as a warehouseman."⁶

1. *Potts v. N. Y. & N. Eng. R. R. Co.*, 131 Mass. 455; s. c., 3 Am. & Eng. R. R. Cas. 425; *Lane v. Old Colony R. R. Co.*, 14 Gray (Mass.), 143; *Fuller v. Bradley*, 25 Pa. St. 120; *Boggs v. Martin*, 13 B. Mon. (Ky.) 239. The unconditional delivery of the goods waives the lien, — *Sears v. Willis*, 4 Allen (Mass.), 212; *Baily v. Quint*, 22 Vt. 474; *Forth v. Simpson*, 13 Q. B. 689, — yet usage or express agreement will sustain it. *The Eddy*, 5 Wall. 481. Where goods pass through the hands of connecting carriers, the last has a lien for his charges and for "back charges" advanced by him. *Wells v. Thomas*, 27 Mo. 17; *R. R. Co. v. Rae*, 18 Ill. 488; *Briggs v. Boston, etc., R. R. Co.*, 6 Allen (Mass.), 246; *Steamboat v. Kraft*, 25 Mo. 76; *Knight v. Providence, etc., R. R. Co.*, 13 R. I. 572; s. c., 9 Am. & Eng. R. R. Cas. 90. When the consignee refuses the goods, and they are stored, the warehouse charges are a lien upon them. *The Eddy*, 5 Wall. 481; *Alden v. Carver*, 13 Iowa, 253; *Western Trans. Co. v. Barber*,

56 N. Y. 544. When the delivery of the goods is obtained by fraudulent representations, the lien is not discharged. *Bristol v. Wilshire*, 1 B. & C. 514; *Bigelow v. Heaton*, 6 Hill (N. Y.), 43.

2. *Rucker v. Donovan*, 13 Kan. 251.

3. *Briggs v. Boston, etc., R. R. Co.*, 6 Allen (Mass.), 246; *Doane v. Russell*, 3 Gray (Mass.), 382; *Hunt v. Haskell*, 24 Mo. 339; *Gracie v. Palmer*, 8 Wheat. 605; *Field v. Newport, etc., Ry. Co.*, 3 H. & N. 409; *Chandler v. Belden*, 18 Johns. (N. Y.) 157.

4. *Marsh v. Union Pac. R. R. Co.*, 3 McCrary, C. Ct. 236; s. c., 6 Am. & Eng. R. R. Cas. 359.

5. *Vaughan v. Providence & Worcester R. R. Co.*, 13 R. I. 578; s. c., 9 Am. & Eng. R. R. Cas. 41, and very lengthy note at the end of the case; *Fitch v. Newbury*, 1 Doug. (Mich.) 11.

6. *Contracts of Carriers (Lawson)*, 219; *American, etc., Express Co. v. Schier*, 55 Ill. 140; *Gibson v. American, etc., Express*

2. *When Consignee refuses to take the Goods.*—When the consignee refuses to take the goods and pay for them, it is the duty of the express company to notify the consignor of that fact; and when the company does so, it is then relieved of the liability of a common carrier, and the goods are subject to the order of the consignor.¹

XX. Collections.—It is the duty of an express company, on taking a claim for money for collection, to act promptly and without unreasonable delay to collect it, and return the money.²

Co., 1 Hun (N. Y.), 387; *Marshall v. American Express Co.*, 7 Wis. 1.

Some courts will take judicial notice of the meaning of the letters "C. O. D."—*United States Express Co. v. Keefer*, 59 Ind. 263; *American Express Co. v. Lesem*, 39 Ill. 312,—while other courts require the letters to be explained by testimony. *Collender v. Dinsmore*, 55 N. Y. 200; *McNichol v. Pacific Express Co.*, 12 Mo. App. 401.

Goods shipped "C. O. D." does not change the liability of the express company if they are destroyed by fire after reaching their destination. *Gibson v. American Merchants' Union Express Co.*, 1 Hun (N. Y.), 387.

Goods marked "C. O. D." were carried, and consignee paid the charges, but refused to receive the goods, and ordered them returned, and this order was not countermanded. He was sued by consignor, who obtained judgment. The goods were returned at consignor's request before judgment. After judgment, consignee sued the company. *Held*, that he had no cause of action. *American Express Co. v. Greenhalgh*, 80 Ill. 68.

1. *American Merchants' Union Express Co. v. Wolf*, 79 Ill. 430; *Gibson v. American, etc., Express Co.*, 1 Hun (N. Y.), 387; *Marshall v. American Express Co.*, 7 Wis. 1.

When goods are sent "C. O. D.," and they are carried and delivered to consignee, who gives his check therefor instead of cash, and that check is returned by the company, and accepted unconditionally by the consignor, this is a waiver of the duty of the company to collect the cash, and ratifies the company's act. *Rathbun v. Citizens' S. Co.*, 76 N. Y. 376.

Goods were sent "C. O. D.," and arrived safe. The consignee was notified of the arrival, and promised to pay for and take them in a few days, but delayed to do so, and the goods were destroyed by accident; and the company was relieved from liability. *Weed v. Barney*, 45 N. Y. 344.

2. *Collections.*—An express company taking note for collection beyond its terminus, and failing by negligence to collect

it, is liable for the damage resulting therefrom. *Knapp v. U. S. & Canada Express Co.*, 55 N. H. 348. But where the express company carried a check for collection, and did not collect by the failure of the bank, there being no unreasonable delay on the part of the company, it was not held responsible for the loss. *Eiswald v. Southern Express Co.*, 60 Ga. 496.

An express company receiving a draft for collection, in case of non-payment should duly notify the person from whom it was received; otherwise the company is liable for all damages sustained for not so doing; and if the company used due diligence to collect the draft before it can be liable for more than nominal damages, the plaintiffs must show that they could, in all probability, have collected the amount of the draft or some part of it from the drawee, if they had received proper notice of non-payment, which it was the company's duty to give. *Lienau v. Dinsmore*, 41 How. Pr. (N. Y.) 97.

In 3 *Sutherland on Damages*, p. 28, it is said, "An express company having received from the drawer for collection, with instructions to return it at once if not paid, a draft for a sum overdue from the drawee to the drawer, with interest, presented it for payment, when the drawee declined to pay a dollar and twenty cents included in the draft. Thereupon the company, without collecting any thing on the draft, agreed with him that they would hold it until he could inquire of the drawer as to the disputed part; and he wrote the same day, making such inquiries, and adding, 'The parties will hold the draft until I hear from you.' Upon receiving a reply in due course of mail, from the drawer, that the additional sum was for interest, the drawee was, and for two days continued to be, ready to pay the draft, which the express company continued to hold, but neglected again to present. The third day was Sunday, and on the fourth day he became insolvent. It was *held* that the express company were liable for the drawer's loss on the draft by the drawee's insolvency." *Whitney v. Merchants' Union Express Co.*, 104 Mass. 152.

XXI. Connecting Lines.—In the absence of special contract, an express company receiving goods marked to a point beyond its route, but having no special business relationship with the carrier on connecting lines, is responsible as a common carrier only for safe and seasonable delivery at the end of its own route to the carrier next in line of transportation.¹

But an express company can contract to carry beyond its route, and render itself responsible as a common carrier for the entire distance.² But when goods are received to be carried over the whole route, and delivered by each to next succeeding company, and each company pays "back charges" till last company, who is to collect all from consignee, this does not make them partners, or make the last company liable for injury to or loss of goods before it reached it.³

Where goods are received under a special contract limiting carriers' liability, and that the goods may be delivered to a connecting carrier, and that it may also have the benefit of the limitations in the contract, a connecting carrier receiving the goods

1. Hadd v. U. S. & Canada Express Co., 52 Vt. 335; s. c., 6 Am. & Eng. R. R. Cas. 443; Gibson v. American Merchants' Union Express Co., 3 T. & C. (N. Y.) 501.

The English cases hold that a carrier first receiving goods marked for a particular place, without expressly limiting its responsibility, undertakes *prima facie* to carry them to their destination, even though beyond the limits of the company's route, and is to be regarded as a common carrier throughout the entire route, even if beyond the limits of England. Root v. The Great Western R. R. Co., 45 N. Y. 530; Muschamp v. Lancaster & P. R. W., 8 M. & W. 421; Watson v. Ambergate R. W., 3 Eng. L. & E. 497; Scothorn v. S. Staffordshire R. W., 8 Ex. 341; s. c., 18 Eng. L. & E. 553; Wilson v. York R. W., 18 Eng. L. & E. 557; Crouch v. London & N. W. R. W., 25 Eng. L. & E. 287; Bristol & Ex. v. Collins, 7 Ho. Lds. Cas. 194.

2. Contracts of Carriers (Lawson), 342; Redfield on Car. §§ 190 to 197; Brice on *Ultra Vires* (Green's ed.), 673.

Probably the only case opposed to this proposition is Hood v. New York, etc., R. R. Co., 22 Conn. 502.

In the case of Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221, it is said, "It does not seem to be denied that the company had the legal capacity to make such a contract, or, which is the same thing in effect, that it is estopped from denying its capacity to do so. That such is the settled law seems to be now well established (2 Redfield on Railways, p. 9, sect. 152; Id. 161; 8 M. & W. 421; 21 Conn. 570; 27 Verm. 399; Id. 110)." Condict v. The Grand Trunk R. R. Co., 54 N. Y. 500;

Maghee v. Camden, etc., R. R. Co., 45 N. Y. 514, where it is said that this is affirmed by the authorities in England and in this country. Muschamp v. Lancaster R. R. Co., 8 M. & W. 421; Mucha v. London & S. & S. W. R. R. Co., 2 Ex. 415; Perkins v. Portland, 47 Me. 573; Noyes v. Rutland, etc., R. R. Co., 27 Vt. 110; Redfield on Railways, 284, and cases cited.

This agreement may be proved by an express contract, or by the company holding itself out as doing business for the whole distance, or by the circumstances showing that the consignment was accepted by the company for through shipment. Root v. Great Western R. R. Co., 45 N. Y. 532; Phila. & Reading R. R. Co. v. Ramsey, 89 Pa. St. 474. But the marks on goods are not, of themselves, evidence of such agreement. Van Santvoord v. St. John, 6 Hill (N. Y.), 157; Babcock v. The Lake Shore, etc., R. R. Co., 49 N. Y. 491. Yet receiving goods to be shipped to a point beyond its route, and receiving the entire price for transportation to that point, makes out a *prima facie* case of contract to carry and deliver the package to that point. St. John v. Express Co., 1 Woods (U. S. C. C.), 612; Adams Express Co. v. Wilson, 81 Ill. 339. Compare Hood v. New York, etc., R. R. Co., 22 Conn. 1; Elmore v. The Naugatuck, etc., R. R. Co., 23 Conn. 457.

3. Hot Springs R. R. Co. v. Trippe, 42 Ark. 465; 18 Am. & Eng. R. R. Cas. 562; Darling v. B. & W. R. R. Co., 11 Allen (Mass.), 295; Atchison, T. & S. F. R. R. Co. v. Roach, 35 Kan. 740; s. c., 27 Am. & Eng. R. R. Cas. 257.

becomes entitled to the benefit of the limitation.¹ If the contract exempts from liability the express company and its connections, it protects intermediate company;² but if the agreement is not a "through contract," the connecting company is not entitled to the limitations in it.³

XXII. Actions by and against Express Companies.—Actions at law may be maintained against express companies the same as against any other common carriers, and the service of summons upon them is had in the same manner; and the proper mode of getting service upon them is in most of the States pointed out by statute.⁴

To support an action against an express company for failure to deliver goods, the plaintiff must be the owner of, or have a special interest in, the goods; and the consignee, *prima facie*, is the owner of them.⁵ But if the consignor is the owner of the goods, he may maintain an action against the company for lost goods.⁶ If the consignment is lost or damaged by the company, the party to bring suit for such loss or damage is he who is the owner thereof, whether he be consignor or consignee.⁷

One who consigns money to the owner may maintain an action for the loss of it.⁸

If the company arbitrarily and illegally refuse to accept the property for transportation, it is liable for a breach of duty, but not as a carrier for value.⁹

1. *For Injunction.*—An injunction will be granted to prevent a railroad company from charging a certain express company higher rates than were charged to other specified companies by the same railroad company.¹⁰

An injunction will lie against a railroad company to prevent its discrimination in favor of one express company over another.¹¹

An injunction will lie to restrain a railroad company, one part

1. *Levy v. Southern Express Co.*, 4 So. Car. 234.

2. *Whitworth v. Erie R. R. Co.*, 87 N. Y. 413.

3. *Ætna Ins. Co. v. William A. Wheeler*, 49 N. Y. 616.

4. See the statute of your own State.

5. *Thompson v. Fargo*, 49 N. Y. 188.

6. *Thompson v. Fargo*, 49 N. Y. 188.

7. *Waterman v. Chicago, etc., R. R. Co.*, 18 Am. & Eng. R. R. Cas. 486; *South & North Ala. R. R. Co. v. Wood*, 72 Ala. 45; s. c., 18 Am. & Eng. R. R. Cas. 634; *Denver, etc., R. R. Co. v. Frame*, 6 Colo. 382; s. c., 18 Am. & Eng. R. R. Cas. 637; *Wells v. American Express Co.*, 55 Wis. 23; s. c., 6 Am. & Eng. R. R. Cas. 298; *Green v. Clark*, 12 N. Y. 343. In which last case it is said, "I am not aware that it has ever been doubted that the owner of the goods may maintain an action on the case against the carrier for negligence or carelessness by which the goods have been injured or

lost. No case was cited upon argument, and I have found none. It has often been made a question whether the title to the goods was in the plaintiff; but, that question being settled, the decisions are uniform that the owner is the proper party to bring the action, whether he is the consignor or consignee. As a rule of evidence, *prima facie*, the title is in the consignee. *Evans v. Marlett*, 1 Ld. Raym. 271; *Sargent v. Morris*, 3 B. & Ald. 277; *Green v. Clarke*, 12 N. Y. 343; *Gwyn v. Richmond & D. R. R. Co.*, 85 N. C. 427; s. c., 6 Am. & Eng. R. R. Cas. 452.

8. *Snider v. Adams Express Co.*, 77 Mo. 523; s. c., 16 Am. & Eng. R. R. Cas. 261.

9. *Nelson v. The H. R. R. Co.*, 48 N. Y. 504.

10. *Southern Express Co. v. Memphis, etc., R. R. Co.*, 8 Fed. Rep. 799.

11. *Balt. & Ohio R. R. Co. v. Adams Express Co.*, 22 Fed. Rep. 404; s. c., 18 Am. & Eng. R. R. Cas. 455.

of whose line is in a foreign country, and the other part in a State, from interfering with the facilities of an express company, and from refusing to receive and carry its messengers and express matter for reasonable compensation over that part of its road within the State.¹

A court of equity has power to issue a preliminary mandatory injunction to compel a railroad company to furnish to an express company express facilities over its railroad.²

2. *For Damages or Loss.* — *a. On Contract.* — In general, actions against an express company for loss of goods must be brought in consignee's name.³

Where goods are sent "C. O. D.," and neither the goods nor the money returned, the consignor may maintain an action for his damage.⁴

If the company carries and delivers the consignment, a payment of price for carriage does not prevent an action to recover for damages done to the goods while in transit. The owner may pay the freight and sue for the damages, or counter-claim the damages when sued for the price of carriage, or may have his cross-action.⁵

3. *In Tort.* — To constitute a conversion of the consignment by an express company, there must be a wrongful disposition or withholding of the goods; mere non-delivery is not sufficient, nor a refusal to deliver on demand, if the goods have been lost through negligence, or have been stolen.⁶

The mere omission of the company to carry the consignment in a reasonable time does not, of itself, render the company liable for the value thereof in an action for conversion.⁷

If an express company, without inquiry as to the value of goods received for shipment, contracts to carry them for a certain price, and there is nothing on consignor's part to mislead the company, and no notice by the company of a limited liability based on value from which an implied statement of value could arise, the company is bound by the contract: and if the goods should prove to be more valuable than the company supposed, and they are carried, the company cannot lawfully demand an additional price from the consignee for carriage or risk incurred; and if it does so, refusing to deliver to consignee until it is paid, and the consignee pays it, an action will lie to recover it back as under duress of goods.⁸

1. *Fargo v. Redfield*, 22 Fed. Rep. 373; the owner of the goods. *Thompson v. s. c.*, 18 Am. & Eng. R. R. Cas. 463. *Fargo*, 49 N. Y. 188.

2. *Wells, Fargo & Co. v. North. Pac. R. R. Co.*, 18 Am. & Eng. R. R. Cas. 440; 59 Ind. 263.

Fargo v. Redfield, 23 Fed. Rep. 469; *s. c.*, 18 Am. & Eng. R. R. Cas. 463; *Chicago, etc., R. R. Co. v. N. Y., etc., R. R. Co.*, 24 Fed. Rep. 516; *s. c.*, 22 Am. & Eng. R. R. Cas. 265.

3. *United States Express Co. v. Keefer*, 59 Ind. 263. *Prima facie* the consignee is

4. *United States Express Co. v. Keefer*, 59 Ind. 263.

5. *Schwinger v. Raymond*, 83 N. Y. 192.

6. *Magnin v. Dinsmore*, 70 N. Y. 410; *Smith v. Dinsmore*, 9 Daly (N. Y.), 188; *s. c.*, 9 Reporter, 627.

7. *Scoville v. Griffith*, 12 N. Y. 509.

8. *Baldwin v. L. & G. W. S. S. Co.*, 74 N. Y. 125.

If the consignee be not at the place of destination of the goods when they arrive, or cannot be found upon reasonable inquiry, and no one appears for him, the company may place the goods in a warehouse; but the company cannot avoid liability by abandoning the goods or property, or by delivering them to a party not entitled to receive them.¹

4. *Recovery of Property.* — If the goods sent "C. O. D." are fraudulently obtained from express company by the consignee, without paying the price, the company may recover the goods in an action in replevin.²

XXIII. Pleadings. — 1. *Petition or Complaint.* — a. *Necessary Allegations.* — In an action upon a written contract against the company to carry, the plaintiff must rely upon the contract, and not on the common-law liability.³

Where suit is brought for non-delivery, and the petition alleges a breach of common-law liability, if the evidence shows the goods were received for carriage under a special written contract, which is not declared upon, the variance is fatal.⁴ An express company is liable in trover for failure to deliver goods.⁵ But, to maintain an action for conversion, there must be a wrongful disposition or withholding: a mere non-delivery, or refusal to deliver on demand, is not sufficient, if the goods have been negligently lost or stolen.⁶

b. *Forms.* — In actions against express companies, the petition must be formal, and to some degree technical.⁷

2. *Answer.* — a. *Limitation must be pleaded when.* — There is an important distinction between limitations provided for in contracts of express companies, limiting their liability in the nature of condition precedent to maintaining an action for loss of, or damage to, consignment; and, in cases where the condition partakes of the nature of a statute of limitation, in such cases the condition cannot be availed of on the trial of the cause unless set up in the answer.⁸

b. *Same Rules apply in Actions against Company.* — In actions against express companies, of course, the same rules of pleadings apply as in other cases. But in some instances answers must be formal, and technically correct.⁹

1. North. Penn. R. R. Co. v. Com. Nat. Bank of Chicago, 25 Reporter, 385.

2. American Merchants' Union Express Co. v. Willsie, 79 Ill. 92.

3. Porter v. Southern Express Co., 4 S. C. 135.

4. Hall v. Penn. Co., 90 Ind. 459; s. c., 16 Am. & Eng. R. R. Cas. 165.

5. Smith v. Dinsmore, 9 Daly (N. Y.), 188; s. c., 9 Reporter, 627.

6. Magnin v. Dinsmore, 70 N. Y. 410.

7. Nash, Pleading & Practice, 521 to 525, where several forms of petitions can be found. Code, Pleading (Boone), § 133; 2 Estee's Pleading (3d ed.), § 1951.

8. Place v. Union Express Co., 2 Hilt. (N. Y.) 19; Westcott v. Fargo, 61 N. Y. 542.

In Westcott v. Fargo, *supra*, the condition in the receipt was, that the company would not be liable for loss or damage unless the claim therefor was made in writing "within thirty days from the accruing of the cause of action;" and the court, construing the condition, says, "The clause in question assumes that the plaintiff had a 'cause of action' which has already 'accrued' to him before the thirty days commenced to run. In that view the provision is in the nature of a statute of limitation, and should have been set up in the answer. As that was not done, the defendant cannot avail himself of it."

9. For forms of answer, see 2 Estee's Pleading (3d ed.), § 3663 to § 3672.

XXIV. Presumptions. — A presumption is an inference as to the existence of one fact from the existence of some other fact founded on a previous experience of their connection.¹ Presumptions of law are founded upon first principles of justice, the laws of nature, or the experienced course of human conduct and affairs, and the connection usually existing between certain things.²

In connection with the relation existing between the express companies and the public are many important presumptions.³

XXV. Evidence. — The word *evidence* includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.⁴ And many questions of evidence as to the rights, duties, and privileges of express companies have been adjudicated by the courts.⁵

1. Bouvier's Law Dict.

2. 1 Greenleaf on Evidence, chap. 6; Abbott's Trial Evidence, p. 569.

3. A presumption of negligence on the part of an express company arises from the mere fact of a loss of the consignment. *Grogan v. Adams Express Company*, 114 Pa. St. 523; s. c., 60 Am. Rep. 360; 7 Atl. Rep. 134.

In an action by employee against company for injuries received by him in its employment, an allegation in his complaint that the injuries complained of were caused by the negligence of one who was the "agent and manager of the said company's office," in absence of further allegations showing duties and powers of the agent, that allegation does not raise a presumption that the agent is a vice-principal, and the company liable for his negligence to employee. *Dwyer v. American Express Co.*, 55 Wis. 453; s. c., 8 Am. & Eng. R. R. Cas. 159.

The presumption is that the consignee is the owner of the consignment: it, however, may be rebutted. *Price v. Powell*, 3 N. Y. 322; *Penn. Co. v. Holderman*, 69 Ind. 18; s. c., 1 Am. & Eng. R. R. Cas. 285.

There is no presumption in favor of exempting an express company from its common-law liability. *Edsall v. Camden & A. R. R., etc., Co.*, 50 N. Y. 661; *Southern Express Co. v. Newby*, 36 Ga. 635; s. c., 91 Am. Dec. 783.

Where the consignment is destroyed by fire, and there is no evidence as to how it originated, the presumption is that it arose from the act of man. *Angel on Car.*, § 156; *Pittsburg, Cin., & St. L. R. R. Co. v. Barrett*, 36 Ohio St. 448; s. c., 3 Am. & Eng. R. R. Cas. 256. But the mere occurrence of a fire does not raise a presumption of negligence against the company. *Whitworth v. Erie R. R. Co.*, 87 N. Y. 413; s. c., 6 Am. & Eng. R. R. Cas. 349.

In the absence of fraud, concealment, or improper practice, the consignor is pre-

sumed to know the provisions in the company's receipt given him, limiting its liability as a carrier. *Belger v. Dinsmore*, 51 N. Y. 166.

The presumption of the law is, in the absence of positive evidence, that the goods are worth as much at destination as at point of shipment. *Rome R. R. Co. v. Sloan*, 39 Ga. 636; s. c., 91 Am. Dec. 783.

If goods are lost or injured while in the custody of an express company, in the absence of explanation which rebuts the presumption of negligence, the presumption is that the loss or injury was occasioned by the negligence of the company. *Adams Express Co. v. Holmes (Pa.)*, 30 Am. & Eng. R. R. Cas. 14; *Kirby v. Adams Express Co.*, 2 Mo. App. 369.

The unexplained non-delivery of the goods by the express company raises a presumption of negligence, which must be rebutted to escape liability. *Grogan v. Adams Express*, 30 Am. & Eng. R. R. Cas. 9; s. c., 114 Pa. St. 523.

4. Greenleaf on Evidence, chap. i.

5. Evidence to explain the Meaning of the Letters "C. O. D." — It is competent to give parol evidence to explain the meaning of "C. O. D." *Collender v. Dinsmore*, 55 N. Y. 200.

What evidence held to be insufficient to support a judgment against an express company for not delivering goods, and collecting the money therefor. *Adams Express Co. v. McConnell*, 27 Kan. 238; s. c., 9 Am. & Eng. R. R. Cas. 240; *Morley v. East Express Co.*, 116 Mass. 97. To establish the company's liability, it must be proved that the goods came into its possession. *Marquette v. Kirkwood*, 45 Mich. 51; s. c., 9 Am. & Eng. R. R. Cas. 85.

Evidence of a Contract over Connecting Lines. — A through contract over connecting lines may be proved by the holding-out of the express company for that purpose, or by circumstances indicating an understanding of such an agreement. *Root v.*

XXVI. Burden of Proof. — In actions against express companies for negligence, the burden of proving negligence is upon the plaintiff; and if the plaintiff's proof raises a presumption of negligence by showing an accident, which usually would not happen if proper care was exercised, then the burden is cast upon the defendant to relieve itself from that presumption.¹

The burden of proof is on the plaintiff, in an action for goods abstracted, to show that they were abstracted while in defendant's possession.²

Where there has been a deviation and a loss of consignment, and where it could be shown that the loss certainly would have

Great Western R. R. Co., 45 N. Y. 524. For a full discussion of English cases and American cases, see *Contracts of Carriers* (Lawson), 345 to 368; *Philadelphia & Reading R. R. Co. v. Ramsey*, 89 Pa. St. 474. But the marks on the goods are not of themselves evidence of such a contract. *Van Santvood v. St. John, 6 Hill* (N. Y.), 157; *Babcock v. Lake Shore, etc., R. R. Co.*, 49 N. Y. 491. Yet receiving goods for a point beyond its route, and the full price for carrying to that point, makes a *prima facie* through contract. 1 *Woods* (U. S. C. C.), 612. The English courts do not agree with the courts of this country as to what evidence constitutes an agreement for through carriage. *McGhee v. Camden, etc., R. R. Co.*, 45 N. Y. 514; *Contracts of Carriers* (Lawson), 345.

Evidence may be received to show that the condition of the package as received from the consignor was the same as when delivered to connecting carrier. *Snider v. Adams Express Co.*, 63 Mo. 376.

Where there is a general limitation from loss by fire, plaintiff must prove negligence to recover. *Whitworth v. Erie R. R. Co.*, 87 N. Y. 413; s. c., 6 Am. & Eng. R. R. Cas. 349.

An express company may refuse to receive goods improperly packed; but if it accepts them, it is bound to due care in the safe carriage; and, if injured, the burden is on the company to show that the injury was attributable to the defective packing, and not to the fault or neglect of the company. *Union Express Co. v. Graham*, 26 Ohio St. 595.

Placing a car next to the engine in which express goods are placed, is not evidence of want of reasonable and ordinary care. *Adams Express Co. v. Sharpless*, 77 Pa. St. 516.

Loss of Money. — It is only necessary to prove the delivery of the money to the company, and a failure by it to redeliver, to make it liable. *United States v. Pacific Express Co.*, 15 Fed. Rep. 867; *United States Express Co. v. Hutchins*, 67 Ill. 348.

Receipt. — A receipt, of itself, is evidence to bind the company. *Porter v. Southern Express Co.*, 4 S. C. 135. But an agent of, when sued by, the company has been permitted to deny the statements in his receipt by his own testimony. *Swann v. Southern Express Co.*, 53 Miss. 286.

Where a receipt contained a clause limiting the liability of the company, and the consignor could not read, and the agent read the principal part of, but not the limiting clause in, the receipt, it was held that, as the clause stated simply the law applicable to the liability of the company, the omission to read to consignor was no fraud, and that such a receipt may be explained by parol. *Hadd v. U. S. & Canada Express Co.*, 52 Vt. 335; s. c., 6 Am. & Eng. R. R. Cas. 443. See *Adams Express Co. v. Boscowitz*, 107 Ill. 660.

The company may show, in the face of a receipt signed by its agent for goods, that the goods never were delivered to the company, and that the agent acted without authority. *Robinson v. Memphis, etc., R. R. Co.*, 9 Fed. Rep. 129; s. c., 6 Am. & Eng. R. R. Cas. 592.

Where witnesses have testified to the value of an article, they may give their reasons therefor, even if the reasons consist of general opinions, statements, and practice. *Mo. Pac. R. R. Co. v. Nevin*, 31 Kan. 385.

1. *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282.

In *Roberts, etc., v. Chittenden*, it is said, "It is well settled that some evidence must be given on the part of the shipper or owner of the non-delivery of the goods, in order to charge the carrier according to the obligations assumed by him: although the allegation is of a negative, it must be sustained by some evidence before the defendants can be called upon to prove its delivery." *Roberts, etc., v. Chittenden*, 88 N. Y. 35; *Canfield v. Balt. & Ohio R. R. Co.*, 93 N. Y. 537.

2. *Canfield v. Balt. & Ohio R. R. Co.*, 75 N. Y. 144.

occurred from the same cause without a deviation, the burden of proof is upon the company to show that fact.¹ The burden is upon the company to show a necessary deviation.²

A failure of the company to deliver, on demand, the property, or a part of it, to consignee, is *prima facie* evidence of negligence.³ As a rule of evidence, *prima facie*, the title to the consignment is in the consignee.⁴

XXVII. Instructions.—An instruction is a statement, by the court to the jury, of the principles of law applicable to the issues and facts of the case developed by the pleadings and evidence.⁵ The court, in an action against an express company, may instruct the jury as to the liability of the company as a common carrier at common law, or under a special contract.⁶

XXVIII. Judgments.—A judgment is the decision of the law, given by a court of competent jurisdiction, as the result of proceedings instituted therein for the redress of an injury.⁷

When the judgment is against an express company for the loss of a consignment, it may vary according to the character of the lost consignment.⁸

1. *For Coin lost.*—When the consignment is coin, and it is lost by the company, it is not considered merchandise; and the judgment in such case should be entered for *coin*, and not for its equivalent in currency.⁹

2. *For Merchandise.*—If the lost consignment was merchandise, the judgment in an action for the damage for the loss thereof should be for the value of the consignment at the place of delivery less the charges for freight, if the goods were actually carried.¹⁰

1. *Maghee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514; *Davis v. Garrett*, 6 Bing. 716; *Dauseth v. Wade*, 2 Scam. (Ill.) 285.

2. *Ackley v. Kellogg*, 8 Cow. (N. Y.) 223.

3. *Canfield v. Balt. & Ohio R. R. Co.*, 93 N. Y. 532.

4. *Green v. Clark*, 12 N. Y. 343.

5. *Green's Pleading & Practice*, p. 384, § 1054.

6. As to whether the carrying of living animals is done as a common carrier, see *Kansas Pac. Ry. Co. v. Reynolds*, 8 Kan. 623; *American Merchants' Union Express Co. v. Phillips*, 29 Mich. 515.

A trunk containing valuable goods was delivered to company with notice of value; and the receipt stipulated that the company would be liable for loss or damage only when specially insured by terms of receipt, and in no case to exceed fifty dollars unless greater amount was specified. The court refused to instruct the jury that the company had the right to assume the trunk did not contain goods of special value, and that it was not liable for the goods, or for injury to trunk beyond fifty dollars. *Levy v. Southern Express Co.*, 4 S. C. 234.

As to instruction in case of fire to car during transit of goods, see *Adams Express Co. v. Sharpless*, 77 Pa. St. 516.

7. *Bouvier's Law Dict.*

8. *Sedgwick on the Measure of Damages* (6th ed.), 425.

9. The recovery in all actions should be for what is lost. Gold coin is not merchandise, but one kind of money; and in an action of tort to recover for its loss, the judgment should be for gold, and not for its value in currency. *Kellogg v. Sweeney*, 46 N. Y. 291; *Chrysler v. Renois*, 43 N. Y. 209.

Whether in such case the judgment should be for the value of the coin in legal-tender notes, or for the coin itself *in specie*, the decisions in Massachusetts and New York are at variance. *Sedgwick on Measure of Damages* (6th ed.), p. 285; *Cushing v. Wells, Fargo & Co.*, 98 Mass. 550; *Kellogg v. Sweeney*, 46 N. Y. 291. Compare *Gay's Gold*, 13 Wall. 358; *The Vaughn and Telegraph*, 14 Wall. 258.

10. *Whitney v. Chicago, etc., R. R. Co.*, 27 Wis. 327; *Louis v. Steamboat Buckeye*, 1 Handy (Sup. Ct. of Cin.), 150; *Bailey v. Shaw*, 4 Fost. (N. H.) 297; *S. & M. R. R. Co. v. Henry*, 14 Ill. 156.

XXIX. Statutes.—The statutes for the most part, so far as they are applicable to common carriers, are but reiterations of the common law;¹ and the principal enactments in England are the "Carriers' Act,"² and the "Railway and Canal Traffic Act,"³ enacted to restore the principles of the common law that had been departed from. And in this country the principal statutes are, the statutes of Illinois, prohibiting a carrier from limiting his common-law liability;⁴ the enactment of Iowa, which prohibits any "contract, receipt, rule or regulation" that will limit the carrier's common-law liability;⁵ the statute of Michigan, which requires a *written* contract, none of which shall be printed, to limit the common-law liability;⁶ the Mississippi statute, under which the courts have decided that a carrier may limit by contract, but not by notice;⁷ and the statutes of Texas,⁸ which forbids the limiting of a carrier's common-law liability "in any manner whatever."

XXX. Intoxicating Liquors.—An express agent, acting in that capacity, receiving at his office a package containing intoxicating liquor, and knowing, or having reason to believe or suspect, what it contains, delivering the same to consignee, collecting the pay therefor, and transmitting it to the consignor, is liable to conviction under an indictment charging him with the illegal sale of the liquor.

It is essential to such liability that the agent have knowledge of, or reason to suspect, the contents of the package.

An express company is not bound to carry and deliver intoxicating liquors if a penalty is incurred thereby by it. But the company, as a general rule, is not bound to know the contents of packages, nor are its agents presumed to know.⁹

XXXI. Postal Laws.—When an express company carries with a package an unstamped letter concerning the package, it does not violate the postal laws. Congress intended in the act of March 3, 1845, to allow an unstamped letter of advice relating to the consignment to be transmitted with it.¹⁰

XXXII. Sunday Laws.—An express company is not relieved from responsibility by reason of the contract having been made

1. Contract of Carriers (Lawson), p. 28.
2. 11 Geo. IV. 1 Wm. IV. ch. 68.
3. 17 & 18 Victoria, ch. 31.
4. The statute of Illinois, prohibiting a carrier from limiting his common-law liability, does not affect his right to restrict his liability to a certain amount, where the value of the property received is asked and not given. *Mather v. American Express Co.*, 2 Fed. Rep. 49; s. c., Contract of Carriers, p. 453.
5. Laws 1866, p. 121. For construction, see *Mulligan v. Ill. Cent. R. R. Co.*, 36 Iowa, 180; *McDaniel v. Chicago, etc., R. R. Co.*, 24 Iowa, 412; Code, § 1307.
6. *Rose v. Des Moines, etc., R. R. Co.*, 39 Iowa, 246.
7. *Mobile, etc., R. R. Co. v. Weiner*, 49 Miss. 725; *Southern Express Co. v. Moon*, 39 Miss. 822.
8. *Paschal's Digest*, art. 4253. Statutes fixing rates of freight and passenger rates on railroads do not include railroad charges for carrying express freight and the messenger of the company. *Texas Express Co. v. R. R. Co.*, 6 Fed. Rep. 426.
9. *State v. Goss*, 59 Vt. 266; s. c., 30 Am. & Eng. R. R. Cas. 118.
10. *United States v. United States Express Co.*, 5 Bissell (U. S. C. C.), 91.

and the goods received on Sunday: its liability does not rest in contract, but is one imposed by law.¹

XXXIII. Stolen Property.—Where property has been stolen, and delivered to an express company, the possession of the company is unlawful; and when the owner or his agent demands the property of the company, it should surrender it; failing to do so, it is liable for its value.²

An express company is liable for goods stolen from its office.³

XXXIV. Interstate Commerce.—If a railroad company doing business in States and Territories can refuse to an express company the facilities of its road for failure to comply with State and Territorial laws, the burden is on the railroad to show the want of compliance with the laws.⁴

An express company engaged in interstate commerce has a right to carry on its business unrestricted by any Territorial or State laws.⁵

1. *Merritt v. Earle*, 29 N. Y. 115. In 65 How. Pr. (N. Y.) 72, it is said, "Although an express company would not be justified in transacting its ordinary business, or receiving and delivering merchandise, on Sunday, yet they may, despite the provisions of the Sunday clause of the Penal Code, carry express through the city of New York on Sunday from Jersey City Ferry to the Grand Central Depot; and if the police threaten to interfere, the court will grant an injunction to restrain them from such interference."

"If the Penal Code is susceptible of such a construction as would interfere with the interstate traffic of an express company, such provisions are unconstitutional and void, because they violate the provisions of the Constitution of the United States, which delegates to Congress the exclusive power to regulate commerce among the several States."

A different rule prevails, however, where the State is the initial point. The State may restrict the business done within her borders. Hence, as to domestic matters, the receiving and delivery of goods within the State may be prohibited, or within a city. *Adams Express Co. v. The Board of Police*, 65 How. Pr. (N. Y.) 72. For a full article on the Sunday Law, 1 *Atlantic Reporter*, 851, also 24 *Am. Law Register*, 378.

2. *United States Express Co. v. Menits*, 72 Ill. 293.

3. *American Express Co. v. Hockett*, 30 Ind. 250; s. c., 9 *Am. Dec.* 691.

4. *Wells, Fargo & Co. v. N. Pac. R. R. Co.*, 23 *Fed. Rep.* 469; s. c., 18 *Am. & Eng. R. R. Cas.* 441.

5. *Wells, Fargo & Co. v. Northern Pacific R. R. Co.*, 23 *Fed. Rep.* 469; s. c., 18 *Am. & Eng. R. R. Cas.* 441.

Under art. I. sect. 8 of the Constitution of the United States, the power of Congress to regulate commerce among the

States is exclusive. *Hardy v. Atchison, T. & S. F. R. R. Co.*, 32 *Kan.* 698; s. c., 18 *Am. & Eng. R. R. Cas.* 432, and note page 440, for collection of cases. In *State v. Saunders*, 19 *Kan.* 127, the court say, "This was a criminal prosecution for an alleged violation of sect. 6 of the act of the legislature of the State of Kansas of 1876, entitled 'An Act for the Protection of Birds.' . . . It seems that the defendant, as the agent of the Adams Express Co., on the 18th of November, 1876, shipped by said express company, from Columbus, Cherokee County, Kan., to Chicago, Ill., four prairie chickens, which prairie chickens had previously and recently been killed as game. Said prairie chickens were not caught or killed in violation of any law, but were caught and killed at a time and in a manner allowed by law. The provisions of said act, which it is claimed that the defendant violated, read as follows: 'Sect. 6. It shall be unlawful for any person, railroad corporation, or express company, or any common carrier, knowingly to transport or to ship, or to receive for purpose of transporting or shipping, any of the animals, wild fowls or birds mentioned, in or out of the State of Kansas; . . . and any agent of any such person, corporation, or company, who shall knowingly violate the provisions of this section by receiving or shipping any such game as the agent of such person, corporation, or company, shall, on conviction thereof, be fined in a sum not less than ten nor more than fifty dollars. . . . *Provided*, that such penalty shall not apply to the transportation of such birds and animals in transit through this State from other States and Territories.'

"The defendant claims that said act is unconstitutional and void so far as it has any application to this case; . . . *Second*, because it is in violation of that provision of sect. 8 of art. I of the Constitution of

An interstate contract for the carriage of goods is an entire contract; and the laws of the State where the contract is made, so far as they attempt to regulate interstate commerce, do not enter into it as a part of the contract, being unconstitutional.¹

Express business, conducted as a branch of the business of a railroad company, is subject to the Federal Act to regulate commerce. Express business, conducted by an independent organization, however, acquiring transportation rights by contract, has been held not to be described in the act with sufficient precision to warrant the Interstate Commerce Commission in taking jurisdiction.²

XXXV. Municipal License.—Where the charter of a city gives it power to collect a license tax from express companies, it has power to impose an *ad valorem* tax on the gross annual receipts of an express company from its business done in the city, and the tax is not unconstitutional because different from the tax on merchants in the city; but all persons engaged in the same business must be taxed alike.³

the United States, which declares that the Congress shall have power . . . to regulate commerce . . . among the several States." And after reviewing that section of the Constitution of the United States, and citing various authorities, the court concludes by saying, "We think that said section 6, so far as it has any application to this case, is unconstitutional and void. See further, *Steamship Co. v. Board of Railroad Commissioners*, 18 Fed. Rep. 10; *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276; s. c., 17 Am. & Eng. R. R. Cas. 398; *Gibbons v. Ogden*, 9 Wheat. 1; *The Daniel Ball*, 10 Wall. 565; *City of Council Bluffs v. R. R. Co.*, 45 Iowa, 338.

As Congress has now legislated upon the subject, it will affect the former decisions in their application to this topic hereafter. *Interstate Commerce Law* (annotated), 27 Am. & Eng. R. R. Cas. after the index in the volume.

1. *Carton & Co. v. Ill. Cent. R. R. Co.*, 59 Iowa, 148; s. c., 6 Am. & Eng. R. R. Cas. 305.

2. *Re Express Companies* (*Interstate Com. Com.*), 32 Am. & Eng. R. R. Cas. 567.

3. *American Union Express Co. v. City of St. Joseph*, 66 Mo. 675; *State Tax on Railway Gross Receipt*, 15 Wall. 284; *Columbia Conduit Co. v. Com.*, 90 Pa. St. 307; *Dubuque v. Chicago, D. & M. R. R. Co.*, 47 Iowa, 196; *W. U. Tel. Co. v. Mayor*, 28 Ohio St. 521; *W. U. Tel. Co. v. State*, 55 Tex. 314; *Memphis & L. R. Co. v. Nolan*, 14 Fed. Rep. 532. In *Adams Express Co. v. City of Owensborough*, 3 S. W. Rep. 370, the charter of the city of Owensborough, subdivision 36 of sect. 10, provides, "The common council shall have power to grant licenses to the following persons, and business, and provide by

ordinance adequate penalties for doing business without license; viz., tavern keepers, . . . concerts, menageries, circuses, astrologers, . . . express companies," etc. Act 1881, p. 817.

And subdivision 37 provides, as to all of them, useful occupations and amusements. "And, in granting such licenses as by this act the common council is authorized to grant, they shall charge such sum or sums of money as they shall deem fit and reasonable, and annex to such licenses such terms and conditions as in their opinion the peace, good order, and general interests of the city may require."

And in *Adams Express Co. v. City of Owensborough*, *supra*, it is said, "The appellant is, however, a foreign corporation. By the Act of March 2, 1870 (Act 1869-70, p. 33), foreign express companies are required to pay a certain tax to the State in lieu of all other taxation. It expressly provides that they 'shall not be required by any county, town, or city, or other corporation or local jurisdiction in this State, to take out or obtain any other or additional license, or to pay any other or additional tax or sum of money, for the right or privilege of conducting its business in or through such county, town, city, corporation, or other local jurisdiction.' Clearly this act was not expressly repealed by the provisions, *supra*, of the Owensborough charter. The latter is not an amendment of the former, and cannot be considered as repealing the exemption unless by implication. General words should not be construed to so operate as to a particular statute unless they are otherwise inoperative. The Act of March 2, 1870, indicated an intention on the part of the State to exempt foreign express companies from

XXXVI. Taxation.—Express companies are liable for the special taxes imposed by a State. And a railroad company organizing an express company, and carrying on a regular express business, as a part of the business of the railroad company, under its own officers and agents, is liable to pay a privilege tax imposed by statute upon express companies.¹ State taxation of the gross receipts of an express company is not an interference by the State with the regulation of commerce.² And a State can grant to municipal corporations the power to tax express companies.³ A gross receipt tax is properly collected from the same without deducting business expenses.⁴

EXPRESSLY.—Used in contradistinction to *impliedly*.⁵ Intentionally, effectually, certainly.⁶

local taxation by the payment of the State tax; and now we are asked to suppose that it intended to reverse the policy so announced as to and for the benefit of one particular city or local jurisdiction."

And the case was decided on the authority of *Adams Express Co. v. City of Lexington*, that the charter of Owensborough did not repeal the act of 1870. 7 Ky. Law Rep. 716. See also 1 Dill. Mun. Corp. § 357; *St. Louis v. Boatmen's Ins. Co.*, 47 Mo. 150; *Freeholders of Essex v. Barber*, 2 Halsted (N. J.), 64; *Mays v. Cin.*, 1 Ohio St. 269.

1. *Memphis, etc., R. R. Co. v. Tennessee*, 9 Tenn. 118; s. c., 13 Am. & Eng. R. R. Cas. 423.

2. *State Tax on Railway Gross Receipts*, 15 Wall. 284; *American Union Express Co. v. St. Joseph*, 66 Mo. 675; *Columbia Conduit Co. v. Com.*, 90 Pa. St. 307; *Southern Express Co. v. Hood*, 15 Rich. (S. C.) 66; *West. U. Tel. Co. v. Mayer*, 28 Ohio St. 521.

3. *West. U. Tel. Co. v. State*, 55 Tex. 314; *Memphis & Little Rock R. R. Co. v. Nolan*, 14 Fed. Rep. 532.

4. *American Union Express Co. v. St. Joseph*, 66 Mo. 676.

Authorities for Express Companies.—The law as applicable to express companies is found in the following standard works: Angel on Carriers; Addison on Contracts; Browne on Carriers; Chitty on Carriers; Hutchinson; Lawson's Contracts of Carriers (this last work has special reference to limiting liability by bills of lading, express receipts, etc.); Parsons on Contracts, title "Bailments;" Redfield on Carriers; Redfield on Railways; Schouler on Bailments; Story on Bailments.

5. "**Expressly named.**"—Where the name of the attorney attesting a warrant of attorney on behalf of one party was first suggested by the other party's attorney, but expressly adopted by the former party as his attorney for that purpose, *held*, that he was "expressly named" by this party. "We cannot, therefore, suppose

that it was intended that the defendant must expressly pronounce at length the Christian name and surname of the attorney; but he must be *expressly* named by him, in contradistinction to his being *impliedly* named or adopted. There is not a word to lead to the conclusion that he must be *originally* or *spontaneously* named by the party, or to exclude the suggestion of a name by a third person. What, then, is there to exclude the suggestion of a name by the plaintiff's attorney? I cannot import such words into the act, when no such prohibition is expressed in it." *Taylor v. Nicholls*, 6 M. & W. 91.

"**Expressly provided.**"—On the construction of an act allowing lessees under certain circumstances where the demised premises had been destroyed, to quit them, and pay no further rent, "unless otherwise expressly provided by written agreement or covenant," the court said, "The statute doubtless requires that there should be an express agreement as contradistinguished from an agreement implied only, and it must also be in writing; and having in view the occasion and purpose of the statute, and the fair construction of its language, we think the intention to take away the benefit of the exemption should be clearly shown on the face of the lease, or other written agreement, before a tenant can be deprived of the benefit of the act. . . . We think the words 'unless otherwise expressly provided by written agreement or covenant,' while they do not require an agreement *in totidem verbis*, that the rent shall continue, notwithstanding the destruction of the premises, or their becoming untenable, are nevertheless not satisfied, unless it appears from the lease, or other writing, that the parties had in mind the contingency mentioned in the statute, and inserted provisions or covenants, inconsistent with the right of surrender thereunder." *Butler v. Kidder*, 87 N. Y. 98.

6. "**Expressly withheld.**"—A married

EXPULSION.—See AMOTION; DISFRANCHISEMENT.

EXTEND.—The word “extend” is relative in its application, and refers to something already begun, and implies a continuation of the same act. A power to extend or continue an act or piece of business cannot authorize a totally distinct transaction.¹ To *extend* a charter is to give one which now exists greater or longer time to operate in than that to which it was originally limited.² The words in the Constitution of the United States, “the judicial power *shall extend*,” etc., import an absolute grant of judicial power, and cannot have a relative signification applicable to powers already granted.³

woman who has a separate estate in land, “with full power to dispose of it in her lifetime by sale, or by last will and testament,” cannot validly mortgage it to secure money loaned to her husband, under an act giving married women power to “sell, convey, devise, charge, or mortgage” their separate realty as *femes sole*, “provided the power is not expressly withheld in the deed or will under which they hold the property.” *Lightfoot v. Bass*, 2 Tenn. Ch. 677. “The whole difficulty grows out of the use of the word ‘expressly.’ But to expressly withhold any thing is only a mode of saying that it is withheld intentionally. The act of withholding is passive and negative, not active or positive, except in the intention. To ascertain when the power of disposition is, or is not, expressly withheld, we must still, as before the statute, look to the intention of the grantor. . . . The words ‘expressly withheld’ mean withheld by a general clause restrictive of all disposition, or by words restrictive of any other mode of disposition than those prescribed, and the latter contingency may occur when the language used, either by limiting the power or purpose of disposition, shows a clear intention to restrain ‘by implication equivalent to an express provision.’ That a power may be ‘expressly withheld,’ it is not necessary that it should be expressly forbidden. In this view the word ‘expressly’ is only used as a mode of saying that the power is ‘intentionally,’ ‘effectually,’ or ‘certainly’ withheld.”

1. Exrs. of *Clement v. Dickey*, 1 Paine (U. S.), 385. “Can an authority, to draw on A. for a certain sum, with a contingent power to *extend* such drawing, by any possibility confer the right of drawing on B. for such further sum?”

In an act permitting a disclaimer to amend the specification of a patent, the words “not being such a disclaimer as shall extend the exclusive right,” were *held* not to mean, in the ordinary sense of the word, “extend,” merely adding to or enlarging the original specification, but were also intended to describe, so confining and re-

stricting its expressions as substantially to amount to a statement of something new. *Ralston v. Smith*, 11 Smith’s L. Cas. 223.

In construing a statute authorizing a street railway company to “extend the location of its tracks,” the court said, “The word ‘extend’ may in its primary sense, when applied to a railroad track or other line, import a continuation of the line without a break. But we do not think that, in this statute, the Legislature intended to use it in this restricted sense. . . . The power to authorize a railway ‘to extend the location of its tracks’ may be held, without any violence of construction, to include the location of an additional track, not connected with the existing tracks except by the tracks of another railway corporation. This construction is in harmony with the general spirit and purpose of the statute.” *South Boston R. Co. v. Middlesex R. R.*, 121 Mass. 485.

The power given to a municipal corporation to “open and extend” streets *held* to signify construction as well as laying out. *Sugar Refg. Co. v. Jersey City*, 26 N. J. Eq. 247.

2. While “to *create* a charter is to make one which never existed before, to *renew* a charter is to give a new existence to one which has been forfeited, or which has lost its vitality by lapse of time. . . . I do not say that these words have no other meaning in the English language. They are not entirely free from ambiguity. Their signification, like that of other words, must depend much on the context. But the definitions here given are consistent with the sense in which they are, if not always, at least very often, used, both in popular and legal phraseology; and to understand them so here is no violation of the ‘*jus et norma loquendi*.’ . . . Though an increase of privileges might be, in some sense, extending a *charter*, it can hardly be said that a *corporate body* is extended in any other way than by prolonging its entire existence.” *Black, C. J.*, in *Moers v. Reading*, 21 Pa. St. 201.

3. *Martin v. Hunter’s Lessee*, 1 Wheat.

EXTENT—EXTERNAL—EXTINGUISHMENT.

EXTENT.—A writ, issuing from the exchequer, by which the body, goods, and lands of the debtor may all be taken at once to satisfy the judgment.¹

EXTERNAL.—Exterior, visible, apparent.²

EXTINGUISHMENT.—See EASEMENT; GROUND RENT; LIEN; MORTGAGE.

(U. S.) 331-332. And see the opinions in the court below. *Hunter v. Martin*, 4 Manf. (Va.) 1, the judgment in which case was reversed.

"These words, 'shall extend to,' are neither exclusive nor prohibitory. . . . The words are satisfied by a concurrent authority, and the jurisdiction of the State courts in cases where it previously existed yet remains." *Bruen v. Ogden*, 6 Halst. (N. J.) 379.

1. Bouv. L. Dict. See 3 Bl. Com. 420; Tidd, Pr. 1046, 1058, 1063, 1089.

2. *Hill v. Hartford Accident Ins. Co.*, 22 Hun (N. Y.), 191 (diss. op.). It was there held that death caused by taking poison with water, and drinking it, mistaking it for pure water, was not death "effected through external, violent, and accidental means," within the meaning of a policy of insurance.

But death caused by accidentally breathing in sleep illuminating-gas escaping into a room is effected through "external, violent, and accidental means." *Paul v. Travellers' Ins. Co.*, 45 Hun (N. Y.), 313, in which the decision in the above case is criticised, the court saying, "The cause of the death came from the outside as surely as would a fatal rifle-ball, or water in case of drowning. The escape of gas into the room was violent in the same sense that would be the flow of water into a wrecked vessel. In either case the external means constitute the cause which produces death. It is a violent death, produced by an external power not natural." Held, also, that the "external and visible sign upon the body of the insured" was required by the policy only to exist in cases of bodily injuries which did not result in death. "It would seem as though the dead body was an external and visible sign of an injury which must have caused the death." And see *U. S. Mut. Acc. Assn. v. Newman*, 3 S. E. Rep. 805 (Va.). Where the infliction upon a portion of the body of a putrid animal substance, which works through the system, causes death from affection of different internal organs of the body, this death is effected through "external, violent, and accidental means." *Bacon v. U. S. Mut. Acc. Ins. Assn.*, 44 Hun (N. Y.), 599, where it is said, "The means through which deceased came to his death were external. The positive testimony of the

physician shows this. The putrid animal substance reached the body, not through the stomach or the lungs, but through the skin,—the external covering. The cause was external as much as the crushing under a car or the bite of a rattlesnake would have been."

Where the insured person, while fording a stream or brook, was seized with an epileptic fit, and fell down in the stream, and was drowned, held that his death was "occasioned by personal injury caused by accidental, external, and visible means." *Winspear v. Accident Ins. Co.* Lim'd, 42 L. T. N. S. 900. And see *Trew v. Ry. Passrs. Ass. Co.*, 6 H. & N. 839; *Acc. Ins. Co. v. Crandal*, 7 Sup. Ct. Reps. 685. But compare *Tennant v. Travellers' Ins. Co.*, 31 Fed. Rep. 322.

Where opium was prescribed for the insured by a physician, but by inadvertence the former took more than he intended, thereby causing his death, held not to be a case of "bodily injury effected through external, violent, and accidental means, occasioning death," within the meaning of the policy. *Bayless v. Travellers' Ins. Co. of Hartford*, 14 Blatchf. (U. S.) 143, though the case was decided on another point.

The exception in a policy on a steamboat as to liability for bursting of boilers or breaking of engine, to such as are caused by "external violence," means not a violence external to the boiler or engine, but "external to the boat, such as striking a log, rock, or sand-bar, or collision with another boat." *Citizens' Ins. Co. of Mo. v. Glasgow*, 9 Mo. 411.

"External to a Company, in an opinion, referring to a contract, was said to mean "not being a part of the original constitution of the company, but a contract made by the company as a corporation and somebody else, but that somebody else might be a director or promoter." *In re Wedgwood Coal & Iron Co.*, 26 W. R. 447.

"External Parts."—Where a lessor covenanted to repair the "external parts" of the demised premises, and an adjoining house was pulled down thereby, leaving the wall of the demised house exposed and without support, and this wall gave way, and the house became uninhabitable, held that the wall, even before the neighboring house had been removed, was an "external part of the demised premises," and that

EXTORTION.

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I. Definition. — Extortion is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due him, or more than is due, or before it is due.¹

II. At Common Law. — In the widest sense of the word, extortion means any oppression under color of right.² Used technically to express an offence at common law, the offence must be limited to the scope of the definition given above.³ The offence, therefore, can only be committed by officers.⁴

III. Statutory Offence. — In many of the States, statutes have been enacted prohibiting and punishing the offence of extortion. In some States it has been held that those enactments supersede the common law,⁵ while in others they are regarded as supple-

the lessee could recover on his covenant. *Green v. Eales*, 2 Q. B. 225. "The external parts of premises are those which form the enclosure of them, and beyond which no part of them extends; and it is immaterial whether those parts are exposed to the atmosphere, or rest upon and adjoin some other building which forms no part of the premises let."

Where a covenant prohibited "any external alteration whatsoever" in the demised premises, held that the word "external" was meant to apply to "every thing external to the house, or, as it is popularly called, 'out of doors.'" *Perry v. Davis*, 3 C. B. N. S. 777.

1. *United States v. Waitz*, 3 Sawy. C. C. 473; s. c., 2 L. & Eq. Rep. 42; *United States v. Deaver*, 14 Fed. Rep. 595; s. c., 4 Cr. L. Mag. 209; *Williams v. State*, 2 Sneed (Tenn.), 160; *People v. Whaley*, 6 Cow. (N. Y.) 661; 4 Bl. Com. 141; 1 Russell on Crimes (5th Eng. ed.), 303; 1 Hawk. P. C. c. 68, § 1.

Extortion signifies, in an enlarged sense, any oppression under color of right. In a stricter sense it signifies the taking of money by an officer by color of his office, either when one at all is due, or not so much due, or when it is not yet due. *People v. Whaley*, 6 Cow. (N. Y.) 661.

"**The Ordinary Meaning** of the word 'extortion' is the taking or obtaining of any thing from another by means of illegal compulsion or oppressive exaction. If an officer of the law has a prisoner in custody,

and by promises or threats induces him to make a confession of crime, such confession is regarded as extorted or forced, and is not admissible in evidence against the prisoner. If such confessions are made to a person not in authority, and in no way directly connected with the prosecution, the strictness of the rule is somewhat modified. The word 'extort' has acquired a technical meaning in the common law, and designates a crime committed by an officer of the law, who, under color of his office, unlawfully and corruptly takes any money or thing of value that is not due to him, or more than is due, or before it is due. The officer must unlawfully and corruptly receive such money or article of value for *his own benefit or advantage*." *United States v. Deaver*, 14 Fed. Rep. 595; s. c., 4 Cr. L. Mag. 209.

2. *United States v. Deaver*, 14 Fed. Rep. 595; s. c., 4 Cr. L. Mag. 209; *People v. Whaley*, 6 Cow. (N. Y.) 661; 1 Hawk. P. C. c. 68, § 1; 4 Bl. Com. 141; 1 Russ. on Crimes (5th Eng. ed.), 303.

3. **As to Extortion by Means of Threats**, see "Threats;" by means of oppression on the part of an executive officer, see "Oppression," this series.

4. See *People v. Whaley*, 6 Cow. (N. Y.) 661; *United States v. Deaver*, 14 Fed. Rep. 595; s. c., 4 Cr. L. Mag. 209.

5. In *Commonwealth v. Evans*, 13 Serg. & R. (Pa.) 426, it was held that a statute subjecting a magistrate to a penalty of fifty dollars recoverable "as debts of the same

mentary to it.¹ Any statute imposing a penalty for extortion, whether such statute be enacted merely for that purpose, or be an act providing a fee bill, is penal in its nature, and must be strictly construed.²

IV. Who are Officers.—**I. In General.**—At common law, any sheriff, or other minister of the king, whose office was in any way connected with the administration of justice, or the common good of the subject, might be guilty of extortion.³ In general, it may be said that any officer, whether he be a federal,⁴ state, municipal,⁵

amount are recovered" for taking illegal fees, superseded the common law. The court said, "It was contended, that, as there was a remedy provided by the act, the proceeding at the common law by indictment is forbidden by the 13th section of the act of the 21st of March, 1806, to regulate arbitrations. If this act has the effect contended for, of blotting out of our criminal code an offence so aggravated and against public justice as the crime of extortion, one would not expect to find it under the head of arbitration. But wherever it is found, still, if it reaches this enormous offence and high misdemeanor in office, and turns it into a civil action recoverable as a debt, and in the same manner as a debt, purging it of its indictable quality, the objection must prevail; for that section provides 'that in all cases where a remedy is provided, or any thing or things directed to be done by any act of assembly, the directions of the act shall be strictly pursued, and no penalty shall be inflicted or any thing done agreeable to the common law further than is necessary for carrying such act or acts into effect.' . . . The fifty dollars is a forfeiture and a penalty, and not in the sense of a compensation to the party grieved. As it was the intention of the legislature to abolish cumulative penalties, double inflictions for the same offence,—one at the common law and the other by statute,—the moment the mind forms the conclusion that this infliction is penal, it follows that this is a case provided for by the act." (A statute rendering the offence indictable has been enacted since the above decision.) See also *Pankey v. People*, 2 Ill. (1 Scam.) 80.

1. *Commonwealth v. Bagley*, 24 Mass. (7 Pick.) 279; *Shattuck v. Woods*, 18 Mass. (1 Pick.) 171; *Runnells v. Fletcher*, 15 Mass. 525.

2. *Aechternacht v. Watmough*, 8 Watts & S. (Pa.) 162, 165; overruling *Jackson v. Purdue*, 3 Pen. & W. (Pa.) 523. See also *Stoddard v. Couch*, 23 Conn. 238, 241; *Hays v. Stewart*, 8 Tex. 358; *Smith v. State*, 10 Tex. App. 413, 417; *Gleason v. Gary*, 4 Conn. 418; *Rawson v. State*, 19 Conn. 292; *Daggett v. State*, 4 Conn. 61.

3. 1 Hawk. P. C. c. 68, § 1.

4. Among the federal officers who have been indicted for extortion are the register of a land-office,—*United States v. Waitz*, 3 Sawy. C. C. 473,—and revenue officers. *United States v. Highleyman*, 22 Int. Rev. Rec. 138. The compensation of pension agents is limited by statute; and exaction of a greater fee for services than that allowed, viz., \$10, is punishable as extortion. U. S. Rev. St. § 5485.

5. A County Treasurer, who exacts and receives from a taxpayer a fee as for a distress and sale of his goods, when none have actually been made, is guilty of extortion. *State v. Burtin*, 3 Ind. 93.

A Pound-Keeper, who demanded and received a greater fee for performing any duty or service than is allowed by the ordinance of the corporation creating the office, is guilty of extortion. *State v. Critchett*, 1 Lea (Tenn.), 271.

Register of Land Office.—The register of a land office cannot lawfully act as attorney for an applicant for a patent for mineral lands whose application is filed, and the proceedings on which are to be conducted before him and in his office. Therefore, if a register undertakes to act as attorney for an applicant in procuring a patent, and receives from him a gross sum, which sum is taken as well for the execution of his official duties as doing some other thing relating to procuring the patent, for the compensation of the one or the other, and the sum so taken is in excess of the fees allowed by law, it will be extortion. *United States v. Waitz*, 3 Sawy. C. C. 473.

Municipal Officers.—It is said in *State v. Critchett*, 1 Lea (Tenn.), 271, that "municipal officers, as such, are officers of the State within the meaning of the statutes regulating official conduct. They are created by virtue of the powers of the charter which is granted by virtue of a law made by the legislative power. They are political divisions of the State, and make up a part of its somewhat complicated machinery, and essential in this age to its healthful working. This being conceded, it would follow that if such an officer, in

a judicial¹ officer, and that every person occupying an official,² a quasi-official,³ position, may be guilty of the offence.

2. *Officers de Facto*.—An officer *de facto* may commit the offence.⁴ Any person who acts as an officer, and has assumed an officer's duties, cannot evade liability by pleading the irregularity of his appointment.⁵

ation of the ordinance of the city, which is a law passed in pursuance of power granted by a law of the land, shall violate that law, he is a person taking compensation not allowed by the law under which he acts, and is within the fair purview of" § 4810 of the Tennessee Code.

The reports contain instances of extortion by a justice of the peace,—*Lane v. Te*, 47 N. J. L. (18 Vr.) 362,—magistrates, *Reg. v. Tisdale*, 20 Up. Can. Q. B. 272; *Commonwealth v. Hagan*, 9 Phila. (Pa.) —, a coroner,—3 Inst. 149,—a sheriff, *Overholtz v. McMichael*, 10 Pa. St. —,—under-sheriffs,—*Hescott's Case*, 1 K. 330; *Empson v. Bathurst*, Hutt. 52, sheriff's officers,—*Statesbury v. Smith*, Burr. 924; *Williams v. Lyons*, 8 Mod. —,—constables,—*Parker v. Newland*, 1 L (N. Y.), 87; *State v. Merritt*, 5 Sneed nn.), 67,—and a jailer,—*Rex v. Ugham*, Tremp. P. C. 111; *Stark*. 588. In England there is an instance of a victim of a church-warden,—*Roy v. es*, 1 Sid. 307,—and of a collector of t-horse duty. *Rex v. Higgins*, 4 Car. 1. 247.

In England it has been held that an attorney is an officer of court, and may commit extortion. *Adams v. Tertenants Savage*, Holt's K. B. 179; *Troy's Case*, Mod. 5.

In America the courts seem to hold that attorneys or solicitors are officers of court, and, as such, only entitled to the fees awarded by law; but that when they act as counsel as well, they may stipulate with their clients for additional fees. *Wallis v. Abat*, 2 Den. (N. Y.) 607; *Merritt v. Abert*, 10 Paige, Ch. (N. Y.) 352.

Excessive Fees by an Attorney.—In *Teters v. Whittemore*, 22 Barb. (N. Y.) 595, the court say, "It is misconduct in an attorney to charge and receive any fees for any service rendered than the statute allows, especially when the statute makes such an indictable offence, as we have seen it does; and the attorney must be regarded as receiving his fees officially,—as much so as a sheriff or other officer." But it would seem that where the attorney collects fees—not as a party in a suit, but on a settlement with an opposite party—before the suit has been entered in court, he is not to be regarded as receiving them in an official capacity. Thus, the New Hampshire court

held that a provision that only one dollar shall be allowed for a writ, including the blank, in bills of cost taxed in the Supreme Court, or court of common pleas, is not violated by an attorney's receiving a larger sum as his compensation for making a writ, while adjusting a suit for his client before the same has been entered in court. *Wilcox v. Bowers*, 36 N. H. 372.

Persons receiving Fees under Statute.—A much nicer question arises in the case where a person is authorized by statute to demand and receive fees. In *Steele v. Williams*, 8 Ex. 624, there are *dicta* to the effect that any person so receiving fees can only charge what the statute gives him, and that any greater sum demanded, under color of the act, is to be considered as paid under compulsion. From this it might be inferred that such person is an officer *quoad* the receipt of fees, although holding no official position. The English reports contain a case in which it was held that a ferryman who extorts sums of money in excess of the ancient rate and price of passage, was guilty of extortion. *Rex v. Roberts*, 4 Mod. 101; and, also, a case in which a miller, who, after custom had ascertained the toll of his mill, took more than the custom warranted, was also held guilty. *Rex v. Burdett*, 1 Ld. Raym. 149. Compare *Rex v. Hamlyn*, 4 Campb. 379. In this case, a turnpike-keeper was indicted for extorting toll from one who was exempt. The court held that the exemption ought to have been claimed, but added, "Whether it could be insisted upon or not, the defendant is not a delinquent. In receiving the toll, he committed no offence for which he is criminally answerable."

4. 2 Bish. Cr. Law, § 392. In *State v. McEntyre*, 3 Ired. (N. C.) L. 171, 174, the court said, "A person who undertakes an office, and is in office, though he might not have been duly appointed, and, therefore, may have a defeasible title, or not have been compellable to serve therein, is yet, from the possession of its authorities, and the enjoyment of its emoluments, bound to perform all the duties, and liable for their omission, in the same manner as if the appointment were strictly legal, and his right perfect."

5. Person assuming to act as Officer.—A person who has assumed the duties of an office cannot himself dispute the validity of his own appointment. This principle

V. Color of Office.—It is essential that the extortion should be made under color of office. It would seem that a sum of money, extorted by an official, not as a fee for the performance of an official act, but by way of blackmail, or for extra official services, is received *colore officii*.¹ So, too, it appears that a person may be

has been often applied in civil cases, and enforced in criminal proceedings against persons assuming to act as officers, and is essential to the protection of the public against the misconduct of those who usurp offices, and neglect the regulations which have been made concerning offices to which they have been rightfully appointed. *State v. Sellers*, 7 Rich. (S. C.) L. 368, 373.

The Supreme Court of South Carolina, in the case of *State v. Maberry*, 3 Strobb. (S. C.) L. 144, say, "In *Berryman v. Hill*, 4 T. R. 366, *Buller, J.*, on the authority of Norton's Case (see *McBee v. Hoke*, 2 Spear (S. C.), 143), affirms that in case of all peace officers, justices, constables, etc., it is sufficient to prove that they acted in those characters, without producing their appointment. If third persons may thus be affected by the acts of an officer *de facto*, it would be dangerous if he were permitted to evade the liability for misconduct by proving that he is not an officer *de jure*. He cannot thus take advantage of his own wrong. Accordingly, in *Allen v. McNeill*, 1 Mill (S. C.), Const. 463, *Notz, J.*, states a consequence of the rule to be, that where a person is sued for any act done by him in an official capacity, it is not permitted to him to say that he is not the officer he has held himself out to the world to be."

1. In *United States v. Waitz*, 3 Sawy. C. C. 473, a register of a federal land office was charged with extortion, in so far as he had received from an applicant for a mining patent a sum greater than that allowed him by law. The defendant pleaded that the excess was charged as attorney's fees for services rendered on behalf of the applicant. The court held that the defendant was not entitled to act as attorney, his duties being of a judicial character, and requiring the exercise of impartial judgment, and that if a "sum was paid defendant as well for the execution of his official duties as doing some other things relating to the getting of the patent, and that there was no specified portion of it taken as compensation or fee for the one or the other, and that the sum taken was in excess of his legal fees, then the taking of the money was extortion." In *People v. Whaley*, 6 Cow (N. Y.) 661, the court held that it was not necessary to charge that the money was received as fees. See also *State v. Stotts*, 5 Blackf. (Ind.) 460.

In *White v. State*, 56 Ga. 385, 389, the court said, "It is not, however, absolutely

requisite that the element of costs should be in contemplation, in order to constitute extortion. If a ministerial officer should use his authority, or any process of law in his hands, for the purpose of awing or seducing any person into paying him a bribe, that would doubtless be extortion. Compare *Commonwealth v. Coolidge*, 128 Mass. 55, where the court said that the technical crime of extortion "can be committed only by a public officer, and only in reference to fees." It is to be noted, however, that it was merely *dictum obiter*.

Under some of the statutes a narrower construction is adopted.

Construction of Statute.—The Alabama courts, in construing Rev. Code, sect. 3593, said, "The statute was designed to reach officers who intentionally charge and take fees which they know at the time they are not authorized to collect. The design on the part of the officer to collect fees to which he is not legally entitled, constitutes a corrupt intent, which is the essence of the offence. Demanding money of a person for whom no official service has been rendered, and on whom the officer has no claim whatever, is not extortion; it may be a cheat, or it may constitute obtaining money under false pretences; but it is not the offence against which the statute is directed." *Cleveland v. State*, 34 Ala. 254.

Same.—As to Attorneys.—In the case of *Collier v. State*, 55 Ala. 125, defendant was a county attorney, indicted under the statute for the crime of extortion. It was charged that he had received money from one Reynolds, a relative of a person who was indicted for petit larceny. The testimony showed that he had asked and received the money for advice given to Reynolds as to the method of procuring a revision of the sentence. The court said, "In this case the money obtained from Reynolds was not for any official service rendered to him, nor was he under any obligation to pay for any services rendered to any other person. It was not extorted by color of office; and however great may be the moral impropriety of taking the money under the circumstances, it is not a criminal offence. A taking under color of office is of the essence of the offence. The money or thing received must have been claimed or accepted in right of office, and the person paying must have been yielding to official authority. The rendition of services not official, and the acceptance

guilty of extortion by color of office, where he himself does not receive the fee, but only issues the writ under which the officer collects it.¹

VI. Intent. — In this, as in every other crime, the intent is an essential ingredient. The extortion must have been made knowingly, and from a corrupt motive.²

of money for such services, not in an official capacity, but as a private individual, acting wholly as such, and disclaiming any purpose to act as an officer, and not exercising official authority, however inconsistent with the official duty may be the rendition of such services, is not the offence defined in the statute." By the revised act of Alabama, sect. 3593, under which the two cases last referred to are decided, any officer "who is by law authorized to receive fees for services rendered by him in his official capacity, and who knowingly takes a fee or fees for any services not actually rendered by him, or knowingly taking any greater fee or fees than are by law allowed for any services actually rendered by him," is punishable by fine and imprisonment. See also *Dunlap v. Curtis*, 10 Mass. 210.

In *Gallagher v. Neal*, 3 Pen. & W. (Pa.) 183, the court held that a statute subjecting to a penalty "any officer taking other or greater fees," etc., did not include a person whose term of office had expired, taking fees due to him while he held the office.

1. *Jackson v. Purdue*, 3 Pen. & W. (Pa.) 519, 523.

Thus, where a justice charges illegal fees, which are indorsed on the execution and collected by the constable, the justice is liable for the penalty, although they are not paid over to him. *Jackson v. Purdue*, 3 Pen. & W. (Pa.) 519.

2. **Common-Law Offence.** — *Commonwealth v. Shed*, 1 Mass. 227; *Commonwealth v. Dennie*, Thach. Cr. Cas. (Mass.) 165, 175; *Leeman v. State*, 35 Ark. 438; s. c., 37 Am. Rep. 44; *People v. Whaley*, 6 Cow. (N. Y.) 661; *Respublica v. Hannum*, 1 Yeates (Pa.), 71. Compare *Commonwealth v. Bagley* (7 Pick.), 24 Mass. 279, 281. In this case the court said, "This is the case of an honest and meritorious public officer, who, by misapprehension of his rights, has demanded and received a lawful fee for a service not yet performed, but which will necessarily be performed at some future time. If we had authority to interpose and relieve from the penalty, we certainly should be inclined to do so; but we are only to administer the law." See also *Commonwealth v. Coolidge*, 128 Mass. 55; *Cobbey v. Burks*, 11 Neb. 157; *Coates v. Wallace*, 17 Serg. & R. (Pa.) 75.

Honest Belief of the Officer that he is entitled by law to the fee demanded and

received, will not shield him from a prosecution for such extortion, because he is bound to know the law under which he acts, and to know the legal fees to which he is entitled. *State v. Critchett*, 1 Lea (Tenn.), 271; *State v. Merritt*, 5 Sneed (Tenn.), 69.

Statutory Offences. — Under the statutes it seems to be generally held that there must be knowledge and corrupt intent, whether the statute in terms requires that such should be the case or not. Under the Vermont statute, which provides that "if any officer or other person shall receive any greater fees than is provided by law, he shall pay," etc., the court held, that, notwithstanding the terms of the statute, knowledge and intent were material. *Henry v. Tilson*, 17 Vt. 479. See also *Haynes v. Hall*, 37 Vt. 20; *Cleaveland v. State*, 34 Ala. 254; *Collier v. State*, 55 Ala. 125; *Triplett v. Number*, 50 Cal. 644; *Leeman v. State*, 35 Ark. 438.

In *Cutter v. State*, 36 N. J. L. (7 Vr.) 125, 126, the court said, "On the part of the State it is argued that this statute is explicit in its terms, and makes the mere taking of an illegal fee a criminal act, without regard to the intent of the recipient. Such, undoubtedly, is the literal force of the language; but then, on the same principle, the officer would be guilty if he took by mistake or inadvertence more than the sum coming to him. Nor would the statutory terms, if taken in their exact signification, exclude from their compass an officer who might be laboring under an insane delusion. Manifestly, therefore, the terms of this section are subject to certain practical limitations. This is the case with most statutes, couched in comprehensive terms, and especially with those which modify or otherwise regulate common-law offences. In such instances the old and new law are to be construed together, and the former will not be considered to be abolished except so far as the design to produce such effect appears to be clear. In morals it is an evil mind which makes the offence; and this, as a general rule, has been at the root of criminal law. The consequence is, that it is not to be intended that this principle is discarded merely on account of the generality of statutory language. It is highly reasonable to presume that the law-makers did not intend to disgrace or to punish a person who should do

It is a question for the jury whether the officer so acted.¹

VII. What constitutes Offence. — I. At Common Law. — By the common law, sheriffs, and other ministers of the king, whose office in any way concerned the administration or execution of justice, or the common good of the subjects, were confined to the rewards they received from the king;² and it is a general rule that any person performing statutory duties, for which fees are fixed by statute, can take nothing in excess of the statutory fee under color of office.³ But where the additional reward is offered voluntarily,

an act under the belief that it was lawful to do it.

Mistake of Officer. — Error in Computation. — If a greater sum than the law allows is demanded and received by mistake for an official duty, as, for example, through an error in computation, the guilt of extortion will not be incurred because the statute supposes the demand to be wilful on the part of the officer, and a constraint on the part of the debtor. *Commonwealth v. Shed*, 1 Mass. 227; *Commonwealth v. Dennie*, Thach. Cr. Cas. (Mass.) 165, 175.

Knowledge must in this crime take a wider sense than is usually attached to it. Thus, it was held that the word "knowingly," in section 3169 of the United States Statutes, which provides that "every officer or agent appointed and acting under the authority of any revenue law of the United States . . . who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, . . . shall be punished," etc., means something more than what is implied in the legal presumption that every person must know the law. A person, to be convicted under this statute, must have violated the law knowingly: the fact that he demanded or received an excess of money prescribed by law is not of itself sufficient to warrant a conviction. *United States v. Highleyman*, 22 Int. Rev. Rec. 138.

Presumed Knowledge of Law. — It would appear, however, that a person who from his position and duties ought to have known that he was committing a breach of the law, will not be allowed to plead that the offence was committed under an honest misapprehension of his rights. Thus, where two magistrates were indicted for extortion, the court said, "They cannot set up as a defence such extraordinary ignorance of the law as it would be necessary to believe they labored under, before it could be credited that they had fallen into a mistake as to their right to charge the defendant with costs in such a case, and under such circumstances." *Reg. v. Tisdale*, 20 Up. Can. Q. B. 272. In *Coates v. Wallace*, 17 Serg. & R. (Pa.) 75, 81, an

action of debt was brought against a justice for the penalties imposed by statute. The court said, "Ignorance of the law will not excuse in any case; and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him with an unusual attention to clearness and precision."

A magistrate acting under 32 & 33 Vict. ch. 20, sect. 37, convicted four persons for creating a disturbance thereunder, and imposed upon each a fine of \$5, but, instead of serving the costs which he had charged, imposed the full amount thereof against each. It was held that under the circumstances, the overcharge must be deemed to have been wilfully made, so as to render the defendant liable to the penalty imposed in such cases by the Rev. Stat. Ont. c. 77, sect. 4. *Parsons qui tam v. Crabbe*, 31 Up. Can. C. P. 151. See also *State v. Merritt*, 5 Sneed (Tenn.), 69; *State v. Critchett*, 1 Lea (Tenn.), 271.

Evidence of Usage will be admitted for the purpose of rebutting the presumption of a corrupt intention. *Commonwealth v. Shed*, 1 Mass. 227; *Lincoln v. Shaw*, 17 Mass. 410; *Shattuck v. Woods*, 18 Mass. (1 Pick.) 171; *Commonwealth v. Bagley*, 24 Mass. (7 Pick.) 279.

1. *Commonwealth v. Shed*, 1 Mass. 227; *People v. Whaley*, 6 Cow. (N. Y.) 661.

2. 1 Hawk. P. C. c. 68, § 2.

3. *United States v. Waitz*, 3 Sawy. C. C. 473; s. c., 2 L. & Eq. Rep. 42.

In England it is held, that "if a person is authorized to receive money by act of Parliament, it is like a contract between the parties that the sum allowed shall be all he is to receive, and he is as much bound by the entirety of what he is authorized to take as he would be by the entirety of a sum in a contract." Per *Martin, B.*, in *Steele v. Williams*, 8 Ex. 624, 632.

In *Irwin v. Commissioners of Northumberland County*, 1 Serg. & R. (Pa.) 595, 596, the court said, "For those items for which a fee is fixed, the officer must take the sum given, and the applicant must pay

without any demand on the part of the officer, it is not extortion for the officer to receive it.¹ If, however, the fee is fixed by statute, no usage, however long continued, will be a justification.² A demand and receipt of fees before the service for which they are exigible has been performed, is, in general, extortion.³ The sheriff is not liable to indictment for extortion practised by his deputy.⁴ Where the offence is committed by two or more acting together, they may both be convicted as principals.⁵ While it is not essen-

it and be content. Those duties for which no fee is set down in the law must still be performed by the officer without charge, or rather are regarded as covered by the salary and commission, or fees, given for other matters."

Charges for Extra Trouble. — Where an officer was charged with extortion, he claimed to have received the money as and for compensation for his trouble in selling the goods taken under an execution. The court say, "The law gives no such compensation, but limits the officer to a fee for levying a percentage, as it has been usually called, and a fee for travel in returning the execution. If this is an inadequate compensation in some cases, it is a liberal one in others; and it was thought that, upon the whole, it would afford a sufficient reward. All actual expenses necessarily incurred are charged upon the goods, such as expenses for storing them, perhaps for taking an account of them and removing them, if that should be necessary; but the officer can receive nothing for extra trouble, his compensation being provided for by the fee bill." *Shattuck v. Woods*, 18 Mass. (1 Pick.) 171, 177.

Those duties for which no fee is set down in the law, must still be performed by the officer without charge, or rather are regarded as covered by the salary, the commissions, or fees given for other matters. *Irwin v. Commissioners of Northumberland County*, 1 Serg. & R. (Pa.) 504; *United States v. Waitz*, 3 Sawy. C. C. 475; s. c., 2 L. & Eq. Rep. 42.

1. The Voluntary Payment of a Greater Sum, where a less is due, cannot be denominated extortion; the offence consists in extorting money, which supposes that it is paid unwillingly and by constraint. It is no offence for an officer to accept what one presents to him as a mark of gratitude, or to insure his greater diligence. *Commonwealth v. Dennie*, Thach. Cr. Cas. (Mass.) 165, citing *Viner*, "Extortion;" 1 Russ. on Crimes, 222.

2. Commonwealth v. Dennie, Thach. Cr. Cas. (Mass.) 165, 175; *Ogden v. Maxwell*, 3 Blatchf. C. C. 319; *Commonwealth v. Bagley*, 24 Mass. (7 Pick.) 279; *Shattuck v. Woods*, 18 Mass. (1 Pick.) 171; *Lincoln v. Shaw*, 17 Mass. 410.

Custom. — But where it has been customary to take the fee received, the demand and receipt of it by the officer is not of itself evidence of a corrupt intention. *Commonwealth v. Shed*, 1 Mass. 227.

3. Commonwealth v. Bagley, 24 Mass. (7 Pick.) 279; *People v. Whaley*, 6 Cow. (N. Y.) 661; *People v. Calhoun*, 3 Wend. (N. Y.) 420.

Taking Fee before Due. — In *Commonwealth v. Bagley*, 24 Mass. (7 Pick.) 279, the court say, "This is the case of an honest and meritorious public officer, who, by misapprehension of his rights, has demanded and received a lawful fee for a service not yet performed, but which almost necessarily must be performed at some future time. If we had authority to interpose and relieve from the penalty, we certainly should be inclined to do so, but we are only to administer the law. . . . And it is extortion at common law to receive, by color of office, a fee before it is due, though no more is taken than will, in all probability, soon become due."

Illegal Fees taken by Mistake. — The fact that a justice of the peace, or other officer, took illegal fees by mistake and misconception of the fee bill, does not relieve him from liability. *Wallace v. Coates*, 1 Ashm. (Pa.) 110; 2 Chit. Cr. L. (4th Am. ed.) 293, note a.

A Sheriff, as an Officer of the Law, was bound to execute the process of the courts according to the exigency thereof, and make due return; and he could not refuse to exercise the right until his fees were paid. *Jones v. Gupton*, 65 N. C. 48; *Tyson v. Paske*, 1 Salk. 333; *Barr v. Satchwell*, 2 Str. 814.

But in some of the States recent statutes allow officers to demand the money in advance, as a protection to the officer. *Johnson v. Kenneday*, 70 N. C. 435; *Jones v. Gupton*, 65 N. C. 48.

4. Laicock's Case, Latch, 187; *Woodgate v. Knatchbull*, 2 T. R. 148.

5. Acquiescence in Extortion. — Where two defendants sat together as magistrates, and one exacted a sum of money from a person charged before them with a felony, the other not dissenting, it was held that they might be jointly convicted. *Reg. v. Tisdale*, 20 Up. Can. Q. B. 272. The court

tial that the sum extorted should be *as fees*, it is necessary that the money paid should be paid to the use or for the benefit of some person other than the person paying it.¹ And it is also essential that money, or something of value, should change hands, and not merely a valueless security.²

2. *Under the Statutes.*—The statutes of the different States generally prohibit the charging of "higher" or "greater fees," and the charging of "other fees" than those prescribed by statute. Under these statutes it is generally held that they must have performed some official service for which a fee is provided by statute;³ and under this interpretation it is not within the statute if the officer exacts a fee for a service not performed,⁴ or for a service performed, but for which no fee is payable,⁵ or demands and receives a fee from a person not liable;⁶ but the penalty will be incurred if he takes, as a compensation for extra trouble, greater fees than are allowed by statute.⁷ An officer may render himself liable to a statutory penalty by the act of a subordinate, even though such act should be unknown to him;⁸ and

said, "Two or more persons may be jointly convicted of extortion when they concur in the demand. It is a misdemeanor, and all are principals. . . . The demand was entirely illegal, and was enforced by these two defendants sitting and acting together."

1. **Officer with Writ receiving Money voluntarily offered.**—For an officer having in his hands a warrant for assault and battery to receive money, which is voluntarily offered and paid him by the defendant, is not extortion, if the money is received in good faith, to be used in settling the bargain, and not for the officer's own use. *White v. State*, 56 Ga. 385.

2. *Co. Litt.* 368, b.; *Commonwealth v. Dennie, Thatcher*, Cr. Cas. (Mass.) 165, 175.

Receipt of Promissory Note not Extortion.—In *Commonwealth v. Cony*, 2 Mass. 523, a deputy sheriff received a promissory note for fees not due. The note was not paid. In an indictment for extortion, the court said, "To constitute extortion at common law, there must be the receipt of money or of some other thing of value. This note, when made, was *ipso facto* void, the consideration of it being illegal, and it was consequently of no value." See *Commonwealth v. Dennie, Thach*. Cr. Cas. (Mass.) 165.

3. *Shattuck v. Woods*, 18 Mass. (1 Pick.) 171, 174. *Smith v. State*, 10 Tex. App. 413; *State v. Smythe*, 33 Tex. 546; *Wilcox v. Bowers*, 36 N. H. 372; *Collier v. State*, 55 Ala. 125; *Ferkel v. People*, 16 Ill. App. 310.

4. A county surveyor being entitled to charge only for lines actually run for the particular occasion, the court held that a charge for lines not so run was not extor-

tion within the meaning of the Texas statute. *Hays v. Stewart*, 8 Tex. 358. See also *Shattuck v. Woods*, 18 Mass. (1 Pick.) 171, 174. Compare *State v. Burton*, 3 Ind. 93.

5. In *Runnells v. Fletcher*, 15 Mass. 525, an officer, on settling an execution, demanded and received more than his legal fees as compensation for trouble he had had at a former time from the debtor's resisting the officer, for which resistance he had been indicted and convicted. It was held that this was not extortion under the Massachusetts statute.

Where no Fees are allowed.—Where a statute prohibits the taking of illegal fees by an officer, and affixes a penalty for its violation, an action to recover such penalty cannot be maintained where it appears that the officer was not entitled by law to any fees for the services performed, because such law does not provide for the punishing of the demanding or receiving of fees not allowed by law by officers authorized by law to demand or receive fees. See *State v. Smythe*, 33 Tex. 546; *Hays v. Stewart*, 8 Tex. 359; *State v. Smith*, 10 Tex. App. 413.

6. *Dunlap v. Curtis*, 10 Mass. 210.

7. *Shattuck v. Woods*, 18 Mass. (1 Pick.) 171, 177.

8. *Overholtzer v. McMichael*, 10 Pa. St. 139; *Peshall v. Layton*, 2 T. R. 712.

Illegal Fees exacted by Deputy.—**Liability of Officer.**—**Conclusiveness of Return.**—In *Woodgate v. Knatchbull*, 2 T. R. 148, the plaintiff sued the sheriff for a penalty alleged to be incurred through the exaction of illegal fees by his deputy. *Buller*, J., said, "I think that the return made by the

he may be liable, even should the fee not actually be paid to him.¹

3. *Under Pension Laws.* — Under the Act of Congress of July 4, 1884, any attorney or other person instrumental in prosecuting a claim for a pension is restricted to a fee of ten dollars; and if he demands, receives, or retains greater compensation than provided by law for prosecuting the claim, he may be indicted and punished. By this statute, the pension agent is punishable, though the payment should be voluntarily made by the pensioner, the prohibition being absolute.²

VIII. *Indictment.* — Each extortion is a separate offence, and must therefore be separately counted upon.³ The fees which were due, if any, and the amount collected by the officer, must be stated.⁴

sheriff is decisive against him; for by that he has adopted the act of the bailiff as his own, and has insisted on the right to retain that sum which has been deducted by the bailiff in executing the writ. The articles are only due as fees to the sheriff; they are claimed by him as such; and on that account it has been held, that, if an action be brought on this act of Parliament for fees, it must be brought by the sheriff, and not by the bailiff. The sheriff is the only officer known in this court: he may employ whom he pleases, but he is answerable *civiliter* for the acts of all those employed by him. And this has been carried so far that a return made by a sheriff that the person was rescued out of the custody of the bailiff, has been held to be bad: the return must be, that the person was rescued out of his custody. So that the court look to the sheriff as the person who is immediately answerable, and here he has returned that he has levied so much which is sufficient to charge him."

1. *A Justice indorsed upon an Execution a Fee payable to himself larger than the Amount allowed by Law:* the fee was collected by the constable, but was not paid over to the justice. It was held that the justice had incurred the penalty provided by the Pennsylvania statute of March 28, 1814. The court said, "It has been argued that the offence is not committed because the constable and not the justice received the fees. . . . The constable acted in obedience to a warrant of the justice under process placed in his hands by the justice. The injury is the same whether the justice received the illegal fee or not: the debtor has been compelled to pay an illegal fee by authority derived from the justice, and is entitled to the penalty." *Jackson v. Purdue*, 3 Pen. & W. (Pa.) 519, 523.

2. This statute repealed the Act of Congress of June 20, 1878; and a pending prosecution upon a bill of indictment,

found for taking an illegal fee under the latter act, fell with its repeal, the later act having no saving clause. *United States v. Hague*, 15 Pitts. L. J., 264; s. c., 22 Fed. Rep. 706.

Extortion by Pension Agents. — A prosecution for a violation of Rev. Stat. sect. 5485, in demanding and receiving a greater compensation for services in procuring a pension than is allowed by law, cannot be maintained for any offence committed prior to July 4, 1884. *United States v. Van Vliet*, 22 Fed. Rep. 641.

Under the earlier statutes it was held that fraud and extortion constituted no part of the offence of demanding or receiving an illegal fee. The fact of its demand or receipt completed the offence. *State v. Moore*, 18 Fed. Rep. 686. And any scheme or contrivance by which, under the guise of a loan or other dealing, the claim-agent or attorney retains more than his legal fee, is a violation against withholding pension money or taking illegal fees. And while the pensioner, who has unconditionally and without restraint or limitation received the money, may do with it what she pleases, — except to pay the attorney a larger fee for his service than allowed by law, — may lend it to him, or buy property from him with it, — these transactions must be with the utmost good faith, and no use of them to evade the statute will be tolerated. *United States v. Moyers*, 15 Fed. Rep. 411.

But the limitation is as to the compensation for services only. Money advanced and expenses incurred in prosecuting the claim may be reimbursed. *States v. Moore*, 18 Fed. Rep. 686.

3. An indictment charging the defendant with divers sums exceeding the ancient rate for ferrying men and cattle over a river, is bad. *Rex v. Roberts, Carth.* 226.

4. *Lake's Case*, 3 Leon. 268; *State v. Cogswell*, 3 Blackf. (Ind.) 55; s. c., 23 Am. Dec. 379; *State v. Brown*, 12 Minn.

It is not sufficient to allege that the defendant took the money by color of office. The indictment must show by color of what office the money was obtained.¹ The intent and corrupt motive must also be alleged.² Where the money is paid by an agent, the indictment may properly charge a payment by the principal.³

IX. Evidence.—The crime of extortion is governed by the general rules of evidence affecting criminal cases.⁴

It would appear, that, where the defendant claims a right to charge the fee received, because it is within an exception provided by a statute restricting his fees, the burden of proof is upon him to show that the case is within such exception.⁵

In the case of a sheriff or other officer executing process, his return is not conclusive of the due and proper execution, and may be contradicted otherwise.⁶

Evidence of the construction put upon a statute by officers generally is admissible, not as showing the defendant's right to charge the fees, but for the purpose of showing the absence of

490, 492; *People v. Rust*, 1 Cai. (N. Y.) 130; *Halsey v. State*, 4 N. J. L. (1, South.) 324; *Seany v. State*, 6 Blackf. (Ind.) 403; *Emory v. State*, 6 Blackf. (Ind.) 107.

What should contain.—An indictment which charged that a justice demanded and took for his services, in taking the examinations of witnesses in a criminal proceeding before him, a certain sum, and alleged that such sum exceeded the fees allowed by law, but did not state the length of such examinations by which the fees were graduated, nor that such money was taken before the conviction of the offender, was held insufficient. *State v. Maires*, 33 N. J. L. (4 Vr.) 142.

But the Alabama court held that it is only necessary, in a count on a statute, to allege that certain sums other and higher than those allowed by law, amounting in all to a sum named, were illegally demanded and received by the defendants, as an officer under certain process. *Spence v. Thompson*, 11 Ala. 746.

1. An indictment alleging that the defendant was at the time judge of probate of N. County, but not that he took the fees as such officer, but merely that he took them by "color of office," was held insufficient. *State v. Brown*, 12 Minn. 490. See also *Territory v. McElroy*, 1 Mont. 86.

2. *State v. Dickens*, 1 Hayw. (N. C.) 406.

In *Leeman v. State*, 35 Ark. 438, 444; s. c., 37 Am. Rep. 44, the court held that corrupt intent was substantially and sufficiently averred by the use of the word "extorsively." See also *State v. Cansler*, 75 N. C. 442. Compare *Reg. v. Tisdale*, 20 Up Can. Q. B. 272.

3. *Commonwealth v. Bagley*, 24 Mass. (7 Pick.) 279.

A Count alleging Extortion of Illegal Fees from the Board of Justices of the Peace of W. County, who were acting as county commissioners, is a sufficient allegation that the money was extorted from the county commissioners. *State v. Moore*, 1 Ind. 548.

4. See *ante*, vol. 4, p. 641, tit. "Criminal Law."

5. Extorting Money from Seamen.—Showing within Exception.—In a prosecution for demanding remuneration for obtaining employment for seamen, it is for the defendant to show himself within the exemption allowed by law as to certain vessels. *United States v. Rose*, 12 Fed. Rep. 576; s. c., 14 Rep. 167.

6. Return of Officer not Conclusive.—Where an officer is indicted for extortion, in receiving fees for the pretended execution of process, to which he was not entitled, his return upon said process of its due and proper execution is not conclusive evidence of its truth. The verity of said return is not collaterally, but directly, brought in question by the indictment, and its falsity in such case may be established by extrinsic evidence. *Williams v. State*, 2 Sneed (Tenn.), 160. The court say, "The truth of this return is put directly in issue by the indictment: it is directly, and not collaterally, brought in question. It would, perhaps, be *prima facie* evidence, that the service was rendered, but not conclusive. It is presumed that a sworn officer will do his duty and make correct returns of his official actions in process; but when such action or return is brought in question directly, either in a civil or criminal prosecution against him, this presumption may be overthrown by proof."

corrupt motive.¹ A variance between the allegation and the proof, as to the person who paid the illegal fees, is fatal;² or as to the date of the writ under which the demand was made,³ or as to the amount due under the writ.⁴ It is not requisite, however, that the prosecution should prove the receipt of the exact sum alleged. Proof of the receipt of a less sum than stated in the allegation will sustain it; and proof that higher fees were received than allowed by law, is equivalent to proof that other fees than the law allows were received.⁵ It is essential that the receipt of money or something of value should be proved.⁶

X. Punishment. — 1. *Fine, Imprisonment, and Deprivation of Office.* — At common law, the offence was punishable at the king's suit by fine and imprisonment, and removal from the office in the execution whereof it was committed. Under the statute 1 Westm. c. 26, sheriffs and other officers of justice were, in addition, liable in a penalty of twice the amount extorted, and were punished at the king's pleasure.⁷ Under the federal statute, and the statutes of some of the States, the punishment is fine and imprisonment, and deprivation of office.⁸ In some States the court seems to have a summary jurisdiction over its officers, for the purpose of correcting extortions.⁹

2. *Penalties.* — The penalty is usually recoverable by the person injured; and the test would seem to be, by whom was the penalty paid?¹⁰ If the payment is made in a representative capacity, the

1. *Commonwealth v. Dennie*, Thach. Cr. Cas. (Mass.) 165.

2. *Lincoln v. Shaw*, 17 Mass. 410.

3. **Upon the Trial of a Deputy Sheriff** for receiving extorsive fees in the service of a writ and execution, the indictment set forth that the writ upon which the execution was founded, bore date the twentieth day of certain month. *Held*, that a writ dated the tenth day of the same month, offered as the foundation of the execution, could not be admitted, and that the variance was fatal. *Commonwealth v. Dennie*, Thach. Cr. Cas. (Mass.) 165.

4. An execution for \$110.43 is not admissible evidence to support an indictment for extortion, charging a constable with having collected more than was due on an execution for \$64. *Seany v. State*, 6 Blclf. (Ind.) 403.

5. *Spence v. Thompson*, 11 Ala. 746; *Rex v. Burdett*, 1 Ld. Raym. 149; *Rex v. Gillham*, 6 T. R. 267.

6. **Sufficiency of Evidence.** — It is settled that in an indictment for extortionally receiving money, if it is not proved that the money was paid, but only that a negotiable note of hand was given by the debtor or party liable, which note had not been paid, it will not be sufficient to authorize a conviction; for the note may be avoided certainly in the hands of the promisee. It

is *ipso facto* void because of the illegal consideration. *Commonwealth v. Cony*, 2 Mass. 523; *Commonwealth v. Dennie*, Thach. Cr. Cas. (Mass.) 165, 175.

7. 1 Hawk. P. C. C. 68, § 5; 4 Bl. Com. 141.

8. **Officers of the United States guilty of Extortion** are punishable by fine not exceeding \$500, or by imprisonment not exceeding one year, except officers and agents differently and specially provided for. *Ogden v. Maxwell*, 3 Blatchf. C. C. 319; U. S. Rev. Stat. sect. 5481.

Under the Missouri Statutes, forfeiture of office, and disqualification to hold office or vote, were designed as part of the punishment of one convicted of illegally issuing an execution for purposes of extortion under color of office as justice of the peace. *State v. Lawrence*, 45 Mo. 492.

9. **In Kentucky** the circuit court where the person resides who has paid an illegal fee bill issued against him, may inspect and quash the bill, and fine the officer. *Tevis v. Craig*, 6 T. B. Mon. (Ky.) 7.

10. **A Statutory Penalty** cannot be exacted unless the officer has performed some official service for which a fee is provided by the statute, and has demanded a greater fee than that provided for such services. *Shattuck v. Wood*, 18 Mass. (1 Pick.) 171. See also *Runnells v. Fletcher*, 15 Mass.

suit for the penalty must be brought in a similar capacity.¹ It has been held a valid defence to an action for the penalty, that the fees were levied under the *bona fide* belief that it was legal and proper to charge them, the defendant having been induced to make the charge through custom;² but it is no defence that the plaintiff has recovered the illegal fees from some third person;³ nor can a constable or other officer of justice plead that the costs

525, 526; *Commonwealth v. Bagley*, 24 Mass. (7 Pick.) 297.

Thus, where a declaration described the offence to be in wilfully and corruptly demanding and receiving more than the lawful fees for the service of the execution therein described, and it appeared that no execution was served, or the fees were taken for the service of a different one from that set forth, it was *held* that the plaintiff should fail, although the defendant might be guilty of extortion, and liable to indictment and punishment at common law, and to refund in a civil action against him. *Shattuck v. Woods*, 18 Mass. (1 Pick.) 171.

Same.—Compensation for former Trouble.

—Where an officer, in settling an execution, demanded and received of the debtor a sum beyond the amount of his legal fees, as compensation for trouble he had had at a former time, from the debtor's resisting the officer, for which he had been indicted and convicted, he will not be liable in a suit for the penalty provided by statute, although liable to an indictment at common law for extortion. See *Runnells v. Fletcher*, 15 Mass. 525; *Dunlop v. Curtis*, 10 Mass. 210; *Shattuck v. Woods*, 18 Mass. (1 Pick.) 171; *Commonwealth v. Shed*, 1 Mass. 227.

Sufficiency of Allegation.—Where the declaration in an action for penalty alleged that the defendant had received the unlawful fees from L., and the evidence showed that they were paid by one W., who received the money for the purpose from the father of L., L. being a minor, and the person for whose use the services were performed, it was *held* that this was not sufficient to maintain the declaration. *Lincoln v. Shaw*, 17 Mass. 410. The court said, "The person from whom the money is received, is he on whom the extortion is practised."

An Employer voluntarily paid to an Alderman Illegal Fees charged by him in a criminal proceeding against persons who were in his employ, and committed the criminal act charged in obedience to his instructions, in the course of his business. The court *held* that he was the party injured, and entitled to recover the penalty for taking such fees; the presumption being in the absence of rebutting testimony, that he paid the fees out of his own money. *Evans v. Harney*, 17 Pa. St. 460.

In an Action against a Recorder to recover fees illegally exacted for the registration of a deed, it was shown that the plaintiff was the grantee in the deed recorded; that he was the person for whose benefit it was recorded; that he was the party liable for the fees, and that he paid them; and it was *held* that it sufficiently appeared that he was the person injured. *Miller v. Lockwood*, 17 Pa. St. 248.

1. An administrator paid illegal fees to the county judge in connection with the final settlement of the administration. The court *held* that an action for the penalty would not be in the name of the administrator as an individual.

2. *Haynes v. Hall*, 37 Vt. 20. See also *Henry v. Tilsen*, 17 Vt. 479.

Effect of Usage.—Evidence of the usage or practice of other officers on such occasions cannot be admitted in evidence to protect the defendant against the charge of extortion. An unlawful act cannot become lawful by usage; and it cannot be known whether the defendant may not himself have contributed to establish the practice under which he would defend himself. See *Lincoln v. Shaw*, 17 Mass. 410; *Shattuck v. Woods*, 18 Mass. (1 Pick.) 171, 178.

3. **Excessive Charges for serving Writ.—Taxing in Costs.**—An officer who charges a greater amount of fees than he is allowed by law, for serving a writ, and who receives the amount so charged from the plaintiff in that suit, while the suit is pending in court, is liable to the plaintiff, from whom he so receives payment, for the penalty imposed by statute for receiving illegal fees, notwithstanding the plaintiff subsequently obtained judgment in his favor, in the suit in which the fees, as charged by the officer, were taxed in the bill of costs, and paid to the attorney of the plaintiff by the defendant in that suit. *Johnson v. Burnham*, 22 Vt. 639. In this case, the court said, "The fact that the illegal fees were subsequently taxed in the bill of costs against Norton, and collected by the attorney from him, cannot affect the merits of the action. If they were corruptly taxed by the attorney of the plaintiff in that action, or by the clerk, a new offence would arise under the statute, and the defendant in that action would be the party aggrieved, and might well sue for the penalty."

collected had been included in a judgment and execution, and collected from the plaintiff in the action for the penalty, under such execution;¹ and the fact that the fees were collected as due to a predecessor in office, and paid over to him, is no defence.² The declaration or complaint must state the services for which the "other or higher fees" were demanded and received,³ and must also state the amount received, and that it is greater than the sum allowed by law.⁴ The right of action to recover the penalty abates with the death of the person injured.⁵

XI. Suit to recover Illegal Exaction.—A civil suit may be maintained to recover the amount illegally charged, although the amount be extorted by the officer in the honest belief that he was entitled to charge it,⁶ or although the exaction should have been made by mistake.⁷ The principal is civilly liable for an overcharge made by his deputy, although without his knowledge,⁸ and the deputy is liable for his own act;⁹ and both are alike liable, although the money extorted should have been paid over to some third party entitled to receive it.¹⁰ A payment demanded and received under color of office can never be voluntary,¹¹ and it would

1. *Tinsley v. Kirby*, 8 S. C. 113.

An Officer will not be relieved from Liability in an action for the penalty, under a statute prohibiting extortion, by the fact that he did not himself receive the money. Thus, where a justice charges illegal fees which are indorsed on the execution, and collected by the constable, the justice is liable for the penalty, although they are not to be paid over to him. *Jackson v. Purdue*, 3 Pen. & W. (Pa.) 519.

2. So held in the case of a sheriff. *Spence v. Thompson*, 11 Ala. 746.

3. *Orton v. Engledow*, 8 Tex. 206; *Aechternacht v. Watmough*, 8 Watts & S. (Pa.) 162; *Ross v. Palmer*, 4 Pa. St. 517. Compare *Overholzer v. McMichael*, 10 Pa. St. 139.

Insufficient Complaint.—Setting aside Verdict.—If the complaint is not sufficient in this respect, the court will set aside the verdict on motion in arrest of judgment by default,—*Orton v. Engledow*, 8 Tex. 206,—or even on motion after verdict. *Ross v. Palmer*, 4 Pa. St. 517.

In a declaration, it is not sufficient to charge generally that the defendant, for services done in the office of sheriff, on a writ of *fi. fa.*, took other and greater fees than were allowed by act of assembly. *Aechternacht v. Watmough*, 8 Watts & S. (Pa.) 162.

4. *Livermore v. Boswell*, 4 Mass. 437. See also *Moor v. Boswell*, 5 Mass. 306.

5. *Reed v. Cist*, 7 Serg. & R. (Pa.) 183.

6. The case of *Ogden v. Maxwell*, 3 Blatchf. C. C. 319, was a suit against the collector of the port of New York to recover excessive fees charged by him for

issuing landing permits for passengers' baggage. The court said, "The high character of the collector takes away every color of suspicion that in these cases he was actuated by any wrongful motives. He administered his office as he found his predecessor had done. And it is not necessary to the maintenance of a civil action for the recovery of money wrongfully collected, that any turpitude should be proved against the officer. The suit rests on no illegal purpose of the defendant in exacting the payment. It is well sustained if his official power was exercised in the collection without warrant of law." See also *American Steamship Co. v. Young*, 89 Pa. St. 186; s. c., 33 Am. Rep. 751.

7. *Miller v. Lockwood*, 17 Pa. St. 248.

8. *Miller v. Lockwood*, 17 Pa. St. 248; *Ogden v. Maxwell*, 3 Blatchf. C. C. 319.

Liability of Sheriff for Overcharge of Deputy.—It need not be shown whether a sheriff recognized an act of his deputy or not. *McIntyre v. Trumbull*, 7 Johns. (N. Y.) 35.

9. In *Steele v. Williams*, 8 Ex. 625, one of the judges said, "I am clearly of opinion that the defendant is the right person to be sued, though he acted on behalf of another, who was the officer appointed under the act of Parliament. Any person who illegally takes money under color of an act of Parliament is liable to be sued for it, though the money is not to go into his own pocket."

10. *Steele v. Williams*, 8 Ex. 625; *Ripley v. Gelston*, 9 Johns. (N. Y.) 201; *Ogden v. Maxwell*, 3 Blatchf. C. C. 319.

11. In *Steele v. Williams*, 8 Ex. 625, the

appear that suit can be brought without notice.¹ The suit must be brought in a representative capacity where the payment has been so made,² and it has been held that different over-charges paid by the plaintiff may be united to give a court jurisdiction.³ The right of action survives to the personal representative of the injured person.⁴

EXTRA.⁵

EXTRADITION.⁶—See also INTERNATIONAL LAW; TREATIES.

I. International, 599.

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plaintiff sued to recover over-charges made by a parish clerk for searching the parish register. The payment was not demanded until after the work had been done.

Martin, B., said, "It is the duty of a person to whom an act of Parliament gives fees, to receive what is allowed, and nothing more. This is more like the case of money paid without consideration: to call it a voluntary payment is an abuse of language. If a person who has occupied a considerable time in a search gave an additional fee to the parish clerk, saying, 'I wish to make you some compensation for your time,' that would be a voluntary payment. But where a party says, 'I charge you such a sum by virtue of an act of Parliament,' it matters not whether the money is paid before or after the service rendered: if he is not entitled to claim it, the money may be recovered back."

In *Ogden v. Maxwell*, 3 Blatchf. C. C. 319, it was held that the money might be recovered, though paid without protest. See also *American Exch. F. I. Co. v. Britton*, 8 Bosw. (N. Y.) 148, 155; *Dew v. Parsons*, 2 Barn. & Ald. 562; *Morgan v. Palmer*, 2 Barn. & Cres. 729; *Britton v. Frink*, 3 How. (N. Y.) Pr. 103; *American Steamship Co. v. Young*, 89 Pa. St. 186; s. c., 33 Am. Rep. 748.

1. *Prior v. Craig*, 5 Serg. & R. (Pa.) 44.
2. *Orton v. Engledow*, 8 Tex. 206.
3. *Jones v. Buntin*, 1 Blackf. (Ind.) 322.
4. *Reed v. Cist*, 7 Serg. & R. (Pa.) 183.
5. Where a contractor made proposals

for furnishing the materials and performing the labor required to erect certain public works, and entered into a contract to erect the same for a certain sum, "being the aggregate cost of the construction . . . at the prices specified in said proposals;"

and after the construction, the cost of materials and labor having been greater than the specified prices, he claimed an amount in excess of the contract price, which was allowed by the auditors,—it was held that the statement of the aggregate cost in the contract was only an estimate, and that the payment of the cost above that amount was not the granting of an "extra compensation" within the meaning of a constitutional prohibition of such grants. The provision was intended to prohibit gifts of public moneys by the legislature, and not to take away the power of appropriating money for the payment of claims against the State, which, upon audit thereof, had been ascertained to be just, although the claimant might have become disentitled as a matter of strict right to enforce his claim. "The distinction is between an arbitrary grant of public money, and the appropriation thereof to the discharge of an established claim." *Swift v. State*, 26 Hun (N. Y.), 508.

Under a statute providing that certain officers "shall be entitled to receive reasonable allowance for extra services," "extra services" are services incident to their offices for which compensation is not provided by law, but not services disconnected with their offices. *Comrs. of Miami Co. v. Blake*, 21 Ind. 32.

6. Scope of this Discussion.—This discussion will be confined mainly to the doctrine of extradition as promulgated and practised in the United States, except in so far as the principal features of extradition as practised and understood by the countries having extradition treaties with the United States, may be treated of incidentally in the notes to the head, "Treaties entered into by the United States."

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I. International. — 1. *Extradition defined.* — International extradition is "the surrender by one sovereign state to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws." ¹

2. *Extradition limited to Treaties.* — In the United States, extradition, as practised and understood, is the surrender and de-

1. **Definition.** — Bouv. Law Dict. vol. i. 567; Stim. L. Gloss. 137.

livery, in pursuance of a treaty, by one sovereign state to another, on its demand, of fugitives from justice, who are charged with the commission of crime within the jurisdiction of the demanding state, that they may be tried for the offences specified in such treaty, and named in the warrant of extradition, and for no others, until a reasonable time and opportunity have been given them, after their release or trial upon such charges, to return to the country from whose asylum they had been forcibly taken under the extradition proceedings.¹

3. *Has No International Basis without Treaty.* — In the absence of treaty stipulations, no obligation is imposed upon the asylum state by the law of nations, to surrender and deliver to the demanding state persons who have committed offences within its jurisdiction, and have fled from justice, and sought refuge within the jurisdiction of the sovereign upon whom the demand for surrender is made.² Yet, as a matter of discretion on the part

1. **Definition limited to Treaty.** — "The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions express and implied of the treaty." *Commonwealth v. Hawes*, 13 Bush (Ky.), 697; s. c., 26 Am. Rep. 242; *U. S. v. Rauscher*, 119 U. S. 407; *In re Metzger*, 5 How. (U. S.) 176; *In re Kaine*, 14 How. (U. S.) 103; *State v. Vanderpool*, 39 Ohio St. 273; *In re British Prisoners*, 1 Woodb. & M. (U. S.) 66; *U. S. v. Davis*, 2 Sumn. (U. S.) 482; *Ex parte Holmes*, 12 Vt. 631; *S. C. Holmes v. Jennison*, 14 Pet. (U. S.) 540; *Commonwealth v. Deacon*, 10 S. & R. (Pa.) 125; *Blandford v. State*, 10 Tex. App. 627; *Case of Jose Ferreira Dos Santos*, 2 Brock. (U. S.) 493.

"The treaty, the acts of Congress, and the proceedings by which he was extradited, clothe him with the right to exemption from trial for any other offence, until he has had an opportunity to return to the country from which he was taken for the purpose alone of trial for the offence specified in the demand for his surrender." *U. S. v. Rauscher*, 119 U. S. 407; *Judge Cooley*, Pr. Rev. Jan. 1879, p. 176; *Ex parte Coy*, 32 Fed. Rep. 911, and note; *U. S. v. Watts*, 14 Fed. Rep. 130; s. c., 8 Sawyer (U. S.), 370; *Ex parte Hibbs*, 26 Fed. Rep. 421, 431.

2. **Right of Extradition based on Treaty alone.** — "It is the settled politic doctrine of the United States, that, independently of special compact, no state is bound to deliver up fugitives from the justice of another state." *Wing's Case*, 6 Op. Atty-Genl. 85; *Sullivan's Case*, 1 Op. Atty-Genl. 509; *Case of Two Portuguese Seamen*, 2

Op. Atty-Genl. 559; *Application of Chevalier Huggens*, 2 Op. Atty-Genl. 452; *De Witt's Case*, 3 Op. Atty-Genl. 661; *Hamilton's Case*, 6 Op. Atty-Genl. 431; *Carl Vogt Case*, For. Rel. U. S. vol. i. p. 81; *Republica v. De Longchamps*, 1 Dall. (U. S.) 120; *Case of Jose Ferreira Dos Santos*, 2 Brock. (U. S.) 493; *Commonwealth v. Deacon*, 10 S. & R. (Pa.) 125; *Matter of the British Prisoners*, 1 Woodb. & M. (U. S.) 66; *U. S. v. Davis*, 2 Sumn. (U. S.) 482; *Ex parte Holmes*, 12 Vt. 631; *S. C. Holmes v. Jennison*, 14 Pet. (U. S.) 540; *U. S. v. Rauscher*, 119 U. S. 407; *Lawrence's Wheaton on Inter'l Law*, 233, and authorities cited.

"The ancient doctrine that a sovereign state is bound by the law of nations to deliver up persons charged with, or convicted of, crimes committed in another country, upon the demand of the state whose laws they have violated, never did permanently obtain in the United States. It was supported by jurists of distinction like Kent and Story; but the doctrine has long prevailed in the United States that a foreign government has no right to demand the surrender of a violator of its laws unless we are under obligation to make surrender in obedience to the stipulations of an existing treaty." *Commonwealth v. Hawes*, 13 Bush (Ky.), 697; s. c., 26 Am. Rep. 242.

"It was formerly very much questioned among jurists whether the surrender of fugitives from justice, by one government to another, was a duty or obligation imposed by the law of nations, or depended upon courtesy or comity, which might, or not, be exercised at the pleasure of each government without cause or complaint. In this country and in England, at least, it has been substantially settled that no such duty

of the government whose action is invoked, and as a matter of courtesy and comity between nations, fugitives from justice have sometimes been surrendered to friendly nations without treaty.¹

4. *Treaty Power vested in President and Senate.* — The Constitution of the United States gives the treaty-making power to the President in general terms, provided there is a concurrence of two-thirds of the senators present.² And, under this general grant of power, treaties may be entered into with foreign nations embracing all the usual subjects of diplomacy, and all sorts of treaties.³ But, though the power is thus general and unrestricted,

exists; and in practice, it is believed that in nearly all countries neither demand nor surrender is now made, except in obedience to treaty stipulations." *Adrianze v. Lagrave*, 59 N. Y. 110.

"The courts of this country possess no power to arrest and surrender to a foreign country fugitives from justice, except as authorized by treaty stipulations and acts of Congress passed in pursuance thereof." *In re Kaine*, 14 How. (U. S.) 103.

"The surrender of fugitives from justice is a matter of conventional arrangement between states, as no obligation is imposed by the law of nations." *The Matter of Metzger*, 5 How. (U. S.) 176.

1. *Surrender as Matter of Comity.* — "If a demand were formally made, that William Jones, a subject and fugitive from justice, or any of our own citizens, heinous offenders within the dominion of Spain, should be delivered to their governments for trial and punishment, the United States are in duty bound to comply." *Case of William Jones*, 1 Op. Atty.-Genl. 68; *Argnelli's Case* (cited in *Whart. Conf. of Laws*, § 941, and *Spear on Extrad.* 1).

"By the law and usages of nations, fugitives charged with felony and other higher crimes should be surrendered by a foreign and friendly jurisdiction to which they have fled." *In re Washburn*, 4 Johns. Ch. (N. Y.) 106; s. c., 8 Am. Dec. 548.

"The Constitution has merely made that obligatory between the states which between nations entirely foreign to each other was done from comity; viz., the delivering up of criminals who have fled from justice." *Commonwealth v. Green*, 17 Mass. 515.

"Power of arresting and detaining offenders against laws of other countries exists of necessity if a right in every sovereign state, independent of constitutional provision or treaty obligation to surrender such fugitive." *In re Fetter*, 3 Zab. (N. J.) 311; s. c., 57 Am. Dec. 382, and note.

"It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed for

trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another; and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government toward another which rest upon established principles of international law." *U. S. v. Rauscher*, 119 U. S. 407.

2. *Treaty Power.* — "He (meaning the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." Const. U. S. art. 2, § 2.

3. *Treaty Power General.* — "The power to make treaties is by the Constitution general; and, of course, it embraces all sorts of treaties, for peace or war, for commerce or territory, for alliance or succors, for indemnity, for injuries or payment of debts, for the recognition and enforcement of principles of public law, and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other." *Story, Const.* § 1508.

"The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced; and consequently it was designed to include all subjects which, in the ordinary intercourse of nations, had usually been made subjects of negotiation and treaty, and which are consistent with the nature of our institutions and the distribution of powers between the General and State Governments." *Holmes v. Jennison*, 14 Pet. (U. S.) 540; *United States v. 43 Gallons, etc.*, 3 Otto (U. S.), 197.

"The power to make treaties is given without restraining it to particular objects in as plenipotentiary a form as it is held by any other sovereign in any other commu-

the treaties made by virtue of such authority must not violate or supersede any other powers or rights given by the same instrument.¹

5. *The States have no Treaty Power.* — The States composing the Union have, under the Constitution, no treaty power. And they have no power or authority, either with or without treaty, to enact or execute laws for the delivery of fugitives to foreign countries. The power belongs exclusively to the General Government, and is to be exercised pursuant to extradition treaties. Before the federal compact, the States possessed the power of treaty-making as potentially as any other independent sovereign; but, by the federal compact, they expressly granted it to the Federal Government in general terms, and prohibited it to themselves.²

6. *Extradition Treaties Constitutional.* — Treaties entered into between sovereign States for the surrender and delivery of fugitive criminals are constitutional, and within the treaty-making power.³

nity. This principle results from the form and necessities of the Government as elicited by a general review of the Federal Compact." *People v. Gerke*, 5 Cal. 381.

1. *Power Limited.* — "But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution cannot be construed to authorize the destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it, and cannot supersede or interfere with any other of its fundamental provisions." *Story*, Const. § 1508.

"A treaty cannot change the Constitution or be held valid if it be in violation of that instrument." *The Cherokee Tobacco Case*, 11 Wall. (U. S.) 616; *People v. Naglee*, 1 Cal. 231; *Pierce v. The State*, 13 N. H. 536.

In *Marbury v. Madison*, 1 Cranch (U. S.), 137, the Constitution itself was spoken of as the paramount authority in all cases, rendering acts of Congress invalid when inconsistent therewith.

"A treaty cannot directly appropriate money belonging to the United States, since this power is given exclusively to Congress." *Turner v. Baptist Missionary Union*, 5 McLean (U. S.), 344.

"A treaty is but a law of the land, and what is forbidden by the Constitution can no more be done by a treaty than by an act of Congress." *People v. Washington*, 36 Cal. 658.

2. *The States have no Right to surrender Fugitives.* — "Under the Constitution, the executive of a State has no power to surrender a person charged with murder to the authorities of a foreign government for

trial." *Holmes v. Jennison*, 14 Pet. (U. S.) 540; *Ex parte Holmes*, 12 Vt. 631.

"By the Constitution of the United States the Federal Government has the exclusive power to regulate, provide for, and control the surrender of fugitives from justice from foreign countries. Hence the provisions of the Revised Statutes (1 R. S. 164, sects. 8-11) for such surrender are unconstitutional, and a warrant issued by the governor in pursuance thereof is void." *People v. Curtis*, 50 N. Y. 321; s. c., 10 Am. Rep. 483.

"Before the compact the States had the power of treaty-making as potentially as any power on earth. It extended to every subject. By the compact they expressly granted it to the Federal Government in general terms, and prohibited it to themselves. The General Government must therefore hold it as fully as the States held it, with the exceptions that necessarily flow from a proper construction of the other powers granted and those prohibited by the Constitution." *People v. Gerke*, 5 Cal. 381.

3. *Constitutionality of Treaties.* — "It is not to be questioned that a treaty stipulation, on the part of the Government of the United States, to surrender fugitives from justice, is a lawful stipulation, and within the authority of the treaty-making power." *In re Angelo de Giacomo*, 12 Blatchf. (U. S.) 391.

"And without attempting to define the exact limits of this treaty-making power, or to enumerate the subjects intended to be included in it, it may be safely assumed that the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the General Government; and as the rights

Congress enacts Laws in Aid of Treaties.—The power to slate in respect to international extradition being vested solely in the Federal Government, the duty to pass such laws as are necessary to carry into effect treaty stipulations devolves upon Congress.¹ And in pursuance of the power thus granted under

the Constitution, Congress has enacted statutory provisions, prescribing what proceedings shall be had as a prerequisite to the delivery of a fugitive.² Before the passage of such laws, the courts held that no delivery of fugitives could lawfully be made by the President under a treaty with the United States without a legislative act prescribing the manner of such delivery.³

The contrary doctrine has been asserted by equally credible authorities.⁴

Due Process of Law as applied to Treaties.—The amendments to the Constitution⁵ which provide that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;" that "no person shall be held to answer for a capital or other infamous crime,

without due diligence of nations toward one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon international law, it follows that the treaty-making power must have authority to decide how the right of a foreign nation, in this respect, will be recognized and enforced. It demands the surrender of any one guilty of offences against it." Holmes v. Wilson, 14 Pet. (U. S.) 540.

The power to make treaties is given by the Constitution in general terms, without description of the objects intended to be embraced; and consequently it was held to include all those subjects which, in ordinary intercourse of nations, had already been made subjects of negotiation by treaty, and which are consistent with the nature of our institutions and the distribution of powers between the General and State Governments." Holmes v. Jennison, 14 Pet. (U. S.) 540; United States v. Gallons, etc., 3 Otto (U. S.), 197; *Ex parte Gerke*, 5 Cal. 381; *Ex parte Kaine*, 14 (U. S.) 103; Story, Const. § 1508.

Constitutional Provision.—"The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof." Const. U. S. art. I, § 8.

Statutory Provisions.—§§ 5270, 5271, 5273, U. S. R. S.

3. Can Treaty Provisions be executed without Legislative Aid?—"This case involves the question whether the President of the United States has authority, by virtue of mere treaty stipulations, and without an express enactment of the national legislature, to deliver up to a foreign power, and virtually to banish from the country, an inhabitant of one of the sovereign States of our Confederacy." . . . "A treaty containing provisions to be executed *in futuro* is in the nature of a contract, and does not become a rule for the courts until legislative action shall be had on the subject." . . . "The treaty with France, of 1843, providing for the surrender of fugitives from justice, cannot be executed by the President of the United States without an act of Congress." *The Matter of Metzger*, 1 Barb. (N. Y.) 248. See also *Foster v. Neilson*, 2 Pet. (U. S.) 253; *Turner v. Am. Bapt. Miss. Union*, 5 McLean (U. S.), 344.

4. Legislative Enactment not Necessary, when.—When the aid of no such act of Congress seems necessary in respect to a ministerial duty devolved on the Executive by the supreme law of a treaty, the Executive need not wait, and does not wait, for acts of Congress, to direct such duties to be done. *In re British Prisoners*, 1 Woodb. & M. (U. S. C. C.) 66; *Case of Christiana* *Cochrane*, 4 Op. Atty.-Genl. 201; 1 Edmond's Sel. Cas. (N. Y.) 399.

5. Const. U. S. §§ 4, 5, 6, of the Amendments.

unless on presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger;" and that no person shall "be deprived of life, liberty or property without due process of law;" that "no bill of attainder, or *ex post facto* law, shall be passed;" and that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury," — have no reference or relation to proceedings had under extradition treaties. These provisions, in so far as they relate to criminal offences and the manner of trial, relate solely to offences committed against the United States, and triable within its jurisdiction.¹

1. Constitutional Amendments construed.

— "Now I do not understand the provisions of the tenth article of the treaty of 1842 as being at all in conflict with this article of the Constitution; or that, in fulfilling it, as has been done in this case, the right of personal security of the accused has been assailed. The protection guaranteed is not against all seizures; it is against unreasonable seizures; it (the seizure) can be made only upon probable cause; and, when authorized, the evidence of its reasonableness is to be furnished by oath or affirmation, all of which prerequisites have been complied with in this case. . . . Nor do I perceive how it can be supposed that there has been any infraction, by the treaty stipulations of the fifth article of the Constitutional Amendments, which, in declaring that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury, was never designed to embrace any other than offences against the United States. The offence charged by this proceeding is one against the Government of Great Britain, over which the courts of the United States can rightfully exercise no jurisdiction, and for which, in these courts, the accused cannot be required to answer upon, or without a presentment or indictment by a grand jury." *Case of Christiana* *Cochrane*, 4 Op. Atty.-Genl. 201.

"The restriction in art. 4 of the Amendments to the Constitution, against violating the right of the people to be secure against unreasonable seizures, and the restriction, in art. 5 of such Amendments, against depriving a person of liberty without due process of law, have no relation to the subject of extradition for crime, as regulated by the treaty in question, and the statutes of the United States passed on that subject." *Case of Angelo de Giacomo*, 12 Blatchf. (U. S.) 391.

"A bill of attainder is defined to be 'a legislative act which inflicts punishment without a judicial trial,' when the legisla-

tive body exercises the office of judge, and assumes judicial magistracy, and pronounces on the guilt of a party without any of the forms and safeguards of a trial. *Cummings v. Missouri*, 4 Wall. (U. S.) 356. This treaty does none of these things; nor do any of the statutes for carrying the treaty into effect contain provisions which fall within such definition." *In re Angelo De Giacomo*, 12 Blatchf. (U. S.) 391.

"By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rule of evidence by which less or different testimony is sufficient to convict than was then required." *In re Angelo de Giacomo*, 12 Blatchf. (U. S.) 391; *Cummings v. Missouri*, 4 Wall. (U. S.) 356; *Calder v. Bull*, 3 Dall. (U. S.) 386.

"The cases referred to in the Amendments are those in which the Government of the United States arraigns and tries the accused for offences committed against its laws; and these certainly are not cases in which that Government is asked, in pursuance of a treaty, to deliver up fugitive criminals for offences committed against a foreign government." *Spear on Extrad.* (1st ed.) 32, 33.

"Due process of law," as occurring in the fifth amendment, "applies, so far as it relates to criminal offences, only to those committed against the United States; and in respect to them, it does not forbid the arrest and examination of a person upon complaint made under oath, or his detention, by the commitment of a magistrate, until his case can be considered by a grand jury. . . . The phrase 'due process of law' has no relation to the questions that arise and are considered in proceedings for the purpose of extradition under a treaty or the powers of the President in making such a treaty." *Spear on Extrad.* (1st ed.) 29, 30.

"If we attend to the Constitution, and

9. *Treaties entered into by the United States.* — There are now in force between the United States and foreign countries thirty-three extradition treaties.¹

the Amendments which are now a part of it, we shall find that all the provisions there made respecting criminal prosecutions and trials for crimes by a jury are expressly limited to crimes committed within a State or district of the United States." *In re Jonathan Robbins*, Whart. St. Trials, 401, 402.

1. The material parts of the treaties entered into by the United States in the order of their respective dates, and designating the foreign nations with whom they were made, will here be given. The formal parts of the various treaties are substantially the same; and this reproduction not being essential to this discussion, and also to a correct understanding of what such treaties contain, all immaterial and formal portions will be omitted.

1. GREAT BRITAIN, AUG. 9, 1842. — *Art. X.* — It is agreed that the United States and her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with attempt to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territory of the other; *provided*, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive.

2. FRANCE, NOV. 9, 1843. — *Art. I.* — It is agreed that the high contracting parties shall, on requisitions made in their name, through the medium of their respective

diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in the next following article, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found, within the territories of the other; *provided*, that this shall be done only when the fact of commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

Art. II. — Persons shall be so delivered up who shall be charged, according to the provision of this convention, with any of the following crimes: to wit, murder (comprehending the crimes designated in the French penal code by the terms assassination, parricide, infanticide, and poisoning), or with an attempt to commit murder, or with rape, or with forgery, or with arson, or with embezzlement by public officers, when the same is punishable with infamous punishment.

Art. III. — On the part of the French Government, the surrender shall be made only by the authority of the keeper of the seals, minister of justice; and on the part of the Government of the United States, the surrender shall be made only by authority of the Executive thereof.

Art. V. — The provisions of the present convention shall not be applied in any manner to the crimes enumerated in the second article, committed anterior to the date thereof, nor to any crime or offences of a purely political character.

ADDITIONAL ARTICLE, FEB. 24, 1845. — The crime of robbery, defining the same to be the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear; and the crime of burglary, defining the same to be breaking and entering by night into a mansion-house of another, with intent to commit felony, and the corresponding crimes included under the French law in the words *vol qualifié* crime, not being embraced in the second article of the convention of extradition concluded between the United States of America and France on the 9th of November, 1843, it is agreed by the present article between the high contracting parties that persons charged with those crimes shall be respectively delivered up in conformity with the first article of the said convention.

ADDITIONAL ARTICLE, FEB. 10, 1858. — It is agreed between the high contracting

parties that the provisions of the treaties for the mutual extradition of criminals between the United States of America and France, of Nov. 9, 1843, and Feb. 24, 1845, and now in force between the two governments, shall extend not only to persons charged with crimes therein mentioned, but also to persons charged with the following crimes, whether as principals, accessories, or accomplices; namely, forging, or knowingly passing or putting in circulation, counterfeit coin or bank-notes, or other paper current as money, with intent to defraud any person or persons; embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

3. HAWAIIAN ISLANDS, DEC. 20, 1849.

—*Art. XIV.*—The contracting parties mutually agree to surrender, upon official requisition, to the authorities of each, all persons, who, being charged with the crimes of murder, piracy, arson, robbery, forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall be found within the territory of the other; *provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial if the crime had there been committed. And the respective judges and other magistrates of the two governments shall have authority, upon complaint made under oath, to issue a warrant for the apprehension of the person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered. And if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

4. SWISS CONFEDERATION, NOV. 25, 1850. —*Art. XIV.*—Persons shall be delivered up according to the provisions of this convention who shall be charged with any of the following crimes; to wit, murder (including assassination, parricide, infanticide, and poisoning); attempt to commit murder; rape; forgery, or the emission of forged papers; arson; robbery, with violence; intimidation, or forcible entry of an inhabited house; embezzlement by public officers, or by persons hired or salaried to the detriment of their employers, when these crimes are subject to infamous punishment.

Art. XV.—On the part of the United States the surrender shall be made only by the authority of the Executive thereof, and on the part of the Swiss Confederation by that of the Federal Council.

Art. XVII.—The provisions of the foregoing articles relating to the surrender of fugitive criminals shall not apply to offences committed before the date hereof, nor to those of a political character.

5. PRUSSIA AND OTHER STATES, JUNE 16, 1852. —*Art. I.*—It is agreed that the United States and Prussia, and the other states of the Germanic Confederation included in or which may hereafter accede to this convention, shall, upon mutual requisitions by them or their ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money (whether coin or paper money), or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found, within the territories of the other. (The remainder of this article is identical in language with the proviso in *Art. XIV.* of the preceding treaty.)

Art. III.—None of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.

Art. IV.—When any person accused of any of the crimes enumerated in this convention shall have committed a new crime in the territories of the State where he has sought an asylum, or shall be found, such person shall not be delivered up under the stipulations of this convention until he shall have been tried, and shall have received the punishment due such new crime, or shall have been acquitted thereof.

6. BREMEN, SEPT. 6, 1853. —Whereas, a convention for the mutual delivery of criminals, fugitives from justice, in certain cases between Prussia and other states of the Germanic Confederation on the one part, and the United States of North America on the other part, was concluded at Washington on the 16th of June, 1852, by the plenipotentiaries of the contracting parties, and was subsequently duly ratified on the part of the contracting governments; and whereas, pursuant to the second article of the said convention, the United States have agreed that the stipulations of the said convention shall be applied to any other state of the Germanic Confederation which might subsequently declare its accession thereto, — therefore, the Senate of the free Hanseatic city of Bremen accordingly hereby declare their accession to the said convention of June 16, 1852, which is lit-

erally as follows. (A copy of the convention of June 16, 1852, between the United States and Prussia and other Germanic states, is here inserted.)

7. BAVARIA, SEPT. 12, 1853. — *Art. I.* — The Government of the United States and the Bavarian Government promise and engage, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, to deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found, within the territories of the other; *provided*, etc. (This proviso as to evidence of criminality, etc., is identical with the proviso in Art. I. of treaty with Prussia.)

Art. III. — None of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.

Art. IV. — Whenever any person accused of any of the crimes enumerated in this convention shall have committed a new crime in the territories of the state where he has sought an asylum, or shall be found, such person shall not be delivered up under the stipulations of this convention until he shall have been tried, and shall have received the punishment due such new crime, or shall have been acquitted thereof.

8. WURTEMBERG, OCT. 13, 1853. — (On Oct. 13, 1853, the Government of His Majesty, the King of Wurtemberg, formally declared its accession to the convention of the 16th of June, 1852, between the United States and Prussia and other states of the Germanic Confederation, for the mutual delivery of criminals, fugitives from justice, in certain cases. See that convention.)

9. MECKLENBURG-SCHWERIN, NOV. 26, 1853. — (On the 26th of November, 1853, the Government of His Royal Highness, the Grand Duke of Mecklenburg-Schwerin, declared its accession to the treaty entered into between the United States and Prussia and other states, on the 16th of June, 1852.)

10. MECKLENBURG-STRELITZ, DEC. 2, 1853. — (This government declared its accession to the treaty of the 16th of June, 1852, between the United States and Prussia and other states of the Germanic Confederation, on the second day of December, 1853.)

11. OLDENBURG, DEC. 30, 1853. — (On Dec. 30, 1853, the Government of His

Royal Highness, the Grand Duke of Oldenburg, formally declared its accession to the treaty of June 16, 1852, between the United States and Prussia and other states.)

12. SCHAUMBURG-LIPPE, JUNE 7, 1854. — (On June 7, 1854, the Government of His Serene Highness, the Reigning Prince of Schaumburg-Lippe, declared its accession to the treaty of June 16, 1852, between the United States and Prussia and other states.)

13. HANOVER, JAN. 18, 1855. — *Art. I.* — The Government of the United States and the Hanoverian Government promise and engage, upon mutual requisitions by them, or their ministers, officers or authorities, respectively made, to deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found, within the territory of the other. (Proviso same as in treaty with Prussia and other states.)

Art. II. — The stipulations of this convention shall be applied to any other state of the Germanic Confederation that may hereafter declare its accession thereto.

Art. III. — None of the contracting parties shall be bound to deliver up its own subjects or citizens under the stipulations of this convention.

Art. IV. — Whenever any person accused of any of the crimes enumerated in this convention shall have committed a new offence in the territories of the state where he has sought an asylum, or shall be found, such person shall not be delivered up, under the stipulations of this convention, until he shall have been tried, and shall have received the punishment due to such new crime, or shall have been acquitted thereof.

14. TWO SICILIES, OCT. 1, 1855. — *Art. XXII.* — Persons shall be delivered up, according to the provisions of this treaty, who shall be charged with any of the following crimes: to wit, murder (including assassination, parricide, infanticide, and poisoning); attempt to commit murder; rape; piracy; arson; the making and uttering of false money; forgery, including forgery of evidences of public debt, bank-bills, and bills of exchange; robbery, with violence; intimidation, or forcible entry of an inhabited house; embezzlement by public officers, including appropriation of public funds, — when these crimes are subject, by the code of the Kingdom of the Two Sicilies, to the punishment *della reclusione*, or other severe punishment, and by the

laws of the United States to infamous punishment.

Art. XXIII.—On the part of each country the surrender of fugitives from justice shall be made only by the authority of the executive thereof. And all expenses whatever of detention and delivery, effected in virtue of the preceding articles, shall be at the cost of the party making the demand.

Art. XXIV.—The citizens and subjects of each of the high contracting parties shall remain exempt from the stipulations of the preceding articles, so far as they relate to the surrender of fugitive criminals; nor shall they apply to offences committed before the date of the present treaty, nor to offences of a political character, unless the political offender shall also have been guilty of some one of the crimes enumerated in *Art. XXII*.

15. AUSTRIA, JULY 3, 1856. — *Art. I.*—By this article it is provided that all persons may be extradited who are "charged with murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys committed within the jurisdiction of either party." Political offences are expressly excluded from its operation, and also the crimes enumerated in the first article committed anterior to the date of the treaty.

Art. II.—Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.

Art. III.—The same as *Art. IV.* in treaty with Hanover.

16. BADEN, JAN. 30, 1857. — *Art. I.*—For the same crimes as in treaty with Austria.

Art. II.—The same as *Art. II.* in treaty with Austria.

Art. III.—Same as *Art. III.* in treaty with Austria.

17. SWEDEN AND NORWAY, MARCH 21, 1860. — *Art. II.*—Persons shall be so delivered up who shall have been charged with or sentenced for any of the following crimes: Murder (including assassination, parricide, infanticide, and poisoning), or attempt to commit murder; rape; piracy (including mutiny on board a ship, whenever the crew or part thereof, by fraud or violence against the commander, have taken possession of the vessel); arson; robbery and burglary; forgery; and the fabrication or circulation of counterfeit money, whether coin or paper money; embezzlement by public officers, including appropriation of public funds.

Art. III.—Provides that all expenses shall be defrayed by demanding government.

Art. IV.—Provides that neither of the contracting parties shall be bound to deliver up its own citizens or subjects.

Art. V.—Provides for the exemption of offences of a political character.

18. VENEZUELA, AUG. 27, 1860. — *Art. XXVIII.*—Persons shall be delivered up, according to the provisions of this convention, who shall be charged with any of the following crimes: to wit, murder (including assassination, parricide, infanticide, and poisoning); attempt to commit murder; rape; forgery; the counterfeiting of money; arson; robbery, with violence; intimidation, or forcible entry of an inhabited house; piracy; embezzlement by public officers, or by persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

Art. XXIX.—On the part of each country the surrender shall be made only by the authority of the executive thereof. The expenses of detention and delivery, effected in virtue of the preceding article, shall be at the cost of the party making the demand.

Art. XXX.—The provisions of the foregoing articles relating to the surrender of fugitive criminals shall not apply to offences committed before the date hereof, nor to those of a political character.

19. MEXICO, DEC. 11, 1861. — *Art. III.*—Persons shall be so delivered up who shall be charged, according to the provisions of this treaty, with any of the following crimes, whether as principals, accessories, or accomplices: to wit, murder (including assassination, parricide, infanticide, and poisoning); assault with intent to commit murder; mutilation; piracy; arson; rape; kidnapping, defining the same to be the taking and carrying away of a free person by force or deception; forgery, including the forging or making, or knowingly passing or putting in circulation, counterfeit coin or bank-notes, or other paper current as money, with intent to defraud any person or persons; the introduction or making of instruments for the fabrication of counterfeit coin or bank-notes, or other paper current as money; embezzlement of public moneys; robbery, defining the same to be the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear; burglary, defining the same to be breaking and entering into the house of another with intent to commit felony; and the crime of larceny of cattle or other goods and chattels of the value of twenty-five dollars or more, when the same is committed within the frontier states or territories of the contracting parties.

Art. IV.—On the part of each country the surrender of fugitives from justice shall be made only by the authority of the ex-

executive thereof, except in the case of crimes committed within the limits of the frontier states or territories, in which latter case the surrender may be made by the chief civil authority thereof, or such chief civil or judicial authority of the districts or counties bordering on the frontier as may be for this purpose duly authorized by the said chief civil authority of the said frontier states or territories; or if, from any cause, the civil authority of such state or territory shall be suspended, then such surrender may be made by the chief military officer in command of such state or territory.

Art. V.—All the expenses whatever of detention and delivery, effected in virtue of the preceding provisions, shall be borne and defrayed by the government or authority of the frontier state or territory in whose name the requisition shall have been made.

Art. VI.—The provisions of the present treaty shall not be applied in any manner to any crime or offence of a purely political character, nor shall it embrace the return of fugitive slaves, nor the delivery of criminals, who, when the offence was committed, shall have been held in the place where the offence was committed in the condition of slaves, the same being expressly forbidden by the Constitution of Mexico; nor shall the provisions of the present treaty be applied in any manner to the crimes enumerated in the third article committed anterior to the date of the exchange of the ratification hereof. Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty.

20. HAYTI, NOV. 3, 1864.—*Art. XXXIX.*—Persons shall be delivered, according to the provisions of this treaty, who shall be charged with any of the following crimes: to wit, murder (including assassination, parricide, infanticide, and poisoning); attempt to commit murder; piracy; rape; forgery; the counterfeiting of money; the utterance of forged paper; arson; robbery; and embezzlement by public officers, or by persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

Art. XL.—The surrender shall be made, on the part of each country, only by the authority of the executive thereof. The expenses of detention and the delivery, effected in virtue of the preceding articles, shall be made at the cost of the party making the demand.

Art. XLI.—The provisions of the foregoing articles relating to the extradition of fugitive criminals shall not apply to offences committed before the date hereof, nor to those of a political character. Neither of the contracting parties shall be bound to deliver up its own citizens under the provisions of this treaty.

21. DOMINICAN REPUBLIC, FEB. 8, 1867.—*Art. XXVIII.*—Persons shall be delivered up according to the provisions of this convention, who shall be charged with any of the following crimes: to wit, murder (including assassination, parricide, infanticide, and poisoning); attempt to commit murder; rape; forgery; the counterfeiting of money; arson; robbery, with violence; intimidation, or forcible entry of an inhabited house; piracy; embezzlement by public officers, or by persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

Art. XXIX.—On the part of each country the surrender shall be made only by the authority of the executive thereof. The expenses of detention and delivery, effected in virtue of the preceding articles, shall be at the cost of the party making the demand.

Art. XXX.—The provisions of the foregoing articles relating to the surrender of fugitive criminals shall not apply to offences committed before the date hereof, nor to those of a political character.

22. ITALY, MARCH 23, 1868.—*Art. II.*—Persons shall be delivered up who shall have been convicted of, or be charged, according to the provisions of this convention, with any of the following crimes:—

1. Murder, comprehending the crimes designated in the Italian penal code by the terms of parricide, assassination, poisoning, and infanticide.

2. The attempt to commit murder.

3. The crimes of rape, arson, piracy, and mutiny on board a ship, whenever the crew, or part thereof, by fraud or violence against the commander, have taken possession of the vessel.

4. The crime of burglary, defined to be the action of breaking and entering into the house of another with the intent to commit felony; and the crime of robbery, defined to be the action of feloniously and forcibly taking from the person of another goods or money, by violence or putting him in fear.

5. The crime of forgery, by which is understood the utterance of forged papers, the counterfeiting of public, sovereign, or government acts.

6. The fabrication or circulation of counterfeit money, either coin or paper, of public bonds, bank-notes and obligations, and, in general, of any title and instrument of credit whatsoever, the counterfeiting of seals, dies, stamps, and marks, of state and public administrations, and the utterance thereof.

7. The embezzlement of public moneys committed within the jurisdiction of either party, by public officers or depositors.

8. Embezzlement by any person or persons hired or salaried, to the detriment of

their employers, when these crimes are subject to infamous punishment.

Art. III.—The provisions of this treaty shall not apply to any crime or offence of a political character, and the person or persons delivered up for the crimes enumerated in the preceding article, shall in no case be tried for any ordinary crime committed previously to that for which his or their surrender was asked.

Art. IV.—If the person whose surrender may be claimed, pursuant to the stipulations of the present treaty, shall have been arrested for the commission of offences in the country where he has sought an asylum, or shall have been convicted thereof, his extradition may be deferred until he shall have been acquitted, or have served the term of imprisonment to which he may have been sentenced.

Art. V.—Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties; or in the event of the absence of these agents from the country, or its seat of government, they may be made by superior consular officers. If the person whose extradition may be asked for shall have been convicted of a crime, a copy of the sentence of the court in which he may have been convicted, authenticated under its seal, and an attestation of the official character of the judge, by the proper executive authority, and of the latter by the minister or consul of the United States, or of Italy, respectively, shall accompany the requisition. When, however, the fugitive shall have been merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have issued, must accompany the requisition as aforesaid. The President of the United States, or the proper executive authority in Italy, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided, that, according to the law and the evidence, the extradition is due, pursuant to the treaty, the fugitive may be given up, according to the forms prescribed in such cases.

ADDITIONAL ARTICLE, JAN. 21, 1869.—It is agreed that the concluding paragraph of the second article of the convention aforesaid shall be so amended as to read as follows:—

8. Embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when these crimes shall be subject to infamous punishment, according to the laws of the United States, and criminal punishment, according to the laws of Italy.

ADDITIONAL ARTICLE, JUNE 11, 1884.—*Art. I.*—The following paragraph is added to the list of crimes on account of which extradition may be granted, as provided in Art. II. of the aforesaid convention of March 23, 1868:—

9. Kidnapping of minors or adults; that is to say, the detention of one or more persons, for the purpose of extorting money from them or their families, or for any other unlawful purpose.

Art. II.—The following clause shall be inserted after Art. V. of the aforesaid convention of March 23, 1868: Any competent judicial magistrate of either of the two countries shall be authorized, after the exhibition of a certificate signed by the minister of foreign affairs (of Italy), or the secretary of state (of the United States), attesting that a requisition has been made by the government of the other country to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime for which, pursuant to this convention, extradition may be granted, and on complaint duly made under oath by a person cognizant of the fact, or by a diplomatic or consular officer of the demanding government, being duly authorized by the latter, and attesting that the aforesaid crime was thus perpetrated, to issue a warrant for the arrest of the person thus incriminated, to the end that he or she may be brought before the said magistrate, so that the evidence of his or her criminality may be heard and considered; and the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made, and supported by evidence as above provided. If, however, the requisition, together with the documents above provided for, shall not be made, as required, by the diplomatic representative of the demanding government, or, in his absence, by a consular officer thereof, within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty.

23. REPUBLIC OF SALVADOR, MAY 23, 1870.—*Art. II.*—Persons shall be delivered up who shall have been convicted of, or be charged, according to the provisions of this convention, with any of the following crimes:—

1. Murder, comprehending the crimes designated in the penal codes of the contracting parties by the terms homicide, parricide, assassination, poisoning, and infanticide.

2. The attempt to commit murder.

3. The crimes of rape, arson, piracy, and mutiny on board a ship, whenever the crew, or part thereof, by fraud, or violence against the commander, have taken possession of the vessel.

4. The crime of burglary, defined to be

the action of breaking and entering by night into the house of another, with the intent to commit felony; and the crime of robbery, defined to be the action of feloniously and forcibly taking from the person of another goods or money by violence, or putting him in fear.

5. The crime of forgery, by which is understood the utterance of forged papers, the counterfeiting of public, sovereign, or government acts.

6. The fabrication or circulation of counterfeit money, either coin or paper, of public bonds, bank-notes, and obligations, and, in general, of all things being titles or instruments of credit, the counterfeiting of seals, dies, stamps, and marks of state and public administration, and the utterance thereof.

7. The embezzlement of public moneys committed within the jurisdiction of either party by public officers or depositors.

8. Embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

Art. III.—The provisions of this treaty shall not apply to any crime or offence of a political character; and the person or persons delivered up for the crimes enumerated in the preceding article shall in no case be tried for any ordinary crime committed previously to that for which his or their surrender is asked.

Art. IV.—If the person whose surrender may be claimed, pursuant to the stipulations of the present treaty, shall have been arrested for the commission of offences in the country where he has sought an asylum, or shall have been convicted thereof, his extradition may be deferred until he shall have been acquitted, or have served the term of imprisonment to which he may have been sentenced.

Art. V.—In no case and for no motive shall the high contracting parties be obliged to deliver up their own subjects. If, in conformity with the laws in force in the state to which the accused belongs, he ought to be submitted to criminal procedure for crimes committed in the other state, the latter must communicate the information and documents, send the implements which were employed to perpetrate the crime, and procure every other explanation or evidence necessary to prosecute the case.

Art. VI.—The same as Art. V. in treaty with Italy.

24. NICARAGUA, JUNE 25, 1870.—*Art. II.*—Persons shall be delivered up who shall have been convicted of or be charged, according to the provisions of this convention, with any of the following crimes:—

1. Murder, comprehending assassination, parricide, infanticide, and poisoning.

2. The crime of rape, arson, piracy, and mutiny on board a ship, whenever the crew, or a part thereof, by fraud or violence against the commander, have taken possession of the vessel.

3. The crime of burglary, defined to be the action of breaking and entering by night into the house of another with the intent to commit felony; and the crime of robbery, defined to be the action of feloniously and forcibly taking from the person of another goods or money by violence, or putting him in fear.

4. The crime of forgery, by which is understood the utterance of forged papers, the counterfeiting of public, sovereign, or government acts.

5. The fabrication or circulation of counterfeit money, either coin or paper, of public bonds, bank-notes, and obligations, and, in general, of all titles or instruments of credit, the counterfeiting of seals, dies, stamps, and marks of state or public administrations, and the utterance thereof.

6. The embezzlement of public moneys, committed within the jurisdiction of either, by public officers or depositors.

7. Embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when these crimes are subjected to infamous punishment.

Art. III.—The same as Art. III. in treaty with Republic of Salvador.

Art. IV.—The same as Art. IV. in treaty with Republic of Salvador.

Art. V.—Same as Art. V. in treaty with Republic of Salvador.

25. PERU, SEPT. 12, 1870.—*Art. II.*—Persons shall be so delivered up who shall be charged, according to the provisions of this treaty, with any of the following crimes, whether as principals, accessories, or accomplices: to wit,—

1. Murder, comprehending the crimes of parricide, assassination, poisoning, and infanticide.

2. Rape, abduction by force.

3. Bigamy.

4. Arson.

5. Kidnapping, defining the same to be the taking or carrying away of a person by force or deception.

6. Robbery, highway robbery, larceny.

7. Burglary, defining the same to be the action of breaking and entering by night-time into the house of another person with the intent to commit a felony.

8. Counterfeiting or altering money, the introduction or fraudulent commerce of and in false coin and money; counterfeiting the certificates or obligations of the government, of bank notes, and of any other documents of public credit, and the uttering and use of the same; forging or altering judicial judgments or decrees of the government or courts, of the seals,

dies, postage-stamps, and revenue stamps of the government, and the use of the same; forging public and authentic deeds and documents, both commercial and of banks, and the use of the same.

9. Embezzlement of public moneys committed within the jurisdiction of either party by public officers or bailees, and embezzlement by any person hired or salaried.

10. Fraudulent bankruptcy.

11. Fraudulent barratry.

12. Mutiny on board a vessel when the persons who compose the crew have taken forcible possession of the same, or have transferred the ship to pirates.

13. Severe injuries intentionally caused on railroads to telegraph lines, or to persons by means of explosions of mines or steam-boilers.

14. Piracy.

Art. III.—The provisions of the present treaty shall not be applied in any manner to any crime or offence of a purely political character, nor shall the provisions of the present treaty be applied in any manner to the crimes enumerated in the second article, committed anterior to the date of the exchange of the ratifications hereof. Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty.

Art. IV.—The extradition will be granted in virtue of the demand made by the one government on the other, with the remission of a condemnatory sentence, an order of arrest, or of any other process equivalent to such order, in which will be specified the character and gravity of the imputed acts and the dispositions of the penal laws relative to the case. The documents accompanying the demand for extradition shall be originals or certified copies, legally authorized by the tribunals or by a competent person. If possible, there shall be remitted at the same time a descriptive list of the individual required, or any other proof toward his identity.

Art. V.—If the person accused or condemned is not a citizen of either of the contracting parties, the government granting the extradition will inform the government of the country to which the accused or condemned may belong, of the demand made, and, if the last-named government reclaims the individual on its own account for trial in its own tribunals, the government to which was made the demand of extradition may, at will, deliver the criminal to the state in whose territory the crime was committed, or to that to which the criminal belongs. If the accused or sentenced person whose extradition may be demanded in virtue of the present convention from one of the contracting parties, should, at the same time, be the subject of claims from one or other govern-

ments simultaneously for crimes or misdemeanors committed in their respective territories, he or she shall be delivered up to that government in whose territories the offence committed was of the gravest character; and, when the offences are of like nature and gravity, the delivery will be made to the government making the first demand; and, if the dates of the demands be the same, that of the nation to which the criminal may belong will be preferred.

Art. VI.—If the person claimed or accused or sentenced in the country where he may have taken refuge for a crime or misdemeanor committed in that country, his delivery may be delayed until the definite sentence releasing him be pronounced, or until such time as he may have complied with the punishment inflicted on him in the country where he took refuge.

Art. VII.—In cases not admitting of delay, and especially in those where there is danger of escape, each of the two governments, authorized by the order of apprehension, may, by the most expeditious means, ask and obtain the arrest of the person accused or sentenced, on condition of presenting the said order for apprehension as soon as may be possible, not exceeding four months.

26. ORANGE FREE STATE, DEC. 22, 1871.

—*Art. IX.*—Persons shall be delivered up, according to the provisions of this convention, who shall be charged with any of the following crimes; to wit, Murder (including assassination, parricide, infanticide, and poisoning), attempt to commit murder; rape; forgery, or the emission of forged papers; arson; robbery, with violence; intimidation, or forcible entry of an inhabited house; piracy; embezzlement by public officers, or by persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

Art. X.—The surrender shall be made by the executives of the contracting parties.

Art. XII.—The provisions of the foregoing articles relating to the surrender of fugitive criminals shall not apply to offences committed before the date hereof, nor to those of a political character.

27. ECUADOR, JUNE 28, 1872. — *Art. II.*—Persons convicted or accused of any of the following crimes shall be delivered up, in accordance with the provisions of this treaty:—

1. Murder, including assassination, parricide, infanticide, and poisoning.

2. The crime of rape, arson, piracy, and mutiny on shipboard, when the crew, or a part thereof, by fraud or violence against the commanding officer, have taken possession of the vessel.

3. The crime of burglary, this being

understood as the act of breaking or forcing an entrance into another's house with intent to commit any crime; and the crime of robbery, this being defined as the act of taking from the person of another goods or money with criminal intent, using violence or intimidation.

4. The crime of forgery, which is understood to be the wilful use or circulation of forged papers or public documents.

5. The fabrication or circulation of counterfeit money, either coin or paper, of public bonds, bank bills and securities, and, in general, of any kind of titles to or instruments of credit, the counterfeiting of stamps, dies, seals, and marks of state, and of the administrative authorities, and the seal and circulation thereof.

6. Embezzlement of public property, committed within the jurisdiction of either party, by public officers or depositaries.

Art. III.—The stipulations of this treaty shall not be applicable to crimes or offences of a political character; and the person or persons delivered up, charged with the crimes specified in the foregoing article, shall not be prosecuted for any crime committed previously to that for which his or their extradition may be asked.

Art. IV.—The same as *Art. IV.* in treaty with Republic of Salvador.

Art. V.—Same as *Art. VI.* in treaty with Republic of Salvador.

28. THE OTTOMAN EMPIRE, Aug. 11, 1874.—*Art. II.*—Persons shall be delivered up who shall have been convicted of, or charged, according to the provisions of this convention, with any of the following crimes:—

1. Murder, comprehending the crimes designated by the terms of parricide, assassination, poisoning, and infanticide.

2. The attempt to commit murder.

3. The crimes of rape, arson, piracy, and mutiny on board a ship, whenever the crew, or part thereof, by fraud or violence against the commander, have taken possession of the vessel.

4. The crime of burglary, defined to be the action of breaking and entering by night into the house of another with the intent to commit felony; and the crime of robbery, defined to be the action of feloniously and forcibly taking from the person of another, goods or money, by violence, or putting him in fear.

5. The crime of forgery, by which is understood the utterance of forged papers, the counterfeiting of public, sovereign, or government acts.

6. The publication or circulation of counterfeit money, either coin or paper, of public bonds, bank-notes, and obligations, and, in general, of all things, being titles and instruments of credit, the counterfeit-

ing of seals, dies, stamps, and marks of state and public administrations, and the utterance thereof.

7. The embezzlement of public moneys committed within the jurisdiction of either party, by public officers or depositors.

8. Embezzlement by any person or persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

Art. III.—Same as *Art. III.* in treaty with Republic of Salvador.

Art. IV.—Same as *Art. IV.* in treaty with Republic of Salvador.

Art. V.—Same as *Art. VI.* in treaty with Republic of Salvador.

Art. VII.—Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty.

29. SPAIN, JAN. 5, 1877.—*Art. II.*—Persons shall be delivered up, according to the provisions of this convention, who shall have been charged with, or convicted of, any of the following crimes:—

1. Murder, comprehending the crimes designated by the terms of parricide, assassination, poisoning, or infanticide.

2. The attempt to commit murder.

3. Rape.

4. Arson.

5. Piracy or mutiny on board ship when the crew, or other persons on board, or part thereof, have, by fraud or violence against the commander, taken possession of the vessel.

6. Burglary, defined to be the act of breaking and entering into the house of another in the night-time, with intent to commit a felony therein.

7. The act of breaking and entering the offices of the government and public authorities, or the offices of banks, banking-houses, savings banks, trust companies, insurance companies, with intent to commit a felony therein.

8. Robbery, defined to be the felonious and forcible taking from the person of another, goods or money, by violence, or by putting him in fear.

9. Forgery, or the utterance of forged papers.

10. The forgery or falsification of the official acts of the government or public authority, including courts of justice, or the utterance or fraudulent use of the same.

11. The fabrication of counterfeit money, whether coin or paper, counterfeit titles or coupons of public debt, bank-notes, or other instruments of public credit; of counterfeit seals, stamps, dies, and marks of state or public administrations, and the utterance, circulation, or fraudulent use of any of the above-mentioned objects.

12. The embezzlement of public funds,

committed within the jurisdiction of one or the other party, by public officers or depositaries.

13. Embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.

14. Kidnapping, defined to be the detention of a person or persons, in order to exact money from them, or for any other unlawful end.

Art. III.—The provisions of this convention shall not import claim of extradition for any crime or offence of a political character, nor for acts connected with such crimes or offences; and no person surrendered by or to either of the contracting parties, in virtue of this convention, shall be tried or punished for any political crime or offence, nor for any act connected therewith, committed previously to the extradition.

Art. IV.—No person shall be subject to extradition, in virtue of this convention, for any crime or offence committed previous to the exchange of the ratifications hereof; and no person shall be tried for any crime or offence other than that for which he was surrendered, unless such crime be one of those enumerated in Art. II., and shall have been committed subsequent to the exchange of the ratifications hereof.

Art. V.—A fugitive criminal shall not be surrendered under the provisions hereof, when from lapse of time, or other lawful cause, according to the laws of the place within the jurisdiction of which the crime was committed, the criminal is exempt from prosecution or punishment for the offence for which the surrender is asked.

Art. VI.—If a fugitive criminal, whose surrender may be claimed pursuant to the stipulations hereof, be actually under prosecution, out on bail, or in custody, for a crime or offence committed in the country where he has sought asylum, or shall have been convicted thereof, his extradition may be deferred until such proceedings be determined, and until such criminal shall have been set at liberty in due course of law.

Art. VII.—If a fugitive criminal, claimed by one of the parties hereto, shall be also claimed by one or more powers pursuant to treaty provisions on account of crimes committed within their jurisdiction, such criminal shall be delivered in preference, in accordance with that demand which is the earliest in date.

Art. VIII.—Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.

Art. IX.—Every thing found in the possession of the fugitive criminal at the time of his arrest, which may be material

evidence in making proof of the crime, shall, so far as practicable, be delivered up with his person at the time of the surrender. Nevertheless, the rights of a third party, with regard to the articles aforesaid, shall be duly respected.

ADDITIONAL ARTICLE, AUG. 7, 1882.—*Art. I.*—Paragraph 5 of Art. II. of the aforesaid convention of Jan. 5, 1877, is abrogated, and the following substituted:—

5. Crimes committed at sea:—

(a) Piracy, as commonly known and defined by the law of nations.

(b) Destruction or loss of a vessel, caused intentionally, or conspiracy and attempt to bring about such destruction or loss, when committed by any person or persons on board of said vessel on the high seas.

(c) Mutiny or conspiracy by two or more members of the crew, or other persons, on board of a vessel on the high seas, for the purpose of rebelling against the authority of the captain or commander of such vessel, or by fraud or violence taking possession of such vessel.

Paragraph 12 of said Art. II. is amended to read as follows:—

12. The embezzlement or criminal malversation of public funds, committed within the jurisdiction of one or the other party, by public officers or depositaries.

Paragraph 13 of said Art. II. is likewise modified to read as follows:—

13. Embezzlement by any person or persons hired, salaried, or employed, to the detriment of their employers or principals, when the crime or offence is punishable by imprisonment or other corporal punishment, by the laws of both countries.

Paragraph 14 of said Art. II. is likewise modified to read as follows:—

14. Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons, in order to exact money from them, or from their families, or for any other unlawful end.

Art. II.—In continuation, and as forming part of Art. II. of the aforesaid convention of Jan. 5, 1877, shall be added the following paragraphs:—

15. Obtaining, by threats of injury, or false devices, money, valuables, or other personal property, and the purchase of the same, with the knowledge that they have been so obtained, when the crimes or offences are punishable by imprisonment or other corporal punishment by the laws of both countries.

16. Larceny, defined to be the theft of effects, personal property, or money, of the value of twenty-five dollars or more.

17. Slave-trade, according to the laws of each of the two countries respectively.

18. Complicity in any of the crimes or offences enumerated in the convention of Jan. 5, 1877, as well as in these additional

articles, provided that the persons charged with such complicity be subject as accessories to imprisonment or other corporal punishment by the laws of both countries.

30. NETHERLANDS, MAY 22, 1880.—*Art. II.*—Persons shall be delivered up, according to the provisions of this convention, who shall have been charged with, or convicted of, any of the following crimes:—

1. Murder, comprehending the crimes of assassination, parricide, infanticide, and poisoning.

2. The attempt to commit murder.

3. Rape.

4. Arson.

5. Burglary; or the corresponding crime in the Netherlands law, under the description of thefts committed in an inhabited house by night; and by breaking in, by climbing, or forcibly.

6. The act of breaking into and entering public offices, or the offices of banks, banking-houses, savings banks, trust companies, or insurance companies, with intent to commit theft therein; and also the thefts resulting from such act.

7. Robbery; or the corresponding crime punished in the Netherlands law, under the description of theft committed with violence, or by means of threats.

8. Forgery, or the utterance of forged papers, including the forgery or falsification of official acts of the government, or public authority, or courts of justice, affecting the title or claim to money or property.

9. The counterfeiting, falsifying, or altering of money, whether coin or paper, or of bank notes, or instruments of debt created by national, state, or municipal governments, or coupons thereof; or of seals, stamps, dies, or marks of state; or the utterance or circulation of the same.

10. Embezzlement by public officers charged with the custody or receipt of public funds.

11. Embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when the offence is subject to punishment by the law of the Netherlands as *abus de confiance*, if the extradition is demanded by the United States, or is subject to punishment as a crime in the United States, if extradition is demanded by the Netherlands.

31. BELGIUM, JUNE 13, 1882.—*Art. II.*—Persons shall be delivered up who shall have been convicted of, or be charged, according to the provisions of this convention, with any of the following crimes:—

1. Murder, comprehending the crimes designated in the Belgian penal code by the terms of parricide, assassination, poisoning, and infanticide.

2. The attempt to commit murder.

3. Rape, or attempt to commit rape; bigamy; abortion.

4. Arson.

5. Piracy or mutiny on shipboard, whenever the crew, or part thereof, shall have taken possession of the vessel by fraud or by violence against the commander.

6. The crime of burglary, defined to be the act of breaking and entering by night into the house of another, with the intent to commit felony; and the crime of robbery, defined to be the act of feloniously and forcibly taking from the person of another, money or goods by violence, or putting him in fear; and the corresponding crimes punished by the Belgian laws, under the description of thefts committed in an inhabited house by night, and by breaking in by climbing, or forcibly; and thefts committed with violence, or by means of threats.

7. The crime of forgery, by which is understood the utterance of forged papers, and also the counterfeiting of public, sovereign, or governmental acts.

8. The fabrication or circulation of counterfeit money, either coin or paper, or of counterfeit public bonds, coupons of the public debt, bank-notes, obligations, or, in general, any thing being a title or instrument of credit; the counterfeiting of seals and dies, impressions, stamps, and marks of state and public administrations, and the utterance thereof.

9. The embezzlement of public moneys committed within the jurisdiction of either party by public officers or depositaries.

10. Embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when the crime is subject to punishment by the laws of the place where it was committed.

11. Wilful and unlawful destruction or obstruction of railroads, which endangers human life.

12. Reception of articles obtained by means of one of the crimes or offences provided for by the present convention.

Extradition may also be granted for the attempt to commit any of the crimes above enumerated, when such attempt is punishable by the laws of both contracting parties.

32. GRAND DUCHY OF LUXEMBURG, OCT. 29, 1883.—*Art. II.*—For the same crimes as specified in Art. II. of treaty with Belgium.

33. EMPIRE OF JAPAN, APRIL 29, 1886.—*Art. I.*—The high contracting parties engage to deliver up to each other, under the circumstances and conditions stated in the present treaty, all persons who, being accused or convicted of one of the crimes or offences named below in Art. II., and committed within the jurisdiction of the one party, shall be found within the jurisdiction of the other party.

Art. II.—1. Murder, and assault with intent to commit murder.

2. Counterfeiting or altering money, or

10. *Extradition applies to Crimes committed before Treaty.*—When a treaty is entered into, it applies to past as well as future crimes; and consequently, a person who has committed a crime in the demanding state, and fled to the United States, before the making of an extradition treaty covering a surrender for such crime, has not thereby acquired a right of asylum of which he cannot be deprived.¹ The treaties of extradition to which the United States is a party do not guarantee a fugitive from the justice of one of the countries an asylum in the other. They do not give such person any greater or more sacred right of asylum than he had before. They only make provision that for certain crimes he shall be deprived of that asylum, and surrendered to justice, and they prescribe the mode in which this shall be done.²

11. *Applies to Subject as well as Foreigner.*—Unless specially exempted by the terms of the treaty, it makes no difference whether the offence was committed by a citizen or a foreigner: he is a proper subject of extradition.³ In many of the treaties entered

uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank-notes, or other instruments of public credit of either of the parties, and the utterance or circulation of the same.

3. Forgery, or altering and uttering what is forged or altered.

4. Embezzlement or criminal malversation of the public funds, committed within the jurisdiction of either party, by public officers or depositaries.

5. Robbery.

6. Burglary, defined to be the breaking and entering by night-time into the house of another person, with the intent to commit a felony therein; and the act of breaking and entering the house of another, whether in the day or night time, with the intent to commit a felony therein.

7. The act of entering, or of breaking and entering, the offices of the government and public authorities, or the offices of banks, banking-houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein.

8. Perjury, or the subornation of perjury.

9. Rape.

10. Arson.

11. Piracy by the law of nations.

12. Murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship bearing the flag of the demanding country.

13. Malicious destruction of, or attempt to destroy, railways, trains, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life.

It will be seen from the foregoing treaties that the obligation to deliver fugitive

criminals is imposed by treaty, and thus by implication rejecting the ancient doctrine, that, independent of treaty stipulations, one state is bound by the law of nations to deliver up to another fugitives from justice.

The tendency also of the later treaties has been to greatly increase the list of extraditable crimes, and to expressly provide that neither of the contracting parties shall be bound to deliver up its own citizens or subjects, or political offenders.

1. *Re De Giacomo*, 12 Blatchf. (U. S.) 391.

2. *Ker v. Illinois*, 119 U. S. 436.

3. "We know of no constitutional provision, express or implied, that secures any such exemption to the citizen of the United States. If he goes into a foreign country, he becomes, for the time being, subject to its municipal laws; and if he violates those laws, then, unless unjustly oppressed contrary to the law of nations, he is not under the protection of the United States, as against trial and punishment therefor by the local authority. . . If he should return to the United States as a fugitive from justice, and if, by the terms of a treaty, his crime were an extraditable offence, and, still further, if the treaty did not exempt the citizens or subjects of the respective parties from being delivered up for such offences, then there is nothing in the mere fact of his citizenship to give him such exemption, any more than there is in such citizenship to secure exemption from trial and punishment in the foreign country whose laws he has violated." Spear on Extrad. (1st ed.) 26, 27; *In re Robbins*, Whart. St. Trials, 401, 402. See Whart. on Confli. of Laws, 628.

into by the United States, it is expressly stipulated that citizens or subjects of the country on which the demand for surrender is made, shall be excluded from their operation.¹

12. *Will not be granted for Political Offences.* — Unless specially provided for by treaty, political offenders will not be delivered up.² And, in many treaties, political offences are expressly excluded from their application, without giving any specific definition of their nature.³

13. *When Fugitive in Custody for Another Offence.* — If, at the time demand is made for the surrender of a fugitive, he is in custody, or under recognizance for trial in the State on which requisition is made, the surrender will be refused, — at least, until such case has been disposed of, and his recognizance discharged.⁴

14. *When Offence not enumerated in Treaty.* — When a treaty has been entered into, naming certain crimes as the ones for which extradition may be had, this must be regarded as declaring that only such offences as are specified in the treaty are extraditable.⁵

15. *Can be tried only for Offence named in Extradition Proceedings.* — It is now definitely settled — at least, in the United States and Great Britain — that a person extradited for a particular offence cannot be tried for any other until a reasonable and proper time has been given him after his trial or release on that particular charge, in which to return to the country from which he was extradited. Extraditable crimes are limited to the ones specifically named in the treaty. And hence the jurisdiction given by such treaty to try criminal offenders is limited to the particular offences

1. **Treaty Stipulations.** — “None of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention. Treaty with Prussia and other States.

And a like provision is contained in the treaties with Bavaria, Hanover, Two Sicilies, Austria, Baden, Sweden and Norway, Republic of Salvador, Peru, Belgium, the Ottoman Empire, Spain Netherlands, Mexico, Hayti, Japan, Grand Duchy of Luxemburg.

2. “Those treaties, on the other hand, that contain no express provision as to the delivery on the ground of political offences, leave the question to be settled in the light of their general stipulations. They do not enumerate such offences as extraditable, and hence there can be no extradition for them.” Spear on Extrad. (1st ed.) 43, 44; Lawrence's Wheaton, Inter'l Law, 245, n.; Woolsey's Inter'l Law, § 79; Lewis, 44; Phill. Inter'l Law, i. 407; Heffter, § 63; Fœlix, ii. No. 609; Mohl, 705; Marquardsen, 48; Bar, § 150; Geyer, in Holtzendorff's Ency. Leipzig, 1870, 540; Kluit, 85, cited Wharton's Conflict of Laws, § 948.

3. **Political Offences exempted by Treaty.**

— In the treaties with France, Swiss Confederation, Two Sicilies, Sweden and Norway, Venezuela, Mexico, Hayti, Dominican Republic, Republic of Salvador, Nicaragua, Peru, Orange Free State, Ecuador, Belgium, The Ottoman Empire, Spain Netherlands, Japan, Grand Duchy of Luxemburg, it is expressly provided that extradition shall not be had for offences of a political character.

4. Whart. Conf. of L. § 959, and authorities cited.

5. **Crimes limited by Implication.** — “By obvious implication, the treaty limits the remedy which it secures to the list of crimes enumerated. If this be not so, then the enumeration is without meaning, and without practical efficacy.” Spear on Extrad. (1st ed.) 99.

“Where a treaty exists making certain offences the subject of extradition, this must be regarded as declaring that only such offences shall be the subject of extradition between the countries in question, and that consequently extradition is not to be granted for other offences.” Whart. Cr. Pl. & Pr. § 47, and authorities cited.

for which extradition may be had, and which are specially designated in the warrant of extradition.¹ Prior to any authoritative

1. United States Supreme Court Decisions. — "Upon a review of these decisions of the federal and State courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." *United States v. Rauscher*, 119 U. S. 407; *Ker v. Illinois*, 119 U. S. 436.

"If, upon the face of this treaty, it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition." *United States v. Rauscher*, 119 U. S. 407.

Federal Court Decisions. — "Relator has the right to claim exemption from trial upon any other charge than those mentioned in the extradition proceedings. . . . A person illegally tried for another crime than that for which he was extradited, cannot waive his privilege of exemption under the provisions of the extradition treaty." *Ex parte Coy*, 32 Fed. Rep. 911.

"An extradited fugitive cannot be held to answer for an offence for which his surrender could not have been asked, and would not have been granted, . . . and he cannot be tried for other offences than those enumerated in that treaty." *U. S. v. Watts*, 8 Sawyer (U. S.), 370; s. c., 14 Fed. Rep. 130.

Again, it has been held that for a government to detain a person extradited under a treaty for any other charge than the one for which he had been surrendered, "would be not only an infraction of the contract be-

tween the parties to the treaty, but also a violation of the supreme law of this land in a matter directly involving his personal rights. A right of person or property, secured or recognized by treaty, may be set up as a defence to a prosecution in disregard of either, with the same force and effect as if such right was secured by an act of Congress." *Ex parte Hibbs*, 26 Fed. Rep. 421, 431.

State Court Decisions. — "Extradited criminals cannot be tried for offences not named in the treaty, or for offences not named in the warrant of extradition. A prisoner extradited from the Dominion of Canada under art. 10 of the treaty of 1842 between the United States and Great Britain, cannot be proceeded against or tried in this State for any other offences than those mentioned in the treaty, and for which he was extradited, without first being afforded an opportunity to return to Canada; and, after being acquitted on trials for the offences for which he was extradited, he cannot be lawfully held in custody to answer a charge for which he could not be put on trial. . . .

"The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express or implied, of the treaty." *Commonwealth v. Hawes*, 13 Bush (Ky.), 697; s. c., 26 Am. Rep. 242. The same doctrine is asserted in *Blandford v. State*, 10 Tex. App. 627; *State v. Vanderpool*, 39 Ohio St. 273; s. c., 48 Am. Rep. 431; *People v. Gray*, 66 Cal. 271.

Other Authorities. — "To obtain the surrender of a man on one charge, and then put him upon trial on another, is a gross abuse of the constitutional compact. We believe it to be a violation also of legal principles. It is a general rule, that when by compulsion of law a man is brought within the jurisdiction for one purpose, his presence shall not be taken advantage of to subject him to legal demands or legal restraint for another purpose. The legal 'privileges' from arrest, when one is in the performance of a legal duty away from his home, rest upon this rule, and they are merely the expressions of reasonable exemption from unfair advantages. The reason of the rule applies it to these cases: it should be held, as it recently has been in Kentucky, that the fugitive surrendered to one charge, is exempt from prosecution upon any other; he is within the State by

and binding decision on the subject, some of the State and federal courts held that the prosecution of the fugitive could not be limited to the specific offence upon which his surrender was obtained, but might extend to a prosecution for any offence committed within the jurisdiction of the demanding State, whether such offence was named in the treaty or not.¹

16. *When Exemption from Trial for Other Offences does not exist.* — A fugitive criminal forcibly brought into the United States from a foreign state, without invoking the aid of the treaty between such countries, cannot claim exemption from a prosecution for other offences than the ones named in the treaty. The right of exemption from prosecution for other offences can only exist

compulsion of law upon a single accusation; he has a right to have that disposed of, and then to depart in peace." Judge Cooley, Pr. Rev. 176.

"Hence arises the doctrine that the party accused can be tried and punished only for the crime or crimes named in the demand and delivery, and that, when this end has been gained, he should, unless he elects to remain, or commits some other crime after his extradition, be permitted to return to the jurisdiction from which he was removed." Spear on Extrad. (1st ed.) 65.

"An extradited person can be tried for that crime, and that only, for which the surrender was asked and obtained." Judge Lowell, 10 Am. L. Rev. 617; William Beach Lawrence, 14 Alb. Law Jour. 96; 15 Alb. Law Jour. 224; 16 Alb. Law Jour. 361; Field's International Code, § 237, p. 122; 3 Whart. Cr. L. (7th ed.) 34, § 2956.

English Extradition Act and Authorities.

—"A fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by an arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning, to her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded." English Act of 1870, 2d sub-sec. of § 3.

"Where, in pursuance of any arrangement with a foreign state, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this act, is surrendered by that foreign state, such person shall not, until he has been restored, or had an opportunity of returning, to such foreign state, be triable or tried for any offence committed prior to the surrender in any part of her Majesty's dominions, other than such of the said crimes as may be proved by the facts on which the surrender is grounded." § 19.

Lord Derby in 1876, in the Lawrence and Winslow cases, construed the treaty between the United States and Great Britain to provide, by implication, that an extradited person should not be tried for any offence except the one upon which he was extradited. For. Rel. U. S. 207.

"Apart altogether from the wording of treaties, there is a silent and implied condition in extradition that the crime for which the surrender of a man is asked must be specified, and that it is for that crime alone that he must be tried." Lord Chancellor of England in Winslow Case, For. Rel. U. S. 286-296.

Since the passage of the English Act of 1870, England has negotiated treaties with Germany, Belgium, Italy, Denmark, Austria, Sweden and Norway, and Brazil, every one of which expressly recognizes the principle that an extradited person can be tried only for the offence in respect to which his surrender was made.

1. "But whether extradited in good faith or not, the prisoner, in point of fact, is within the jurisdiction of the court, charged with a crime therein committed; and I am at a loss for even a plausible reason for holding, upon such a plea as the present, that the court is without jurisdiction to try him. . . . And I cannot say that the fact that the defendant was brought within the jurisdiction by virtue of a warrant of extradition for the crime of forgery, affords him a legal exemption from prosecution for other crimes by him committed." United States v. Caldwell, 8 Blatchf. (U. S.) 131; United States v. Lawrence, 13 Blatchf. (U. S.) 295; *Adrian v. Lagrave*, 59 N. Y. 110; s. c., 17 Am. Rep. 317.

"A fugitive criminal, extradited under the treaty of 1842 between the United States and Great Britain, may be held on his prior conviction and sentence for a non-extraditable offence after the charges for which he was delivered have been ignored." *In re Miller* (U. S. C. C.), 6 Crim. L. Mag. 511.

when the fugitive has been extradited for a crime named in the treaty between such countries, and which offence is specifically described in the warrant of extradition.¹

17. *State and Federal Courts authorized to inquire into Cause of Restraint.* — When a fugitive from justice has been brought into the United States from a foreign country by virtue of treaty stipulations, and it is sought to try him for any other offence than the one upon which his surrender was obtained, or if it is sought to deprive him of any right guaranteed under such treaty, either State or federal courts have authority to inquire, by a writ of *habeas corpus*, into the cause of his restraint, and release him if his detention be unlawful.² The jurisdiction, however, of the State courts is limited to cases where the fugitive is not, at the time the writ issues, held in custody of the United States by any of their tribunals or officers.³ But the jurisdiction of the federal

1. "The principle that an extradited fugitive from justice can be tried only for the crimes named in the treaty between the extradition countries, does not apply when the party was forcibly taken from the foreign country, and not under an extradition warrant." *Ker v. People*, 110 Ill. 627; s. c., 51 Am. Rep. 706.

"If Ker had been brought to this country by proceedings under the treaty of 1870-74 with Peru, it seems probable, from the statement of the case in the record, that he might have successfully pleaded that he was extradited for larceny, and convicted by the verdict of a jury of embezzlement; for the statement in the plea is, that the demand made by the President of the United States, if it had been put in operation, was for an extradition for larceny, although some forms of embezzlement are mentioned in the treaty as subjects of extradition. But it is quite a different case when the plaintiff in error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty." *Ker v. Illinois*, 119 U. S. 436.

2. *Federal and State Courts have Concurrent Jurisdiction.* — "The principle we have here laid down removes this difficulty; for under the doctrine that the treaty is the supreme law of the land, and is to be observed by all the courts, State and national, 'any thing in the laws of the States to the contrary notwithstanding,' if the State court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the Federal Government which has been fully recognized. . . . If the party is under arrest, a writ of *habeas corpus* may issue

from one of the federal judges or federal courts on the ground that he is restrained of his liberty in violation of the Constitution, or a law, or a treaty, of the United States; and the truth of such allegation will be inquired into, and, if it be well founded, he will be discharged. State courts also could issue such a writ." *U. S. v. Rauscher*, 119 U. S. 409; *Ex parte Coy*, 32 Fed. Rep. 911; *Ex parte Brown*, 28 Fed. Rep. 653; *In re Roberts*, 24 Fed. Rep. 132. See also *Ex parte Royall*, 117 U. S. 241, *et seq.*, and cases there cited; *Robb v. Connelly*, 111 U. S. 544; *Blandford v. State*, 10 Tex. App. 627.

3. Jurisdiction of State Courts limited.

—"The recognition, therefore, of the authority of a State court, or of one of its judges, upon writ of *habeas corpus*, to pass upon the legality of the imprisonment, within the territory of that State, of a person held in custody, — otherwise than under the judgment or orders of the judicial tribunals of the United States, or by the order of a commissioner of a circuit court, or by officers of the United States acting under their laws, — cannot be denied merely because the proceedings involve the determination of rights, privileges, or immunities derived from the nation, or require a construction of the Constitution and laws of the United States." *Robb v. Connelly*, 111 U. S. 544.

"And that equal power does not belong to the courts and judges of the several States; that they cannot, under any authority conferred by the States, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the General Government acting under its laws, — results from the supremacy of the Constitution and laws of the United States." *Ex parte Royall*, 117 U. S. 241;

courts is not thus limited. After the State courts have passed upon the question of the legality of the restraint of the fugitive, and refused to release him, the federal courts have the authority to interpose in his behalf; and, if his detention is unlawful, he will be taken from the custody of such State courts, and set at liberty.¹

18. *Demand should be made by Foreign Government.*—Under the treaties entered into between the United States and foreign countries, the duty of surrendering fugitive criminals is not imposed until a demand has been made by the proper executive authority of such foreign state, in compliance with the terms specified in such treaty; the object of such treaties being to establish a reciprocal right, on certain terms, to demand the surrender of fugitives from justice, and to impose a corresponding obligation to deliver such fugitives, who, having committed offences within the jurisdiction of one State, have fled from justice, and taken refuge within that of another.²

19. *Demand should be made upon the President.*—By the weight of authority, the judiciary of the United States possess no jurisdiction to entertain and institute proceedings for the apprehension and committal of an alleged fugitive whose extradition is demanded until a previous requisition has been made, under the authority of the foreign government, upon the President of the United States, and his sanction and mandate obtained to arrest such fugitive.³ And it would seem, from a very recent decision,

Ableman v. Booth, 21 How. (U. S.) 506; Tarble's Case, 13 Wall. (U. S.) 397.

1. *Supremacy of the Federal Courts.*—“If it shall transpire that the State court shall be remiss in the discharge of a duty devolving upon it with reference to questions arising under the Constitution of the United States, treaty stipulations, or the laws of Congress, the federal courts will still be accessible.” *Ex parte Coy*, 32 Fed. Rep. 911; *Ex parte Royall*, 117 U. S. 241, and cases there cited. See also *U. S. v. Rauscher*, 119 U. S. 409, and case there cited; *Blandford v. State*, 10 Tex. App. 627.

2. *Should be a Demand.*—“The actual delivery of fugitive criminals should always be preceded by a demand of one government upon the other, made by the supreme political authority, or by ministers or officers duly authorized for this purpose.” Spear on Extrad. (1st ed.) 41.

“And when no mandate has issued showing a requisition duly made upon the executive authority of this government, the extradition will not be granted.” *In re Herries*, 32 Fed. Rep. 583.

“A warrant issued by a United States commissioner for the arrest, under an extradition treaty, of an alleged criminal, must show on its face the authority of

the commissioner to issue it, and also that a requisition has been duly made by the foreign government upon the Government of the United States, and the authority of the latter obtained for the arrest. If such a warrant fail to show either of these facts, it is void.” *In re Farez*, 7 Blatchf. (U. S.) 34, 46; *Ex parte Maine*, 3 Blatchf. (U. S.) 1.

“The one common purpose of all these (treaty) stipulations is to establish, as between the contracting parties, the reciprocal right, upon the terms specified, to demand and impose a corresponding obligation to deliver fugitive criminals.” Spear on Extrad. (1st ed.) 38.

3. *Demand on Executive.*—“The United States Circuit Court possess no jurisdiction to entertain proceedings, under any treaty or convention between it and a foreign government, for the apprehension and committal of an alleged fugitive from, whose extradition is demanded by, such foreign government, without a previous requisition having been made, under the authority of the foreign government, upon the Government of the United States, and the authority of the United States obtained to arrest such fugitive.” *Matter of Farez*, 7 Abb. (N. Y.) Pr. N. S. 84.

“The judiciary possess no jurisdiction to entertain the proceedings under the treaty

that, before the judiciary have jurisdiction to act in the premises, the mandate of the President, thus obtained, must show on its face that a previous requisition has been duly made upon the executive authority of the United States by the demanding government.¹ But while the weight of authority, as well as the latest adjudication upon the subject, support the proposition here asserted, still there are a number of cases which hold that no authority is required from the executive department of the United States to give jurisdiction to a judge, magistrate, or commissioner, to issue a warrant for the arrest of an alleged fugitive from justice.² And some cases hold that the President's mandate is only a prerequisite to jurisdiction in such proceedings when the treaty under which the demand for surrender is made requires that such demand shall first be made on the proper executive authority.³

20. *Executive issues his Mandate.*—Requisition having been properly made by a foreign government upon the President of the

for the apprehension and committal of the alleged fugitive, without a previous requisition made, under the authority of Great Britain, upon the President of the United States, and his authority obtained for the purpose." *Ex parte Kaine*, 3 Blatchf. (U. S.) 1; *Case of Metzger*, 1 Parker's Cr. (N. Y.) 108; *In re Heinrich*, 5 Blatchf. (U. S.) 414; *U. S. v. Nash, alias Robbins*, Whart. St. Trials, 401, 402; *Re Farez*, 7 Blatchf. (U. S.) 34, 46.

"Under the extradition treaty of 1842, between the United States and Great Britain, the sanction of the executive department of State is necessary, as an initiative step, for the surrender of an alleged fugitive, in order to give the commissioner jurisdiction; and when no mandate has issued, showing a requisition duly made upon the executive authority of this government, the extradition will not be granted." *In re Herris*, 32 Fed. Rep. 583.

1. "And when no mandate has issued showing a requisition duly made upon the executive authority of this government, the extradition will not be granted." *In re Herris*, 32 Fed. Rep. 583.

2. "Under the treaty between the United States and Great Britain of Aug. 9, 1842, and the legislation of Congress for carrying into effect its stipulations, no authority is required from the executive department of the United States, to enable a judge, magistrate, or commissioner to issue a warrant for the arrest of an alleged fugitive from justice." *Re Ross*, 2 Bond. (U. S.) 252; *In re Kaine*, 10 N. Y. Leg. Obs. 257; *Re Kelley*, 2 Lowell (U. S.), 339; *Castro v. De Uriarte*, 16 Fed. Rep. 93; *Re Macdonnell*, 11 Blatchf. (U. S.) 79; *Spear on Extrad.* (1st ed.) 212; *Case of Calder*, 6 Op. Atty.-Genl. 91.

In *Ex parte Kaine*, 14 How. (U. S.) 103, four of the judges held incidentally that under the treaty with Great Britain and the act of Aug. 12, 1848 (9 Sts. 302), a writ for the arrest of a fugitive may be issued by a magistrate, without previous requisition on the government, or obtainment of executive authority. Three of the judges held the contrary doctrine, and one expressed no opinion. These views of the judges, however, are considered as mere dictums, as that question was not presented for their adjudication. Mr. Justice Nelson of the Supreme Court subsequently discharged the prisoner in this same case; and one of the grounds for discharge was, "that the judiciary possess no jurisdiction to entertain the proceedings under the treaty, for the apprehension and committal of the alleged fugitive, without a previous requisition made under the authority of Great Britain upon the President of the United States, and his authority obtained for the purpose." *Ex parte Kaine*, 3 Blatchf. (U. S.) 1.

3. "In cases where a treaty of extradition with a foreign country does not require the issuing of an executive mandate as a prerequisite to the entertaining of proceedings, and the issuing of a warrant of arrest by a magistrate, such prerequisite is not necessary." *In re Thomas*, 12 Blatchf. (U. S.) 370; *Castro v. De Uriarte*, 16 Fed. Rep. 93.

Some of the treaties specially provide that jurisdiction to entertain such proceedings in extradition may be had upon the proper complaint on oath being made before any of the courts having authority to hear such cases. And when such provision is made in the treaty itself, that, of course, obviates the necessity of the President's mandate.

United States for the surrender of a fugitive from justice, the President will, if he deems it expedient so to do, issue his mandate, under the hand of the secretary of state, and the seal of the state department, for the purpose of moving to "action the proper judicial authorities of the country, in order to the arrest and lawful examination of the party charged with crimes, and the investigation thereof for the information of the government."¹ The issuing of such mandate is the commencement of proceedings in the case; and if the evidence presented to the President is sufficient, *prima facie*, to establish a presumption of the guilt of the fugitive, this is sufficient evidence of criminality to authorize the issuing of such mandate.²

21. *Courts authorized to issue Warrants of Arrest.* — The authority to issue warrants for the arrest and apprehension of fugitive criminals, is conferred upon "any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or any judge of a court of record of general jurisdiction of any State."³

22. *Commissioner's Authority must appear on Face of Warrant.* — Before a commissioner is authorized to issue his warrant for the arrest of a fugitive in an extradition proceeding under a treaty, he must have been invested, by the court appointing him, with the special authority to act in such proceedings. And the power to so act must appear on the face of the warrant. But the writ need not show that the commissioner was appointed to issue the particular warrant. An averment of authority to issue such warrants generally is sufficient.⁴ And it has been held that not only the warrant, but the complaint also, should show on its face that the commissioner issuing the warrant is duly empowered to act in cases of that description.⁵

23. *Complaint necessary to give Jurisdiction.* — The initial step necessary to give jurisdiction in extradition proceedings, is a complaint made on oath or affirmation, charging the person found within the jurisdiction of any State, district, or territory, with having committed, within the jurisdiction of the demanding government, any one, or more, of the crimes specified in the treaty or convention with such country, and reciting the requisites prescribed by treaty and statute.⁶

1. *In re Farez*, 7 Blatchf. (U.S.) 34; Spear on Extrad. (1st ed.) 208; 6 Op. Atty.-Genl. 91.

2. Spear on Extrad. (1st ed.) 208-209; 6 Op. Atty.-Genl. 217.

3. *What Courts have Jurisdiction.* — "The act of Congress of Aug. 12, 1848, confers on judges of the several State courts, and on the justices of the Supreme and district courts, and on United States commissioners, the power to issue warrants to apprehend fugitives from justice under treaties with foreign nations." *Matter of Heilborn*, 1 Parker, Cr. (N. Y.) 429; U. S. R. S. § 5270.

4. *Authority must appear on Face of Writ.* — The authority of the commissioner to issue a warrant in extradition proceedings under a treaty, must appear on the face of the writ, but an averment of his authority to issue such warrants generally is sufficient. *Re Kelley*, 25 Fed. Rep. 268; *Re Farez*, 7 Blatchf. (U. S.) 345; 2 Abb. (U. S.) 346; 40 How. (N. Y.) Pr. 107; *In re Kaine*, 14 How. (U. S.) 103; 4 Op. Atty.-Genl. 201.

5. *Ex parte Lane*, 6 Fed. Rep. 34.

6. *A Complaint necessary.* — "The com-

24. *Sufficiency of Complaint.* A complaint praying for the issuing of a warrant in a foreign extradition case, must be as specific as would be required in a case of an offence committed within the jurisdiction of the United States. The substance of the crime charged should be clearly set forth, so that the court can see, from the complaint itself, that a crime has been committed for which a warrant for the fugitive can properly be granted.¹ And without a sufficient complaint the court has no jurisdiction to issue the warrant for the arrest of the fugitive.² And the commissioner has no power or authority to amend a complaint or warrant, or to supply defects by his certificate, after the case is closed and a writ of *certiorari* is served upon him to produce the record of his proceedings.³ But the complaint need not show that a warrant has been issued against the accused in the demanding State; and if the person making the complaint is a representative of the foreign government, it is not defective by reason of not averring personal knowledge on the part of the deponent.⁴

25. *Complaint must be made by Foreign Representative.*—To give the court or commissioner jurisdiction to issue a warrant for the arrest and extradition of a fugitive from justice, the complaint must show on its face that the person making it is an agent or representative of the foreign government. The complainant must be an official representative of that government.⁵ But when made in such official capacity, the complainant need not show a personal knowledge of the facts averred in the complaint.⁶ And whether the foreign government authorized the person to make the complaint, is a question to be determined by the commissioner.⁷ If the complaint is made by a private individual, his authority to represent the foreign government must appear before the pro-

plaint being properly made, the magistrate is then authorized to issue his warrant for the apprehension of the person so charged." *In re Farez*, 7 Blatchf. (U. S.) 34; *In re Heinrich*, 5 Blatchf. (U. S.) 414; Spear on Extrad. (1st ed.) 217.

"A warrant to arrest a fugitive from justice, under a treaty with foreign nations, must be founded on a complaint on oath or affirmation, which complaint must charge the fugitive with having committed one of the crimes provided for in the treaty. An insufficient complaint gives no jurisdiction to issue the warrant." Matter of Heilbonn, 1 Parker's Cr. (N. Y.) 429.

1. *Re Farez*, 7 Blatchf. (U. S.) 34, 48; *Re Roth*, 15 Fed. Rep. 506.

2. Matter of Heilbonn, Parker's Cr. (N. Y.) 429.

3. *Ex parte Lane*, 6 Fed. Rep. 34.

4. *Re Farez*, 7 Blatchf. (U. S.) 345; s. c., 2 Abb. U. S. 346; 40 How. (N. Y.) Pr. 107.

5. *Authority to make Complaint must appear on its Face.*—"A complaint made before a United States commissioner, upon

which a warrant issues for the arrest and extradition of a fugitive from justice, is fatally defective, if it does not show on its face that the person making it was an agent or representative of the foreign government." *In re Herris*, 32 Fed. Rep. 583; *In re Kaine*, 14 How. (U. S.) 103; Spear on Extrad. (1st ed.) 217.

6. *Personal Knowledge of Facts not Necessary, when.*—"If the person making the complaint has no personal knowledge of the facts, it should appear that he is a representative of the foreign government, acting in an official capacity, or he should produce an indictment against the party charged, or depositions tending to show his guilt, or at least set forth with particularity the sources and details of his information, that it may appear that the arrest of the party is sought upon something more than a rumor or suspicion of his guilt." *Ex parte Lane*, 6 Fed. Rep. 34; *In re Farez*, 7 Blatchf. (U. S.) 345.

7. *Re Kelley*, 26 Fed. Rep. 852. Compare *Re Dugan*, 2 Lowell (U. S.), 367.

ceedings before the commissioner are closed, or it must be dismissed for want of jurisdiction.¹ And a magistrate has no right or authority to arrest a fugitive from a foreign country, on the charge of a private person that such fugitive has committed an extraditable offence, in order to give the executive of the United States an opportunity to deliver him up.²

26. *Evidence necessary to justify Committal.* — When the accused is charged with having committed an offence within the jurisdiction of the demanding sovereign, and his extradition is asked in pursuance of treaty stipulations, the evidence, in order to be sufficient to justify his committal to await the action of the President, must be of such a character as, according to the laws of the asylum State, would justify the committal of the party for trial, if the offence had been there committed. The evidence is sufficient to warrant a committal, if, upon the whole case, there is probable cause to believe that the crime alleged has been committed by the person charged.³ The evidence need not be so conclusive as to justify a conviction in the judgment of the magistrate, if he were sitting in a final trial of the cause,⁴ although, in one instance, the contrary doctrine has been asserted.⁵ The proceeding in such a case is simply a preliminary examination, and not a trial at all.⁶

27. *Criminality of Accused may be shown by Parol or Written Evidence.* — The criminality of the accused may be shown by oral testimony, taken before the court,⁷ or by depositions, warrants, and other papers offered in evidence, if they are properly and legally authenticated.⁸ And it has been laid down as a rule, that

1. *Re Ferrelle*, 28 Fed. Rep. 878.

2. *Commonwealth v. Deacon*, 10 S. & R. (Pa.) 125.

3. *Evidence must show Probable Cause to believe him guilty.* — "The evidence, to detain a fugitive from justice for the purpose of surrender, should be sufficient to commit the party for trial, if the crime were perpetrated where he is found." *In re Washburn*, 4 Johns. Ch. (N. Y.) 106; s. c., 8 Am. Dec. 548; *In re Farez*, 7 Blatchf. (U. S.) 345; s. c., 2 Abb. U. S. 346; 10 How. Pr. (N. Y.) 107.

"To justify holding a person accused of crime against a foreign government, for extradition, evidence furnishing good cause to believe that the crime alleged has been committed by the person charged, is necessary." *Re Farez*, 7 Blatchf. (U. S.) 345.

4. *Proof sufficient to convict not required.* — "But the examining magistrate should not require the full proof which would insure a conviction upon a trial in chief." *Re Farez*, 7 Blatchf. (U. S.) 345; s. c., 2 Abb. U. S. 346; 10 How. Pr. (N. Y.) 107.

5. The proof, in all cases under an extradition treaty, should be sufficiently strong to warrant a conviction in the judgment of the magistrate, if sitting upon the

final trial of the case." *Ex parte Kaine*, 3 Blatchf. (U. S.) 1.

6. *Extradition Proceedings not a Trial.* — "Extradition is not a trial at all, but simply a preliminary arrest, examination, and delivery of a fugitive criminal, with a view to his trial in the country whose laws he has offended." Spear on Extrad. (1st ed.) 25.

7. Spear on Extrad. (1st ed.) 219.

8. "In every case of complaint and of a hearing upon the return of a warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person apprehended, by the tribunals of the foreign country from which the accused party shall have escaped; and copies of any such depositions, warrants, or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition,

each piece of documentary evidence produced should have the proper certificate, as prescribed by statute.¹ And such evidence, when so authenticated, is entitled to the same weight and credit as if the witnesses were personally present and testifying at the hearing.² And consequently the accused is not entitled to demand that he be confronted with the witnesses against him.³

28. *Authentication of Documentary Proof.*—Documentary evidence offered in support of the criminality of the accused "should be accompanied by a certificate of the principal diplomatic or consular officer of the United States resident in the foreign country from which the fugitive shall have escaped, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge by the tribunals of such foreign country."⁴ The authentication is suffi-

warrant, or other paper or copy thereof, is authenticated in the manner required in this section." R. S. U. S. § 5271.

1. *Rules of Practice.*—*In re Heinrich*, 5 Blatchf. (U. S.) 414, the judge, in the course of his opinion, said, "Before finally dismissing this case, I will endeavor to make some suggestions which may tend to prevent some of that uncertainty, confusion, and prolixity which have so often characterized these proceedings under our extradition treaties.

"1. It would seem indispensable that a demand for the surrender of the fugitive should be first made upon the executive authorities of the government, and a mandate of the President be obtained before the judiciary is called upon to act. See Mr. Justice Nelson's opinion, *In re Kaine*, 3 Blatchf. (U. S.) 1. At all events, this would be the better practice, and one in keeping with the dignity to be observed between nations in such delicate and important transactions.

"2. Where the warrant of arrest is returnable before a commissioner for hearing, it should be one who has been previously designated by the circuit court under which he holds his office as a commissioner for that purpose. *In re Kaine*, 14 How. (U. S.) 103.

"3. Each piece of the documentary evidence offered by the agents of the foreign government in support of the charge of criminality should be accompanied by a certificate of the principal diplomatic or consular officer of the United States resident in the foreign country from which the fugitive shall have escaped, stating clearly that it is properly and legally authenticated so as to entitle it to be received in evidence in support of the same criminal charge by the tribunals of such foreign country.

"4. The commissioner before whom an alleged fugitive is brought for hearing

should keep a record of all the oral evidence taken before him, — taken in narrative form, and not by question and answer, — together with the objections made to the admissibility of any portion of it, or to any part of the documentary evidence, briefly stating the grounds of such objections; but he should exclude from the record the arguments and disputes of counsel.

"5. The parties seeking the extradition of the fugitive should be required by the commissioner to furnish an accurate translation of every document offered in evidence which is in a foreign language, accompanied by an affidavit of the translator made before him, or some other United States commissioner, or a judge of the United States, that the same is correct.

"6. The complaint upon which a warrant of arrest is asked should set forth clearly but briefly the substance of the offence charged, so that the court can see that one or more of the particular crimes enumerated in the treaty is alleged to have been committed. This complaint need not to be drawn with the formal precision and nicety of an indictment for final trial, but should set forth the substantial and material features of the offence."

2. "Documentary evidence entitled to same weight as if the witnesses were present and testifying." *In re Farez*, 7 Blatchf. (U. S.) 345; Spear on Extrad. (1st ed.) 220.

3. *Not entitled to be confronted with Witnesses against Him.*—"The treaty with Great Britain does not give the accused the right to be confronted with the witnesses against him. The evidence may be in the form authorized in the country whence it comes, and, in substance, sufficient to warrant action in the country whose action is invoked." *Re Dugan*, 2 Lowell (U. S.), 367.

4. *In re Heinrich*, 5 Blatchf. (U. S.) 414.

cient if certified to by the proper consular or diplomatic officer in the language of the statute.¹ And when such certificate conforms to the statute, it is absolute proof that the papers certified are receivable in proof of criminality in the demanding State, whether they are originals or copies.² But the consular certificate is not the exclusive source of authentication, and the authentication may be assisted by other written or oral evidence.³ The depositions and copies thereof require the same kind of authentication to entitle them to be receivable in evidence in proof of criminality.⁴ If the certificate is not conformable to the statute, the papers, whether originals or copies, may still be received upon proof of the fact, that, by the foreign law, the papers presented would be competent evidence in proof of the criminality of the accused in the country from which he escaped.⁵

29. *Hearing may be adjourned to procure Testimony.* — The commissioner may adjourn the hearing a reasonable time, on the application of either party, for the purpose of procuring testimony not then attainable.⁶ And the prisoner is not entitled, in such event, to be discharged on *habeas corpus*, unless it clearly appears that the commissioner has abused his discretion.⁷

30. *May issue a Second Warrant.* — If, for any reason, the first warrant of arrest is of questionable regularity, and no order has been entered upon the first complaint and warrant, the court, before whom such proceedings are pending, has the power, under the statute,⁸ to issue a second warrant; and the arrest of the accused upon such warrant will not be held void on *habeas corpus*.⁹ And if the accused, upon an examination, is discharged for want of sufficient evidence, he may again be re-arrested and re-examined without the issuance of a second mandate by the President.¹⁰ And a warrant for the arrest of a fugitive may be continued in force, and the accused be held under it for a further examination, not-

1. "When the authentication by the United States minister follows the language of the statute, it is sufficient, whatever of ambiguity there may be in that of the statute." *Re Behrendt*, 22 Fed. Rep. 699; *In re McPhun*, 30 Fed. Rep. 57.

For the various rules which govern the authentication of papers requisite or admissible in extradition cases, see *Re Farez*, 7 Blatchf. (U. S.) 345; s. c., 2 Abb. U. S. 346; 10 How. Pr. (N. Y.) 107.

2. *In re McPhun*, 30 Fed. Rep. 57.

3. "Under U. S. Act of Aug. 3, 1842, regulating the practice in extradition proceedings, the certificate is not the exclusive source of authentication, but may be assisted by other evidence; and it need not appear that the depositions or documentary evidence would be competent evidence upon the trial of the accused, if sufficient to authorize his arrest." *Re Wadge*, 16 Fed. Rep. 332.

Original depositions taken abroad were

in this case so authenticated by oral proof, that they were made admissible under sect. 5271, as so amended. *Re Fowler*, 18 Blatchf. (U. S.) 430.

4. "Under the Act of Congress of Aug. 3, 1842, both depositions and copies thereof require the same kind of authentication to entitle them to be received in evidence in proof of criminality; and whether the originals or a copy is offered, it is not admissible under the Act of 1842, unless it would be receivable in the foreign country in proof of criminality." *In re McPhun*, 30 Fed. Rep. 57.

5. *In re McPhun*, 30 Fed. Rep. 57.

6. *In re Ludwig*, 32 Fed. Rep. 774; *Re Macdonnell*, 11 Blatchf. (U. S.) 79.

7. *In re Ludwig*, 32 Fed. Rep. 774; *Re Macdonnell*, 11 Blatchf. (U. S.) 79.

8. R. S. U. S. § 5270.

9. *Fergus*, Petitioner, 30 Fed. Rep. 607.

10. *Re Kelley*, 26 Fed. Rep. 852.

withstanding a commitment, upon an examination already had, has been set aside for errors committed by the commissioner.¹

31. *Accused may introduce Evidence in his own Behalf.* — A person under examination in extradition proceedings has a right to introduce witnesses in his own behalf.² The examination should conform to the laws of the State in which the proceedings are had, except in so far as it may be specially regulated by an act of Congress.³ And when the local laws allow a defendant in a criminal case to testify, the accused has a right to be personally examined as a witness.⁴

32. *Should be committed for a Reasonable Time.* — The commissioner before whom the examination is had, if he thinks the evidence warrants such action, should commit the fugitive for a reasonable time, so as to enable the government to surrender him, or the foreign government to take proceedings for his surrender; and if no application for his delivery is made within a reasonable time, he should be discharged.⁵

33. *Facts of the Case to be certified to Secretary of State.* — After a full investigation of the case before the commissioner or magistrate, if he "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue, upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the committal of the person so charged to the proper jail, there to remain until such surrender shall be made."⁶ Thus it will be seen that the judiciary possess no power to order a delivery of the fugitive to a foreign country.⁷

34. *Action of Commissioner subject to Review by Habeas Corpus.* — When the proceedings are had before a commissioner, and he has committed the accused to await the action of the President, the United States courts have the power, by a writ of *habeas corpus*, to review the commissioner's decision upon matters of law, but not of fact.⁸ When the proper proceedings have been had

1. *Re Farez*, 7 Blatchf. (U. S.) 491.

2. *Re Kelley*, 25 Fed. Rep. 268; *In re Farez*, 7 Blatchf. (U. S.) 345; s. c., 2 Abb. U. S. 346; 10 How. Pr. (N. Y.) 107.

3. "The examination of the person whose return is claimed must be conducted according to the laws of the State in which the proceeding is had as to all particulars not specially regulated by a statute of the United States." *Re Farez*, 7 Blatchf. (U. S.) 345; s. c., 2 Abb. U. S. 346; 10 How. Pr. (N. Y.) 107.

4. *Re Farez*, 7 Blatchf. (U. S.) 345; s. c., 2 Abb. U. S. 346; 10 How. Pr. (N. Y.) 107; Whart. Conf. of L. 644.

5. *In re Washburn*, 4 Johns. Ch. (N. Y.) 106; s. c., 8 Am. Dec. 548.

6. R. S. U. S. § 5270.

7. *Judiciary cannot deliver Fugitive.* — "On the other hand, the judiciary can neither order the delivery, nor bind the action of the President by its judgment, affirming that the case is a suitable one for extradition." Spear on Extrad. (1st ed.) 223.

8. *Reviewing Power limited to Questions of Law.* — "The court has no power to revise the decision of the commissioner on the question of fact as to the criminality of the accused." *Re Stupp*, 12 Blatchf. (U. S.) 501; *Re Vandewelpen*, 14 Blatchf. (U. S.)

before the commissioner to give him jurisdiction, and he has had before him legal and competent evidence of the criminality of the accused, he is made the judge of the weight and effect of the evidence, and the courts will not review his decision as to the fact of criminality, or whether there was sufficient evidence to sustain his actions.¹ In one or two instances the courts have held that on *habeas corpus* they would look into the evidence on which the judgment of the commissioner was based, pass upon its competency and weight, and discharge the prisoner if, in the opinion of the court, the evidence was not sufficient to authorize his commitment for extradition; but the weight of authorities, as we have already seen, is overwhelming against this position.²

35. *The Executive issues Warrant for Final Delivery.* — Before the President can lawfully issue his warrant for the delivery of the fugitive to the representative or agent of the foreign government, the proper judicial proceedings must have been had, and the facts upon which the magistrate or commissioner ordered his committal certified to the secretary of state.³ And after all the proper proceedings have been had before the committing magistrate, and the facts certified as required by statute, the President still has a discretionary power in the matter of final delivery, and may lawfully decline to issue his warrant for the surrender of the fugitive.⁴

36. *Delivery must be made within two Calendar Months.* — The surrender, if made at all, should be made within two calendar months from the time of committal. And if not made within that period, the alleged fugitive may, by a proper application to either Federal or State courts, be discharged from custody.⁵ And the accused being thus discharged, the original warrant for extradition cannot be used for the purpose of his re-arrest.⁶

137; *Re Wiegand*, 14 Blatchf. (U. S.) 370; 2 Abb. U. S. Prac. 211, and cases cited; *Re Wahl*, 15 Blatchf. (U. S.) 334; *Re Fowler*, 18 Blatchf. (U. S.) 430; *Re Wadge*, 16 Fed. Rep. 332.

1. When a commissioner has had before him legal and competent evidence of facts, in an extradition case, for him to consider in deciding the question of criminality under the treaty, his decision as to the fact of criminality cannot be reviewed by the circuit court on *habeas corpus*. *Re Fowler*, 18 Blatchf. (U. S.) 430; *Re Wahl*, 15 Blatchf. (U. S.) 334; *In re Stupp*, 12 Blatchf. (U. S.) 501; *Re Wadge*, 16 Fed. Rep. 332.

"The reviewing court will not review the decision of the commissioner or examining magistrate upon the sufficiency of the proof." 2 Abb. U. S. Prac. 211.

2. *Ex parte Kaine*, 3 Blatchf. (U. S.) 1; *In re Heinrich*, 5 Blatchf. (U. S.) 414.

3. 9 Op. Atty.-Genl. 379; Spear on Extrad. (1st ed.) 214, 223.

4. *Executive Discretion.* — The President may, in his discretion, refuse to deliver

up the alleged fugitive criminal. *In re Stupp*, 12 Blatchf. (U. S.) 501; Spear on Extrad. (1st ed.) 214-215.

5. "Whenever any person who is committed under this title or any treaty to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way out of the United States, it shall be lawful for any judge of the United States or of any State, upon application made to him by, or on behalf of, any person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the secretary of state, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered." R. S. U. S. § 5273.

6. 12 Op. Atty.-Genl. 75.

37. *President's Action subject to Review on Habeas Corpus.*—After the executive has reviewed the case, as certified by the committing court, and the extradition warrant has been issued by the secretary of state, ordering his delivery to the foreign government, the fugitive may, before the warrant is carried into effect, and the accused placed beyond the jurisdiction of such court, be released by a Federal court on *habeas corpus*, if his detention and proposed surrender are in violation of the provisions of the treaty or of the Constitution of the United States.¹ But the court on *habeas corpus* and *certiorari* cannot pass, in any manner, upon the discharge of the executive functions of the President. If the mandate of the President, authenticated by the State department, shows that the President considers that satisfactory evidence has been produced that the person named stands charged with the crime, the court cannot question the evidence on which the President came to that conclusion. The reviewing power simply extends to matters of law, and not to the sufficiency of the facts upon which the executive acted.²

II. *Interstate.* — I. *Plantation and Colonial Compacts to deliver Fugitives.* — As early as 1643, the plantations under the Government of Massachusetts, the plantation under the Government of New Plymouth, the plantations under the Government of Connecticut and the Government of New Haven, and the plantations in combination therewith, entered into a compact between themselves, recognizing the right of extradition, and agreeing to deliver up to each other, on certain terms, fugitives from justice.³ And when the American Colonies organized themselves under the Articles of Confederation, the compact provided that "if any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State, shall flee from justice and be found in any of the United States, he shall, upon the demand of the Governor or Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence."⁴ Thus it will be seen, that, long before the adoption of the Federal Constitution, the plantations and the American Colonies had the right and power to surrender fugitive criminals

1. *Ex parte Kaine*, 3 Blatchf. (U. S.) 1; *In re Metzger*, 1 Barb. (N. Y.) 248; Spear on Extrad. (1st ed.) 216.

2. *Re Farez*, 7 Blatchf. (U. S.) 345; s.c., 2 Abb. U. S. 34; 10 How. Pr. (N. Y.) 107.

3. *Plantation Compact.* — The plantations entered into a compact which "pledged themselves to each other that upon the escape of any prisoner or fugitive for any criminal cause, whether by breaking prison, or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the jurisdiction out of which the escape was made, that he was a prisoner or such an offender at the

time of the escape, the magistrate, or some of them of the jurisdiction where, for the present, the said prisoner or fugitive abideth, shall forthwith grant a warrant as the case will bear, for the apprehending of any such person, and the delivery of him into the hands of the officer or other person who pursueth him; and if there be help required for the safe returning of any such offender, then it shall be granted unto him that craves the same, he paying the charges thereof." *Kentucky v. Dennison*, 24 How. (U. S.) 66, and authorities cited.

4. Art. 4 of the Articles of Confederation, cited in Spear on Extrad. (1st ed.) 226.

to each other. At the time of the organization of the Federal Union, each State was exercising this power as an attribute of sovereignty. The provision in the Constitution of the United States,¹ providing for federal regulation of the interstate extradition of fugitives from justice, does not therefore assert a power not previously exercised by the States, but merely places the regulation of the pre-existing right within the domain of national legislation, in order that uniformity may be attained, and discrimination by one State or its citizens against another State or its citizens be prevented.²

2. *Interstate Extradition defined.* — Interstate extradition, in the United States, is the surrender by one State to another, on its demand, of fugitives from justice, pursuant to the Constitution and laws of the United States, that they may be dealt with according to the laws of the demanding State.³

3. *Demand should be made by the Executive.* — Under the Constitution of the United States and Act of Congress, the right to demand the surrender of fugitives from justice is vested solely and absolutely in the executive authority of the State or Territory where the crime was committed.⁴ But neither the Constitution

1. Art. 4, § 2, Const. U. S.

2. "The uniform opinion heretofore has been, that the States, on the formation of the Constitution, had the power of arrest and surrender in such cases, and that, so far from taking it away, the Constitution had provided for its exercise contrary to the will of a State in case of a refusal, thereby settling, as amongst the States, the contested question, whether, on demand, the obligation to surrender was perfect and imperative, or whether it rested on comity and discretionary." *Holmes v. Jennison*, 14 Pet. (U. S.) 540, 597; *Cooley's Const. Lim.* (4th ed.) 20, 21, 22, and note.

"In considering this question, it is material to observe that this clause of the Constitution does not contain a grant of power. It confers no right: it is the regulation of previously existing right." *In re Fetter*, 3 Zab. (N. J.) 311; s. c., 57 Am. Dec. 382.

The duty of regulating the practice under the Constitution devolves upon Congress. *Kentucky v. Dennison*, 24 How. (U. S.) 66.

"Prior to the American Revolution, a criminal who fled from one colony found no protection in another. He was arrested wherever found, and sent for trial to the place where the offence was committed." *Commonwealth v. Deacon*, 10 S. & R. (Pa.) 127; *State v. Buzine*, 4 Harr. (N. J.) 572.

3. *Definition.* — "The surrender by one sovereign State to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws.

... The surrender of persons by one federal State to another on its demand, pursuant to their federal constitution and laws." 1 Bouv. L. D. 567.

4. *Constitutional Provision.* — "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." Art. 4, § 2, Const. U. S.

Act of Congress. — "Whenever the executive of any State or Territory demands any person, as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be dis-

nor Act of Congress specifies under what conditions this right shall be exercised; and in the absence of a statutory provision of the demanding State, prescribing the circumstances under which the demand shall be made, the executive may, in his discretion, decline to make the demand for the fugitive, and his action is not subject to review, but is final and conclusive.¹

4. *When authorized to make the Demand.* — The executive authority of the State or Territory from which the fugitive fled is not authorized to make the demand on the executive of the asylum State for the surrender of the fugitive, until it has been shown to him that the alleged fugitive stands charged with the commission of crime in the demanding State. And the charge made must be in the regular course of judicial proceedings. A charge made before the executive is not sufficient.² And the evidence of such charge, in the form of a copy of an indictment or an affidavit, made before a magistrate, properly certified as authentic by the governor or chief magistrate of the demanding State or Territory, must accompany the demand before the requisites of the statute are complied with.³

5. *Statutory Provision in Aid of Constitution.* — The clause of the Constitution, providing for interstate extradition, does not name the person upon whom the demand for the surrender of a fugitive shall be made; and in order to obviate this difficulty,

charged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory." U. S. Rev. Stats. § 5278.

1. *The Demanding Discretion.* — "Neither the Constitution nor the law of Congress declares that it shall be the duty of the executive of any State or Territory, under any circumstances, to demand the surrender of a criminal who may have escaped to another State or Territory. The former requires a delivery to be made, in the presence of the conditions specified, 'on demand of the executive authority of the State from which' the fugitive 'fled;' and the latter declares that, 'whenever the executive of any State or Territory demands any person as a fugitive from justice,' etc., then, the prescribed conditions being supplied, the delivery shall be made by the executive to whom the demand is addressed. Neither of these provisions makes the demand a duty imposed by law upon any executive, and neither touches the question whether it shall be made or not. This question, so far as the Constitution and the law of Congress have any application to it, is hence left to the discretion of the executive authority of each State and Territory, qualified only by a specification of the conditions upon which the demand, if

made, shall involve the obligation to deliver. The implication is, that each executive has the power, either with or without statutory law providing therefor, to make a demand; but whether he shall in any case exercise the power, is a matter for him to determine. It follows that any legal regulation of executive discretion on this subject, if made at all, must be by the legislative authority of the States or Territories." Spear on Extrad. (1st ed.) 317, 318.

2. *Must be charged with the Commission of Crime in demanding State.* — "The governor of the State could not, upon a charge made before him, demand the fugitive; for, according to the principles upon which all our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned; and its duty in those cases consists only in aiding to support the judicial process, and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department. The executive authority of the State, therefore, was not authorized by this article (of Constitution) to make the demand unless the party was charged in the regular course of judicial proceedings." *Kentucky v. Denison*, 24 How. (U. S.) 66.

3. U. S. Rev. Stats. § 5278.

Congress, in 1793, passed an act, providing, among other things, that the demand should be made on the executive of the State or Territory to which such fugitive has fled.¹ The constitutionality of this statute, in so far as it relates to the extradition of fugitives from the Territories of the United States, has been questioned on the ground that the Territories not being designated in the Constitution, Congress had no authority to provide for and prescribe the manner of the delivery of fugitives from justice as to such Territories.² But it has been authoritatively decided that the act is constitutional in all its material parts.³

6. *Appointment of Receiving Agent, and the Expense.* — Nothing is said in the Constitution about the appointment of a receiving agent; but Congress, assuming that the delivery was to be made in that manner, has directed the executive, on whom demand is made, "to cause the fugitive to be delivered to such agent when he shall appear;" and if he does not appear "within six months from the time of the arrest, the prisoner may be discharged." And by the same law, it is provided that "all costs or expenses incurred in apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."⁴ Further provision is made empowering the agent to transport the fugitive to the State or Territory from which he has fled, and prescribing a penalty in case such fugitive is forcibly set at liberty, or rescued from such agent while so trans-

1. R. S. U. S. § 5278.

2. "No mention is made in the Constitution as to any extradition to or from the Territories of the United States; and yet the law of Congress includes them in its provisions, and for this purpose treats them as if they were States. In *The State v. Soper*, Ga. Decis. part ii. 33, it was urged that this feature of the law is unconstitutional, since a Territory is not a State, and the latter only is named in the extradition clause of the Constitution. The court declined to express an opinion upon the point, inasmuch as it was not deemed necessary to the decision of the case." Spear on Extrad. (1st ed.) 231, 232.

3. *Act of Congress Constitutional.* — "No one has ever supposed that Congress could, constitutionally, by legislation, exercise powers, or enact laws, beyond the powers delegated to it by the Constitution. But it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end. . . . From that time (1793), down to the present hour, not a doubt has

been breathed upon the constitutionality of this part of the act; and every executive in the Union has constantly acted upon and admitted its validity. . . . We hold the act to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon State magistrates, to be free from reasonable doubt and difficulty upon the grounds already stated." Prigg v. Commonwealth, 16 Pet. (U. S.) 539.

"There is no instance, so far as we know, in which the application of extradition to the Territories of the United States, as provided for by the act of 1793, has been judicially held to be unauthorized by the Constitution. The power to make 'all needful rules and regulations' in respect to these Territories is expressly given to Congress; and this clearly includes the power to enact an extradition law as between these Territories, and as between a State and Territory when the demand proceeds from the former, if not when it proceeds from the latter. The spirit of the Constitution, though not in its precise letter, includes Territories in the extradition principle. The reason for it in respect to States and Territories is one and the same." Spear on Extrad. (1st ed.) 232.

4. R. S. U. S. § 5278.

porting him.¹ The person appointed to receive the fugitive is the agent of the demanding State;² and a warrant issued to him as such agent, authorizing the arrest of a fugitive, is valid.³

7. *Delivery made by Chief Justice in District of Columbia.*—In 1801 Congress enacted an extradition law in relation to the District of Columbia, in which it was declared that “in all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the chief justice of the Supreme Court shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authority of the several States are required to do by the provisions of sections 5278 and 5279 of the Revised Statutes” of the United States. “All executive and judicial officers” in the District “are required to obey the lawful precepts or other process

1. “Any agent so appointed who receives the fugitive into his custody, shall be empowered to transport him to the State or Territory from which he fled. And any person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year.” R. S. U. S. sect. 5279.

2. *Receiving Agent.*—“The person appointed to receive the fugitive is the agent of the demanding State; and if arrested therefor on a charge of malicious prosecution, he is entitled to a writ of *habeas corpus* from the district court under sect. 753, whether or not the indictment charge a crime within the meaning of the laws of the United States.” *Re Titus*, 8 Ben. (U. S.) 411.

“No such questions are here presented, unless it be, as claimed, that the plaintiff in error is, within the principles of former adjudications, an officer of the United States, wielding the authority and executing the power of the nation. We are all of opinion that he was not such an officer, but was and is simply an agent of the State of Oregon, invested with authority to receive, in her behalf, an alleged fugitive from the justice of that State. By the very terms of the statute under which the executive authority of Oregon demanded the arrest and surrender of the fugitive, he is described as the ‘agent of such authority.’ It is true that the executive authority of the State in which the fugitive has taken refuge, is under a duty imposed by the Constitution and laws of the United States, to cause his surrender upon proper demand by the executive authority of the State from which he has fled. It is equally true that the authority of the agent of the demanding State to bring the fugitive

within its territorial limits, is expressly conferred by the statutes of the United States, and, therefore, while so transporting him, he is, in a certain sense, in the exercise of an authority derived from the United States. But these circumstances do not constitute him an officer of the United States, within the meaning of former decisions. He is not appointed by the United States, and owes no duty to the national government, for a violation of which he may be punished by its tribunals, or removed from office. His authority in the first instance comes from the State in which the fugitive stands charged with crime. He is in every substantial sense her agent, as well in receiving custody of the fugitive, as in transporting him to the State under whose commission he is acting. The fugitive is arrested and transported for an offence against her laws, not for an offence against the United States. The essential difference, therefore, between the cases heretofore determined and the present one, is, that in the former, the judicial authorities of the State claimed and exercised the right, upon *habeas corpus*, to release persons held in custody in pursuance of the judgment of a court of the United States, or by order of a circuit court commissioner, or by officers of the United States in the execution of their laws; while in the present case, the person who sued out the writ was in custody of an agent of another State, charged with an offence against her laws.” *Robb v. Connolly*, 111 U. S. 624.

This decision is in direct conflict with the text in Whart’s Cr. Pl. & Pr. 37, § 37.

3. A warrant issued by the governor to an agent of another State, authorizing the arrest of a fugitive, is not invalid. *Commonwealth v. Hall*, 9 Gray (Mass.), 262; s. c., 69 Am. Dec. 285.

issued for that purpose, and to aid and assist in such delivery."¹ And a person who has committed a crime within such District, and has fled from justice, may be returned to its jurisdiction for trial in the same manner as if he were demanded by any of the States or Territories for a violation of their criminal laws.²

8. *May be arrested before Demand made.* — Any person who has committed an offence against the laws of any of the States or Territories of the United States, and has fled from justice, and is found in another State or Territory, may be arrested and detained, preparatory to his surrender, before a demand has been actually made by the executive authority of the State or Territory where the crime was committed.³ But it is held, that, in order to hold him for such purpose, a complaint, in writing, under oath, must be made before an examining court, alleging the commission of a crime in the foreign state, and that the accused stands charged therewith, and that he has fled from justice, and is found there. And these facts must be clearly averred. It is not sufficient that such facts may be inferred from what is stated.⁴ Many of the States have provided by statute for the arrest and detention of fugitives from justice, preceding a demand for his surrender by the executive authority of the State or Territory where the offence was committed, and allowing a reasonable time in which his extradition may be demanded.⁵ And such laws have been declared constitutional, and not in conflict with the Constitution of the United States.⁶

1 R. S. U. S. § 843, relating to the District of Columbia.

2 "For a criminal offence committed within the District of Columbia, the offender, if found beyond the District, may be removed to the District for trial." *Re Buell*, 3 Dill. (U. S.) 116. See also *In re Perry*, 2 Crim. Law Mag. 84.

3 *Arrest before Demand.* — "A fugitive from justice from any of the United States may be arrested and detained in another State, under art. 4, sect. 2, of the Constitution of the United States, preparatory to his surrender, before requisition is actually made by the executive of the State where the crime was committed." *In re Fetter*, 3 Zab. (N. J.) 311; s. c., 57 Am. Dec. 382; *People v. Schenck*, 2 Johns. (N. Y.) 479.

A judge or justice of the peace has power to order the arrest of a fugitive from justice from another State or Territory before demand. *State v. Buzine*, 4 Harr. (Del.) 572; *State v. Howell*, R. M. Charlton (Ga.), 120; *In re Washburn*, 4 Johns. Ch. (N. Y.) 106; *Ex parte Cubreth*, 49 Cal. 436; *Ex parte Romanes*, 1 Utah, 33; *State v. Soper*, Ga. Dec. part ii. 33. But see *In re Mohr*, 73 Ala. 503; s. c., 49 Am. Rep. 63, which in principle seems to support a different doctrine.

4 *Must be a Complaint.* — "To enable

a magistrate to arrest and examine an alleged fugitive from another State, it must be shown to him, by a complaint in writing, on oath, that a crime has been committed in the foreign State; that the accused has been charged in such State with the commission of such crime; and that he has fled from such State, and is found here: and these facts must be distinctly alleged. It is not sufficient that they may be inferred from what is stated." *In re Heyward*, 1 Sandf. (N. Y.) 701; *In re Leland*, 7 Abb. Pr. U. S. (N. Y.) 64.

5 As examples of legislation on the subject by the various States, see Rev. Stats. of Ill. (Hard ed.) 524, 525; Stats. of Ind. (Davis ed.) vol. ii. 421, 422; Gen. Stats. of R. I. 569, 570; Gen. Stats. of N. H. 497, 498; Rev. Stats. of Me. (1871) 900, 901; Gen. Stats. of Ky. (1877) 492; Gen. Stats. of Conn. 544; Code of Va. (1873) 200, 201; Stats. of Tenn. (1871) §§ 5343-5353; Code of Ga. §§ 53-57; Gen. Stats. of Mass. c. 177, § 7, *et seq.* See also Stats. of N. Y. and Cal.

6 *Statutory Provisions Constitutional.* — "A legislature may authorize the arrest and detention of an alleged fugitive from the justice of another State, to await a requisition from the governor; and may impose any conditions, which must be

9. *Executive Discretion in causing Arrest and Delivery.*—The law of Congress, in relation to extradition between the States and Territories, provides that when a proper demand is made on the executive authority of any State or Territory to which a fugitive from justice has fled, and the compliance with certain requirements therein specified, it shall be the duty of such executive authority to cause the arrest and delivery of such fugitive.¹ But it has been authoritatively decided that the duty to deliver is simply a moral obligation imposed upon the executive; and if in his discretion he declines to make the surrender, there is no power vested in the courts or General Government to compel or cause him to perform that duty.²

10. *Governor of a Territory bound to deliver Fugitives.*—Under the extradition laws of the United States, the governor of a Territory, as well as the governor of a State, is bound, when a proper demand is made upon him by the executive authority of any other

strictly complied with. Construction of such enactment in Cal. Pol. Code determined." *Ex parte Rosenblat*, 51 Cal. 285.

"The law of California authorizing the arrest of a fugitive from justice who has fled from another State, before a demand for his surrender by the executive authority of the State from which he fled, and his detention for a reasonable time to afford an opportunity for such executive demand, is not in conflict with U. S. Const. art. 4, § 2." *Ex parte Cubreth*, 49 Cal. 436.

In the case of the Commonwealth *v. Tracy et al.*, 5 Metc. (Mass.) 536, Chief Justice Shaw, in considering the constitutionality of the provision of the statute relating to the arrest and detention of fugitive criminals, said, "It is a provision obviously not repugnant to the Constitution and laws of the United States, nor tending to impair the rights, or relax the duties, intended to be secured by them. To this extent, therefore, the court are of opinion that this law is constitutional and valid, one the legislature had authority to pass." See also *Commonwealth v. Hall*, 75 Mass. 262; *In re Heyward*, 1 Sandf. (N. Y.) 701; *In re Leland*, 7 Abb. Pr. (N. Y.) N. S. 64. But see *Prigg v. Commonwealth*, 16 Pet. (U. S.) 539, 617; *Ex parte McKean*, 3 Hughes (U. S.), 23; *Degant v. Michael*, 2 Ind. 396.

1. R. S. U. S. § 5278.

2. "The demand being thus made, the act of Congress declares that 'it shall be the duty of the executive authority of the State,' to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations

which the United States and the several States bear to each other, the court is of opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights; and we think it clear that the federal government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, etc. . . . But if the governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the judicial department, or any other department, to use any coercive means to compel him." *Kentucky v. Dennison*, 24 How. (U. S.) 66.

"If the principal is arrested in the State where the obligation is given, and sent out of the State by the governor, upon the requisition of the governor of another State, it is within the third. In such cases the governor acts in his official character, and represents the sovereignty of the State in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse, there is no means of compul-

State or Territory, to deliver up fugitives from justice.¹ But it has been held that neither the Constitution nor law of Congress authorizes the surrender to only such countries as the "Cherokee Nation," they not being embraced in the words "State" or "Territory," as used in the Constitution and Act of Congress.²

11. *Sufficiency of the Requisition.*—The Act of Congress³ requires three prerequisites before the delivery of a fugitive is authorized: "1. That the fugitive must be demanded by the executive of the State from which he fled. 2. A copy of an indictment found, or an affidavit made before a magistrate, charging the fugitive with having committed the crime. 3. Such copy of the indictment or affidavit must be certified as authentic by the executive." And unless these requisites have been complied with, the governor on whom demand is made has no jurisdiction to order the arrest and delivery of a fugitive from justice.⁴ But it has been held that it is a sufficient compliance with the law of Congress if the requisition is accompanied by an authenticated copy of an information, instead of an indictment found, or an affidavit made before a magistrate.⁵ It is not necessary to show that a warrant has been

sion." *Taylor v. Taintor*, 16 Wall. (U. S.) 366.

And a writ of *certiorari* will likewise not be issued against a governor to compel the production of the papers on which he issued his warrant. *Matter of Leary*, 10 Ben. (U. S.) 197, 212; s. c., 6 Abb. N. Cas. (N. Y.) 43, 58.

1. "Although the constitutional provision in question does not, in terms, refer to fugitives from the justice of any State, who may be found in one of the Territories of the United States, the act of Congress has equal application to that class of cases, and the words, 'treason, felony, or other crime,' must receive the same interpretation when the demand for the fugitive is made, under that act, upon the governor of a Territory, as when made upon the executive authority of one of the States of the Union." *Ex parte Reggel*, 114 U. S. 642.

2. The Cherokee Nation is neither a "State" nor a "Territory" as these words are used in the United States Constitution. Hence, the United States Constitution and laws of Congress do not authorize the governor of Arkansas to honor the demand of the chief of the Cherokee Nation for the extradition of a fugitive. *Ex parte Morgan*, 20 Fed. Rep. 298.

3. R. S. U. S. § 5278.

4. *Requisites of the Act of Congress.*—"The U. S. St. of 1793, c. 7, § 1, requires three things: 1, That the fugitive must be demanded by the executive of the State from which he has fled; 2, A copy of an indictment found, or an affidavit made before a magistrate, charging the fugitive with having committed the crime; 3, Such

copy of the indictment or affidavit must be certified as authentic by the executive." *Kingsbury's Case*, 106 Mass. 223; *Clark's Case*, 9 Wend. (N. Y.) 212, 219; *State v. Schlemn*, 4 Harr. (Del.) 579; *Romaine's Case*, 23 Cal. 585; *Ex parte Sheldon*, 34 Ohio St. 319; *Ex parte Thorton*, 9 Tex. 646.

"When a requisition recites that the prisoner stood charged with the crime of theft, committed in said State, that said governor has demanded his arrest and extradition, that the demand was accompanied by affidavits, etc., whereby the prisoner is charged with said crime, and with having fled from the said State, and that such papers were certified by said governor to be duly authenticated, *held*, that the warrant fully complied with the statute, and sufficiently established the conditions necessary to its issue; that it was not necessary to state therein the facts constituting the alleged crime." *People v. Donahue*, 84 N. Y. 438.

"A governor should not deliver up one on extradition when there is no evidence that the requirements of the act of Congress, that the affidavit shall be produced and authenticated by the governor demanding the extradition, has been complied with." *Ex parte Powell*, 20 Fla. 806.

5. "A warrant by the governor of Wisconsin recited that it had been represented to him by the governor of Kansas that 'A.' stood 'charged with the crime of obtaining illicit connection with a female of good repute, under the age of twenty-one years, under promise of marriage, committed in the county of L. in said State,' etc. It is

issued for the fugitive in the State from which he fled. It is the indictment or affidavit, and not the issuing of a warrant, that constitutes the charge against a fugitive upon which his return can be demanded.¹ The indictment or affidavit must be certified as authentic by the governor or chief magistrate of the State or Territory from which he has fled. And an indictment or affidavit certified as authentic by the secretary of state, does not meet the requirements of the statute.² The certificate of authentication is not required to be in any particular form; and when the language of the demanding governor in the requisition shows the copy of the indictment or affidavit annexed thereto to be authentic, it is sufficient.³ The certificate, or copy thereof, of the clerk or justice of the peace, need not be attached to the copy of the indictment or affidavit.⁴ If the clerk's or justice's certificate is attached, the absence of the court seal will not vitiate the requisition, nor is it necessary that the file marks should be shown.⁵

12. *Must be substantially charged in Demanding State.*— Before the governor of a State can lawfully issue his warrant for the arrest and delivery of an alleged fugitive from justice, it must be shown to him that the person demanded is substantially charged with the commission of crime in the State from which it is alleged he has fled, by an indictment or an affidavit certified as authentic by the governor of the State making the demand, and that he is in fact a fugitive from the justice of said State.⁶ And as to whether

also showed that the requisition made by the governor of Kansas was accompanied by a duly authenticated copy of an information filed in that State against A., charging him with said offence. *Held*, sufficient." *In re Hooper*, 52 Wis. 699.

1. "There is nothing either in the act of Congress, or in the act of this State, upon the subject of fugitives from justice, which requires that a warrant shall be issued for the fugitive, upon the charge against him, before his return can be demanded from the State or Territory to which he may have fled. It is the indictment or affidavit, and not the issuing of a warrant, which constitutes the charge against a fugitive upon which his return can be required." *Tullis v. Fleming*, 69 Ind. 15.

2. *Saloman's Case*, 1 Abb. Pr. (N. Y.) N. S. 347.

3. "But, as has been said, the genuineness of the copy is not to be ascertained by a resort to any technical rule for ascertaining the fact, nor need the fact be made to appear in any set form of words, or even in the words of the statute requiring the authentication. All that can be required is, that the language employed by the demanding governor in the requisition, understood in its ordinary meaning, shows that the copy of the indictment upon which the requisition is made is genuine." *Ex parte*

Sheldon, 34 Ohio St. 319; *Matter of Manchester*, 5 Cal. 237. See also *Hibler v. State*, 43 Tex. 197.

4. *Ex parte Sheldon*, 34 Ohio St. 319.

5. "When a copy of the indictment accompanying a requisition upon the governor of Texas for one claimed to be a fugitive from justice is certified as authentic by the governor who makes the requisition, no further authentication is needed under U. S. Rev. Stats. sect. 5278. And the absence of a seal to the certificate of the clerk of the court in which the indictment purports to have been found, or of a file-mark on the indictment, will not be noticed on *habeas corpus*." *Hibler v. State*, 43 Tex. 197.

6. *Must be substantially charged.*— "The Act of Congress, Rev. Stat. sect. 5278, makes it the duty of the executive authority of the State to which such person has fled, to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any State demands such person as a fugitive from justice, and produces a copy of an indictment found, or affidavit made before a magistrate of any State, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate of the State from whence the person so charged has fled. It must appear, therefore, to the governor of the

he is substantially charged, is a question of law open to judicial inquiry on the face of the papers on an application for a discharge by a writ of *habeas corpus*.¹ As to whether the accused is a fugitive, is one of fact, upon which the decision of the governor against the person charged is sufficient to justify his removal, unless this presumption is overthrown by contrary proof.²

13. *That Fugitive stands charged with Crime, how proved.* — The only evidence required by law that the person whose delivery is demanded has been charged with crime in the demanding State, is a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, charging the person with having committed the particular crime therein set forth, which copy must be properly certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled. No other authentication can be required.³

14. *Sufficiency of Indictments.* — An indictment is sufficient if it substantially charges an offence against the laws of the State where found, although it does not conform to the technical rules of criminal pleading as observed elsewhere.⁴ If it conforms

State to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the State making the demand; and, second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand." *Roberts v. Reilly*, 116 U. S. 80, 95; *In re Perry*, 2 Crim. L. Mag. 84; *Davis' Case*, 122 Mass. 324; *In re Fetter*, 3 Zab. (N. J.) 311; s. c., 57 Am. Dec. 382; *Ex parte Smith*, 3 McLean (U. S.), 121; *In re Heyward*, 1 Sandf. (N. Y.) 701; *Ex parte Sheldon*, 34 Ohio St. 319; *State v. Buzine*, 4 Harr. (N. J.) 572; *Johnston v. Riley*, 13 Ga. 97; *In re Manchester*, 5 Cal. 237.

1. "The first of these prerequisites (that is, as to whether the person is substantially charged) is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*." *Roberts v. Reilly*, 116 U. S. 80, 95.

2. "The second (that is, as to whether or not the person is a fugitive) is a question of fact, which the governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in *habeas corpus*, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the execu-

tive of the State in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect, or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof." *Roberts v. Reilly*, 116 U. S. 80, 95; *Ex parte Reggel*, 114 U. S. 642.

3. "The fact that the person demanded is charged with crime, is to be proved by a copy of an indictment or affidavit certified by the governor of the demanding State. No other authentication can be required on *habeas corpus*." *Leary's Case*, 6 Abb. N. Cas. (N. Y.) 43.

4. "In connection with this proposition, counsel discusses, in the light of the adjudicated cases, the general question as to the authority of a court of the State or Territory in which the fugitive is found, to discharge him from arrest, whenever in its judgment the indictment, according to the technical rules or criminal pleading, is defective in its statement of the crime charged. It is sufficient for the purpose of the present case to say, that, by the laws of Pennsylvania, every indictment is to be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the act of assembly prohibiting its commission, and prescribing the punishment therefor; or, if at common law, so plainly that the nature of the offence charged may be easily understood by the jury; and that the indictment which accompanied the requisition of the governor of Pennsylvania does charge the crime substantially in the language of the statute;

to the law of the State where found, it is sufficient to warrant the return of the fugitive.¹ But it must charge the commission of a definite offence against the laws of the demanding State.²

15. *Sufficiency of Affidavits.* — An affidavit, upon which a requisition has issued for a fugitive, need not set forth the crime with all the legal exactness necessary in an indictment, but it is sufficient if it charges that a crime has been committed by the accused in the State or Territory from which he has fled.³ But such affidavit must not be on belief, or embody a hearsay statement, but must distinctly charge the offence.⁴ And it must also allege that the accused has fled from justice.⁵ And if the affidavit is defective in any of these particulars, the court will not ordinarily remand the prisoner until the proper documents can be prepared.⁶

16. *Sufficiency of Executive Warrants.* — The executive warrant, to be sufficient, should show on its face three things: —

1. That it has been represented to such executive that the accused stands charged in the demanding State with a certain specified crime, and that he has fled from justice.

2. That a demand has been made upon him for the surrender

that Commonwealth has the right to establish the forms of pleadings and process to be observed in her own courts, in both civil and criminal cases, subject only to those provisions of the Constitution of the United States involving the protection of life, liberty, and property in all the States of the Union." *Ex parte Reggel*, 114 U. S. 642, 651.

On *habeas corpus* to prevent extradition, if the indictment charges a crime against the law of the State where found, this is enough to justify the refusal to discharge, although the crime might also be prosecuted in the State to which the person has fled; nor will he be discharged because, possibly, the corporation from which a larceny is charged may be incapable of the ownership of property. *Roberts v. Reilly*, 116 U. S. 80.

The courts of the State where the fugitive is found will not consider the technical sufficiency of the indictment accompanying the requisition. *Matter of Voorhees*, 32 N. J. L. 141.

"When an indictment appears to have been returned by a grand jury, and is certified as authentic by the governor of the other State, and substantially charges a crime, this court cannot, on *habeas corpus*, discharge the prisoner because of formal defects in the indictment; but the sufficiency of the charge as a matter of technical pleading is to be tried and determined in the State in which the indictment is found." *Davis's Case*, 122 Mass. 324, 329; *In re Greenough*, 31 Vt. 279, 288; *Briscoe's Case*, 51 How. (N. Y.) Pr. 422; *Ex parte Roberts*, 24 Fed. Rep. 132.

1. *Ex parte Reggel*, 114 U. S. 642; *Roberts v. Reilly*, 116 U. S. 80.

2. "An information charged, accused with 'the commission of a criminal offence against the laws of Dakota, which, if committed in Nebraska, would, by the law thereof, be a crime;' and that 'he was now a fugitive from said Territory.' *Held*, that it was void for not charging a definite offence, and that the accused detained thereunder was entitled to discharge by *habeas corpus*." *Smith v. State*, 21 Neb. 552.

3. "It is not necessary that an affidavit upon which a requisition has issued should set forth the crime with all the legal exactness necessary in an indictment. The charge of the commission of an offence is all that is necessary." *Matter of Manchester*, 5 Cal. 237.

But the affidavit must charge that a crime has been committed by the accused in the State or Territory from which he has fled. *Ex parte Smith*, 3 McLean (U. S.), 121; *Matter of Heyward*, 1 Sandf. (N. Y.) 701; *People v. Brady*, 56 N. Y. 182.

4. *Ex parte Smith*, 3 McLean (U. S. C. C.), 121; *Matter of Leland*, 7 Abb. Pr. (N. Y.) N. S. 64; *Matter of Rutter*, 7 Abb. Pr. (N. Y.) 67.

5. *Matter of Heyward*, 1 Sandf. (N. Y.) 701; *Ex parte Romanes*, 1 Utah, 33; *In re Fetter*, 3 Zab. (N. J.) 311; s. c., 57 Am. Dec. 382. But see *Ex parte Swearingen*, 13 S. Car. 74.

6. *Matter of Leland*, 7 Abb. Pr. (N. Y.) N. S. 64; *Matter of Rutter*, 7 Abb. Pr. (N. Y.) 67.

of such fugitive, pursuant to the Constitution and laws of the United States.

3. That said representation and demand was accompanied by an indictment or affidavit duly certified as authentic by the demanding governor.¹ But a copy of the indictment or affidavit need not accompany the warrant.² The requisition of itself does not give jurisdiction to issue a warrant for the arrest of the fugitive.³ Nor does an affidavit of an attorney, communicating information received by telegraph, meet the requirements of the law of Congress.⁴ An authenticated copy of the indictment or affidavit must be presented.⁵ And when the requisites herein named are complied with, it has been held that such recitals by the governor are "conclusive evidence of the right to remove the prisoner to the State from which he fled."⁶

1. **The Executive Warrant.**—"When the requisition recites that the prisoner stood charged with the crime of theft, committed in said State, that said governor has demanded his arrest and extradition, that the demand was accompanied by affidavits, etc., whereby the prisoner is charged with said crime, and with having fled from the said State, and that such papers were certified by said governor to be duly authenticated, *held*, that the warrant fully complied with the statute, and sufficiently established the conditions necessary to its issue." *People v. Donohue*, 84 N. Y. 438.

"The circumstances that give jurisdiction for arrest and delivery are these: 1. The demand of the fugitive criminal by the executive authority of one State or Territory formally addressed to that of another State or Territory. 2. The production, at the same time, of a copy of an indictment found, or an affidavit made before a duly authorized magistrate of any State or Territory, charging the crime, and, of course, specifying the acts constituting the crime.

3. The certification of this copy as 'authentic, by the governor or chief magistrate of the State or Territory from whence the person so charged has fled.' These conditions being supplied in a given case, then, according to the law, the necessary jurisdiction for arrest and delivery comes into existence." *Spear on Extrad.* (1st ed.) 291.

As to the sufficiency of executive warrants generally, see *Nichols v. Cornelius*, 7 Ind. 611; *Robinson v. Flanders*, 29 Ind. 10; *Davis's Case*, 122 Mass. 324; *Brown's Case*, 112 Mass. 409; *State v. Schlemm*, 4 Harr. (N. J.) 577; *Commonwealth v. Hall*, 9 Gray (Mass.), 262; *Kingsbury's Case*, 106 Mass. 223; *Taylor v. Taintor*, 16 Wall. (U. S.) 366; *Ex parte Butler*, 18 Alb. L. J. 369; *Matter of Romaine*, 23 Cal. 585; *Ex parte Cubreth*, 49 Cal. 435; *In re Jackson*, 2 Flipp (U. S.), 183; s. c., 12 Am. Law

Rev. 602; *Ex parte Pfitzer*, 28 Ind. 450; *Matter of Clark*, 9 Wend. (N. Y.) 212; *Ex parte Thornton*, 9 Tex. 635; *In re Dorn*, 18 Fed. Rep. 898; *People v. Pinkerton*, 77 N. Y. 245.

2. *Nichols v. Cornelius*, 7 Ind. 611; *Robinson v. Flanders*, 29 Ind. 10; *People v. Pinkerton*, 77 N. Y. 245; *People v. Donohue*, 84 N. Y. 438.

3. Mere recitals in the demanding governor's requisition are not sufficient to authorize the arrest and surrender of the alleged fugitive. *Hartman v. Aveline*, 63 Ind. 344; 6 Am. Jurist, 226; *Lewin, Crown Cases*, 266; *In re Adams*, 7 Law Rep. 386; *Ex parte Manchester*, 5 Cal. 237; *Matter of Rutter*, 7 Abb. (N. Y.) Pr. N. S. 67.

4. "A requisition from the governor of another State to the governor of New York, for the arrest of an accused person, is not of itself sufficient authority for such arrest. Nor is the affidavit of an attorney communicating information received by telegraph sufficient." *Matter of Rutter*, 7 Abb. (N. Y.) Pr. N. S. 67.

5. *Matter of Rutter*, 7 Abb. (N. Y.) Pr. N. S. 67.

6. *Davis's Case*, 122 Mass. 324; *Brown's Case*, 112 Mass. 409; s. c., 17 Am. Rep. 114; *State v. Schlemm*, 4 Harr. (N. J.) 577; *Commonwealth v. Hall*, 9 Gray (Mass.), 262; *Kingsbury's Case*, 106 Mass. 223; *Taylor v. Taintor*, 16 Wall. (U. S.) 366.

Behind the indictment and affidavit the court will not go, nor can their averments be contradicted by parol. *Kingsbury's Case*, 106 Mass. 223; *Davis's Case*, 122 Mass. 324; *In re Clark*, 9 Wend. (N. Y.) 212; *People v. Pinkerton*, 77 N. Y. 245; *Commonwealth v. Daniel*, 6 Penn. L. J. 417; 4 Clark, 49; *State v. Buzine*, 4 Harr. 572; *State v. Schlemm*, 4 Harr. (N. J.) 577; *Norris v. State*, 25 Ohio St. 217; *Work v. Corrington*, 34 Ohio St. 64, 319. See *Bull. In re Cent. L. J.* (1877) p. 255; 4 South. L. Rev. N. S. 676, 702; *Sedg. Const. Law*,

Other cases hold the right to examine into the warrant to see if a crime has been properly charged.¹

17. *Executive Warrant may be revoked.* — If a warrant for the extradition of a fugitive has been obtained in a case in which it should not have been issued, the governor may revoke it, whether issued by himself or his predecessor.² And when such warrant has been revoked, no inquiry will be made in a proceeding on *habeas corpus*, on behalf of the alleged fugitive, as to the grounds of such revocation, although at the time of the revocation the fugitive may have been in custody of the agent of the demanding State.³

18. *May be a Second Delivery.* — If, after the fugitive has been delivered up to the demanding State, he escapes by forfeiting his bond, or otherwise, and again becomes a fugitive from justice, the governor may order a second arrest and delivery.⁴ But it has been held that the executive of the demanding State or Territory has no authority to surrender him, after his trial and acquittal, or after conviction and punishment, or after conviction and pardon, to the authorities of another State or Territory, to answer for a crime there committed, and that he should be allowed a reasonable opportunity to return to the place of his previous domicile.⁵ But the soundness of this doctrine has been questioned by very able authority.⁶

395; Hurd on Hab. Corp. §§ 327-338, 606; Cooley's Const. Lim. 16.

1. *People v. Donohue*, 84 N. Y. 438; *People v. Pinkerton*, 77 N. Y. 245; 17 Hun (N. Y.), 199.

2. *Work v. Corrington*, 34 Ohio St. 64; s. c., 32 Am. Rep. 345; *In re James Carroll*, Chicago Legal News, Sept. 28, 1878; Spear on Extrad. (1st ed.) 304, 305.

3. *Work v. Corrington*, 34 Ohio St. 64; s. c., 32 Am. Rep. 345.

4. When a fugitive from justice has been delivered up by the governor, allowed bail, forfeited his bond, and again has become a fugitive, and taken refuge in such State, the governor may order his arrest a second time, and again deliver him to the demanding State. *Matter of Hughes*, Phill. (N. Car.) 57; *Re Greenough*, 31 Vt. 279.

5. "The fugitive criminal being demanded and delivered for the crime specified in the charge, the executive of the demanding State or Territory is not authorized by the Constitution or by the law of Congress to surrender him, after his trial and acquittal, or after conviction and punishment, or after conviction and pardon, to the authorities of another State or Territory, and thereby interfere with his liberty of return to the place of his previous domicile. He was not found in that State or Territory as a fugitive from justice, but was forcibly brought there by legal process; and hence,

when it has exhausted its jurisdiction over him in respect to the crime with which he was charged, and for which he was delivered up, the executive authority of the State or Territory demanding and receiving him, acting under the Constitution and laws of the United States, is not clothed with any power to transfer him by another legal process to another State or Territory demanding him, so as to prevent his return to the State or Territory in which he was previously domiciled, and from which he was removed by extradition. Such a course would not only exceed the power conferred, but would be contrary to the intent and express words of the Constitution." Spear on Extrad. (1st ed.) 277, and authority cited.

6. A case is referred to by Mr. Spear as reported in Binn's Justice, where it was held, where a defendant is brought into a State as a fugitive from justice, after acquittal, or conviction and pardon, he cannot be surrendered to the authorities of another State as a fugitive, but must be allowed an opportunity to return to the State in which he is domiciled. Spear's Law of Extradition (2d ed.), 558. We cannot ascertain the facts of that case, but we know that it was the decision of the Court of Quarter Sessions, and therefore of but little value as an authority. So far as we can judge of the case, it is different from the present, as

19. *Surrender may be postponed.* — If, at the time a demand is made for the surrender of a fugitive, he is detained in the asylum State to answer for a crime there committed, his delivery may be postponed until his trial and acquittal, or conviction and punishment for said offence.¹ If, however, the accused is on bail to answer said charge, and the asylum State waives its jurisdiction by delivering up the fugitive before putting him on his trial for such offence, this will constitute a good defence to an action on his bond for his non-appearance.² But, before this defence will be available, it must appear that the State participated in his surrender.³

20. *When Fugitive arrested by Private Person.* — A private person has no authority to arrest and return a fugitive from justice to the authorities of the State where the crime was committed. He can only be delivered up when the executive authority of the demanding State has made a formal requisition upon the governor

it does not there appear that when the demand from the sister State reached the State to which it was addressed, the accused was confined in jail for an offence committed after he had voluntarily come into the State. This we regard as an essential fact, exerting an important influence in the case. But, conceding that the case is directly opposed to our views, it is difficult, if not impossible, to reconcile it with the decision in Dow's case, *supra*, where it was said, by the court, speaking through one of the ablest judges that ever occupied its bench, Gibson, C. J., that "A judge, at the place of arrest, could not be found to discharge a prisoner proved to have fled from a well-founded accusation of murder." Hackney v. Welsh, 107 Ind. 253; s. c., 57 Am. Rep. 101.

1. *When accused in Custody in Asylum State.* — "Where a demand is properly made by the governor of one State upon the governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter State have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied. The duty of obedience then arises, and not before." Taylor v. Taintor, 16 Wall. (U. S.) 366.

"The Constitution and the law refer to fugitives at large, in relation to whom there is no conflict of jurisdiction." Troutman's Case, 4 Zab. (N. J.) 634.

"By the Constitution and laws of the United States, the governor of Alabama had the right to demand Allen, and the governor of Tennessee had the power to give him up. Indeed, it would have been his imperative duty to have done so if he had not rendered himself, by the commission of crime, amenable to our criminal

laws. This would have justified the governor of Tennessee in detaining him till he had made satisfaction therefor." State v. Allen, 2 Humph. (Tenn.) 258. And this rule is held to apply when the requisition finds him detained under civil process. Matter of Briscoe, 51 How. (N. Y.) Pr. 422. Compare, however, *Ex parte* Rosenblat, 51 Cal. 285.

"The legal principle involved in these decisions is, that, when jurisdiction has already attached to a case, it is, in the absence of any provision to the contrary, to be deemed exclusive until it has performed its function." Spear on Extrad. (1st ed.) 276; Hagan v. Lucas, 10 Pet. (U. S.) 400; Taylor v. Carryl, 20 How. (U. S.) 583; *Ex parte* Jenkins v. Crosson, 2 Amer. Law Reg. 144; Taylor v. Taintor, 16 Wall. (U. S.) 370.

2. "If the principal is arrested in the State where the obligation is given, and sent out of the State by the governor upon the requisition of the governor of another State, it is within the third. In such cases, the governor acts in his official character, and represents the sovereignty of the State, in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse, there is no means of compulsion; but if he act, and the fugitive is surrendered, the State whence he is removed can no longer require his appearance before her tribunals, and all obligations which she has taken to secure that result thereupon at once, *ipso facto*, lose their binding effect." Taylor v. Taintor, 16 Wall. (U. S.) 366; Taintor v. Taylor, 36 Conn. 242; s. c., 4 Am. Rep. 58; State v. Allen, 2 Humph. (Tenn.) 258.

3. State v. Allen, 2 Humph. (Tenn.) 258; Taylor v. Taintor, 16 Wall. (U. S.) 336; Taintor v. Taylor, 36 Conn. 242; s. c., 4 Am. Rep. 58.

of the asylum State, pursuant to the requirements of the Constitution and laws of the United States.¹ And if such private person forcibly and unlawfully delivers such fugitive, he may be compelled to respond to him in civil damages for such act.² And if such forcible and unlawful delivery constitutes a crime by the laws of the State where the act is committed, such person may be prosecuted criminally for said offence.³ And if he is not found within the State when required to answer said charge, and has taken refuge in any other State or Territory of the United States, he may be returned to said State in the same manner as other fugitives are extradited.⁴ And it has been held that when a private person arrests a fugitive without a warrant, he should take him before the most convenient justice of the peace, and procure an affidavit to be made against him, and a warrant issued thereon. And if he fails to do this within a reasonable time, he is guilty of false imprisonment, especially if the person arrested and detained be not a fugitive from justice.⁵

21. *For what Offences Extradition may be had.*—The Constitution provides that extradition may be had for "treason, felony, or other crime;" and this embraces every criminal offence and every act forbidden and made punishable by the law of the State where the crime is committed, whether made so by common law or statute.⁶ Extradition may be had for a misdemeanor, as well as for

1. *Botts v. Williams*, 17 B. Mon. (Ky.) 687.

2. "Persons who thus deliver up fugitives without authority are liable to respond to him in damages for the illegal act." *Botts v. Williams*, 17 B. Mon. (Ky.) 687; *Ker v. Illinois*, 119 U. S. 436.

3. *Ker v. Illinois*, 119 U. S. 436.

4. *Ker v. Illinois*, 119 U. S. 436.

5. *Lavina v. State*, 63 Ga. 513.

6. *What Offences are Extraditable.*—"Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words, 'treason, felony, or other crime,' in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by the law of the State. The word 'crime' of itself includes every offence from the highest to the lowest in the grade of offences, and includes what are called 'misdemeanors,' as well as treason and felony." *Commonwealth v. Dennison*, 24 How. (U. S.) 66.

"It was objected in the court of original jurisdiction that there could be no valid requisition based upon an indictment for an offence less than a felony. This view is erroneous. . . . It is within the power of each State, except as her authority may be limited by the Constitution of the United States, to declare what shall be offences

against her laws, and citizens of other States, when within her jurisdiction, are subject to those laws. In recognition of this right, so reserved to the States, the words of the clause in reference to fugitives from justice were made sufficiently comprehensive to include every offence against the laws of the demanding State, without exception as to the nature of the crime." *Ex parte Reggel*, 114 U. S. 642.

"The constitutional requirement for the surrender of fugitives from justice applies to those charged with statutory as well as common-law crimes." *Matter of Hughes*, Phill. (N. Car.) 57; *In re Fetter*, 3 Zab. (N. J.) 311; s. c., 57 Am. Dec. 382; *People ex rel. Jourdan v. Donohue*, 84 N. Y. 438.

The term "other crime," used in the provision of the Constitution and laws of the United States, means any offence indictable by the laws of the demanding State. *Brown's Case*, 112 Mass. 409; s. c., 17 Am. Rep. 114; *Davis's Case*, 122 Mass. 324; *Commonwealth v. Green*, 17 Mass. 515; *In re Voorhees*, 3 Vroom (N. J.), 141; *In re Clark*, 9 Wend. (N. Y.) 212; *People v. Brady*, 56 N. Y. 182; *Morton v. Skinner*, 48 Ind. 143; *Johnston v. Riley*, 13 Ga. 97; *Taylor v. Taintor*, 16 Wall. (U. S.) 366; *Wilcox v. Nolze*, 34 Ohio St. 520; *Opinion of Judges in Maine*, 24 Am. Jurist, 233; 18 Alb. L. J. 156; *Opinions of Governor Miffin and Atty.-Genl. Randolph*, 20 State

other crime.¹ And it has been held that a misdemeanor punishable by a fine not exceeding five thousand dollars is within the meaning of the word "crime," as used in the Constitution.²

22. *What Persons may be extradited.*—The Constitution and laws of Congress do not authorize the extradition of any class of persons except those who were actually present in the demanding State when they committed the acts alleged against them, and have fled from justice, and are found in another State or Territory.³

Papers, U. S. 39; 13 Am. Law. Rev. 192. But see Opinions of Governor Seward, II. Seward's Works, 452; Governor Dennison in Lago's Case, 18 Alb. L. J. 149; Spear on Extrad. (1st ed.) 234.

1. "The word 'crime' of itself includes every offence, from the highest to the lowest, in the grade of offences, and includes what are called 'misdemeanors,' as well as treason and felony." *Kentucky v. Dennison*, 24 How. (U. S.) 66. And see authorities cited under the preceding note.

2. "The papers in the case copied into the record, show that the appellant is charged in Illinois with a crime which is neither treason nor felony, but is a misdemeanor punishable by fine not exceeding five thousand dollars; and the question, and only question, made by the appellant, is whether the case is one coming within the Constitution and laws of the United States relating to the surrender or extradition of fugitives from justice fleeing from one State to another. Does the act charged come within the meaning of the word 'crime' as used in the Constitution of the United States, art. 4, sect. 2? We have examined the question thus presented with such care as the time and circumstances would allow, and have come to the conclusion that the act charged is a crime within the meaning of the Constitution and laws of the United States." *Morton v. Skinner*, 48 Ind. 123, and authorities cited.

3. *Accused must have been in Demanding State.*—"It is ordained in the Constitution of the United States, that 'a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime' (Const. art. 4, sect. 2). These words, taken, as they must be, in their natural and obvious sense, do not include a case of constructive presence in the demanding State, and constructive flight therefrom, but relate only to a case where the accused is actually present in the demanding State at the time he commits the act of which complaint is made." *Wilcox v. Nolze*, 34 Ohio St. 520.

"It is clear to our mind that crimes

which are not actually, but are only constructively, committed within the jurisdiction of the demanding State, do not fall within the class of cases intended to be embraced by the Constitution and act of Congress. Such at least is the rule unless the criminal afterward goes into such State and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have 'fled' from a State, in the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime. And only this class of persons are embraced within either the letter or spirit of the Constitution, the purpose of which was to make the extradition of fugitive criminals a matter of duty, instead of mere comity between the States." *In re Mohr*, 73 Ala. 503; s. c., 49 Am. Rep. 63.

"It is difficult to see how one can flee who stands still. That there must be an actual fleeing, we think is clearly recognized by the Constitution of the United States. The words 'who shall flee' do not include a person who never was in the country from which he is said to have fled. . . . In other words, he must have been in the State, committed the crime, and fled." *Jones v. Leonard*, 50 Iowa, 106; s. c., 32 Am. Rep. 116.

"In other words, I think the constitutional provision and the act of Congress upon the subject relate only to persons who are personally present in the State or Territory where the crime is alleged to have been committed, and who flee thence to another State or Territory." *Hartman v. Aveline*, 63 Ind. 344; 30 Am. Rep. 217.

"In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from the jurisdiction, so that he could not be reached by her criminal process." *Ex parte Reggel*, 114 U. S. 642. And to the same effect as the preceding cases are *Roberts v. Reilly*, 116 U. S. 80; *In re Greenough*, 31 Vt. 279; *In re Adams*, 7 N. Y. Law Rep. 386; *In re*

And no mere constructive presence is sufficient.¹ The laws of the demanding State may have been violated; but without the corporal presence of the offender therein at the time of the commission of such offence, the power and authority of the federal laws cannot be invoked for the purpose of bringing him within the jurisdiction of such State.² But if the offender goes voluntarily into such State after the commission of the crime, and departs from its jurisdiction, and is found in another State or Territory, he may then be properly and legally extradited as a fugitive from justice.³

23: *Who are Fugitives from Justice.* — A fugitive from justice is defined to be "a person who commits a crime within a State, and withdraws himself from such jurisdiction without waiting to abide the consequences of such act."⁴ But it is not necessary that the party charged should have left the State in which the crime was committed, after an indictment has been found against him, or for the purpose of avoiding a prosecution anticipated or begun; but it is sufficient if he has within a State committed an act which, by its laws, constitutes a crime, and when he is sought to be subjected to its criminal processes to answer for his offence he has left its jurisdiction, and is found within the territory of another State or Territory.⁵

Voorhees, 3 Vroom (N. J.), 141; *In re Hughes*, Phill. (N. Car.) 57; *Jackson's Case*, 12 Am. L. Rev. 602; *Ex parte Smith*, 3 McLean (U. S.), 121; *In re Taylor*, 1 Crim. L. Mag. 505; *Spear on Extrad.* (1st ed.) 306.

1. Constructive Presence not Sufficient.

— The words "treason, felony, or other crime," "taken, as they must be, in their natural and obvious sense, do not include a case of constructive presence in the demanding State, and constructive flight therefrom." *Wilcox v. Nolze*, 34 Ohio St. 520; *In re Mohr*, 73 Ala. 503; s. c., 49 Am. Rep. 63; *Hartman v. Aveline*, 63 Ind. 344; s. c., 30 Am. Rep. 217; *Jones v. Leonard*, 50 Iowa, 106; s. c., 32 Am. Rep. 116; *Ex parte Reggel*, 114 U. S. 642; *Roberts v. Reilly*, 116 U. S. 80; *In re Greenough*, 31 Vt. 279; *In re Voorhees*, 3 Vroom (N. J.), 141; *In re Hughes*, Phill. (N. Car.) 57; *Ex parte Smith*, 3 McLean (U. S.), 121; *In re Taylor*, 1 Crim. L. Mag. 505; *Jackson's Case*, 12 Am. L. Rev. 602; *In re Adams*, 7 N. Y. Law Rep. 386.

2. *People v. Adams*, 3 Denio (N. Y.), 190. And see authorities cited under the preceding note.

3. "It is clear to our mind that crimes which are not actually, but are only constructively, committed within the jurisdiction of the demanding State, do not fall within the class of cases intended to be embraced by the Constitution or act of Congress. Such at least is the rule, unless

the criminal afterward goes into such State and departs from it, thus subjecting himself to the sovereignty of its jurisdiction." *In re Mohr*, 73 Ala. 503; s. c., 49 Am. Rep. 63.

4. Definition of Fugitive from Justice. —

"A person who commits a crime within a State, and withdraws himself from such jurisdiction without waiting to abide the consequences of such act, must be regarded a fugitive from the justice of the State whose laws he has infringed." *Matter of Voorhees*, 32 N. J. L. 141.

"A person who commits a crime in one State, for which he is indicted, and departs therefrom, and is found in another State, may well be regarded as a fugitive from justice." *Hibler v. State*, 43 Tex. 197, 201.

"The material facts are, that the prisoner is charged with a crime in the manner prescribed, and has gone beyond the jurisdiction of the State, so that there has been no reasonable opportunity to prosecute him after the facts were known. The fact in this case, that she returned to her permanent home, cannot be material." *Kingsbury's Case*, 106 Mass. 223, 227.

"The term 'flee from justice,' in art. iv. sect. 2 of the Constitution of the United States, includes cases where a citizen of one State commits a crime in another State, and then returns to his home." *Ex parte Swearingen*, 13 S. Car. 74. See also authorities cited under note 3, p. 645.

5. *Roberts v. Reilly*, 116 U. S. 80.

24. *Accused may show that he is not a Fugitive.* — A person arrested on a warrant of extradition may show on a *habeas corpus* proceeding for his release that he was not in fact in the demanding State at the time it is alleged he committed the offence, and consequently that he never fled therefrom.¹ And on such hearing he may also demand proof of his identity with the person named in the warrant of extradition.²

25. *State and Federal Courts may inquire into Cause of Restraint.* — State and federal courts have concurrent jurisdiction to inquire, by a writ of *habeas corpus*, into the lawfulness of the arrest and detention of a person charged with being a fugitive from justice; and if he is held in violation of the Constitution and laws of the United States, he will be released from custody.³

26. *Guilt or Innocence not inquired into.* — Where a person is arrested as a fugitive from justice, the question of his guilt or innocence will not be inquired into on *habeas corpus*. The determination of that fact is exclusively within the jurisdiction of the courts of the demanding State. If the proceedings for his extradition have been regular, and in compliance with the Constitution and laws of the United States, his discharge will be refused.⁴

1. "But whether or not the accused committed the acts complained of while actually present in the demanding State, is jurisdictional; and it is clearly competent in such case to show by parol evidence a defect in the executive power, however regular the extradition papers may be in matter of form." *Wilcox v. Nolze*, 34 Ohio St. 520, 524.

"We are of opinion that the probate judge did not err in discharging the prisoner, and that it was competent for him to hear oral evidence in order to establish the fact that the petitioner was not a fugitive from justice." *In re Mohr*, 73 Ala. 503; s. c., 49 Am. Rep. 63; *Ex parte Reggel*, 114 U. S. 642; *Jones v. Leonard*, 50 Iowa, 106; s. c., 32 Am. Rep. 116.

2. "The person arrested can demand proof of his identity with the person indicted." *People v. Byrnes*, 33 Hun (N. Y.), 98.

3. *Concurrent Jurisdiction of Federal and State Courts.* — "It follows, however, whenever the executive of the State, upon whom such a demand has been made, by virtue of his warrant, causes the arrest for delivery of a person charged as a fugitive from the justice of another State, the prisoner is held in custody only under color of authority derived from the Constitution and laws of the United States, and is entitled to invoke the judgment of the judicial tribunals, whether of the State or the United States, by the writ of *habeas corpus*, upon the lawfulness of his arrest and imprisonment. The jurisdiction of the courts of the States is not excluded in such cases." *Roberts v. Reilly*, 116 U. S. 80.

"Congress has not undertaken to invest the judicial tribunals of the United States with exclusive jurisdiction of issuing writs of *habeas corpus* in proceedings for the arrest of fugitives from justice, and their delivery to the authorities of the State in which they stand charged with crime. . . . Subject, then, to the exclusive and paramount authority of the national government, by its own judicial tribunals, to determine whether persons held in custody by authority of the courts of the United States, or by the commissioners of such courts, or by officers of the General Government, acting under its laws, are so held in conformity with law, the States have the right, by their own courts, or by the judges thereof, to inquire into the grounds upon which any person within their respective territorial limits is restrained of his liberty, and to discharge him if it be ascertained that such restraint is illegal; and this notwithstanding such illegality may arise from a violation of the Constitution or laws of the United States." *Robb v. Connolly*, 111 U. S. 624.

"The State courts have power to inquire into, on *habeas corpus*, the cause of the detention of one held under a requisition from the governor of another State." *Re Robb*, 64 Cal. 431; *Hartman v. Aveline*, 63 Ind. 344; s. c., 30 Am. Rep. 217. Compare *In re Robb*, 19 Fed. Rep. 26, in which it was held that the federal courts had exclusive jurisdiction in such cases.

4. *The Question of Accused's Guilt will not be inquired into.* — "But whether he is guilty or not, is not the question to be de-

27. *May show Commission of Crime by Parol Evidence.* — In a *habeas corpus* proceeding for the discharge of an alleged fugitive, it may be shown by parol evidence that the accused committed the crime in the demanding State, as alleged in the warrant of extradition, and that he is, in fact, a fugitive from the justice of said State.¹

28. *Can Fugitive be tried for Other Offences when extradited.* — There is great conflict in the authorities as to the right of a State to try an extradited person on any charge other than the one named in the warrant of extradition upon which his surrender was had. One line of authorities hold that the fugitive cannot in good faith be subjected to a prosecution for any offence other than the one upon which he was extradited.² Another class of decisions

cided here. It is whether he has been properly charged with guilt, according to the Constitution and act of Congress. . . . It is not necessary to be shown that such person is guilty; it is not necessary, as under the comity of nations, to examine into the facts alleged against him constituting the crime; it is sufficient that he is charged with committing the crime." *In re Clark*, 9 Wend. (N. Y.) 212; *State v. Schlemn*, 4 Harr. (Del.) 577, 578; *People v. Brady*, 56 N. Y. 182, 187; *Tullis v. Fleming*, 69 Ind. 15; *Matter of Voorhees*, 32 N. J. L. 141, 150; *Ex parte Swearingen*, 13 S. C. 74, 78; *In re Greenough*, 31 Vt. 279, 288; *Mohr's Case (Ex parte State of Pennsylvania)*, 18 Cent. L. J. 252; s. c., 2 Ala. L. J. 457; *Wilcox v. Nolze*, 34 Ohio St. 520.

In *Wilcox v. Nolze*, *supra*, the court said, "The governor of a State, in issuing his warrant of extradition of a fugitive from justice, acts in an executive, and not in a judicial, capacity. He is not permitted to try the question whether the accused is guilty or not guilty; he is, not to regard a departure from the prescribed forms for making the application, or as to the manner of charging the crime, in any matter not of the substance; and he is not to be controlled by the question whether the offence is, or is not, a crime in his own State, the inquiry being whether the act is punishable as a crime in the demanding State. Nor have the courts larger powers, in any of these respects, than the governor."

1. Whether the crime charged to have been committed in a warrant of extradition was committed in the demanding State, may be shown by parol evidence on the return of a writ of *habeas corpus*. The warrant is not conclusive as to facts which go to the question of jurisdiction. *Wilcox v. Nolze*, 34 Ohio St. 520.

2. **No Prosecution can be had for other Offences.** — "The constitutional safeguards on this subject concern the individual's

liberty, and not merely the State's dignity; and no one holds his liberty subject to State comity, or on any less tenure than constitutional right. Can a person who has been demanded for prosecution as a criminal, and who could not have been demanded on any other ground, be arrested after arriving here, on a different complaint, and have his original accusation dropped by the same prosecuting authority? If the requisition had been made for an expressly fraudulent purpose, and with no expectation of prosecution for the crime which was its pretext, we do not think any department of the government could sanction such a use without the plainest perversion of justice. No ingenious reasoning could remove from such a transaction the disgrace which no decent commonwealth could afford to incur. It does seem very clear to us, that it would not be much less fraudulent in law, or wrong in fact, to take advantage of such an extradition for a similar purpose, when it is discovered that it never ought to have been demanded, and was obtained on insufficient grounds. . . . The question was fully discussed on its general merits; and the very well considered case of *Commonwealth v. Hawes*, 13 Bush (Ky.), 697, was referred to with approval, as declaring the correct doctrine on the subject. It was claimed, on the argument here, that while that case may have been properly decided as applicable to extradition treaties with other nations, it had no bearing on extradition between the States. We do not perceive any ground for the distinction. The duties of one State to another are measured by law, and not by their mere good pleasure; and so are rights of citizens. The disregard of domestic duties and of foreign duties should not be considered as different in quality; and when both depend on law, it is impossible to find good reason for holding either class of obligations as undeserving of obedience." *In re Cannon*, 47 Mich. 481.

hold that when a person is properly charged with crime, the courts will not inquire into the circumstances under which he was brought into such jurisdiction.¹ The Supreme Court of the United

"To obtain the surrender of a man on one charge, and then put him upon trial on another, is a gross abuse of the constitutional compact. We believe it to be a violation also of legal principles. It is a general rule, that when, by compulsion of law, a man is brought within the jurisdiction for one purpose, his presence shall not be taken advantage of to subject him to legal demands or legal restraints for another purpose. The legal privileges from arrest, when one is in performance of a legal duty away from home, rest upon this rule, and they are merely the expression of reasonable exemption from unfair advantages. The reason of the rule applies to these cases. It should be *held*, as it recently has been in Kentucky (*Commonwealth v. Hawes*, 13 Bush (Ky.), 697), that the fugitive surrendered on one charge is exempt from prosecution upon any other. He is within the State by compulsion of law upon a single accusation: he has a right to have that disposed of, and then depart in peace." Judge Cooley, *Pr. Rev.* January, 1879, p. 176.

"It is due to good faith, to the sovereignty of the States as distinct political communities, to the terms of their intercourse with each other in demanding and surrendering fugitives from justice, and to the intent of the Constitution in providing the remedy, that when one State in this way obtains from another the custody of a person, it should limit that custody to the purpose for which it was obtained, and which was avowed by it when obtaining it; and hence, when this purpose has been answered, the State demanding and receiving the fugitive should secure to him freedom of departure and return to the State from which he was removed." Spear on *Extrad.* (1st ed.) 349.

"Wilder had been surrendered by the State of Pennsylvania to be prosecuted by the State of Ohio, and in her name, for an alleged crime. It was for this purpose alone that the State of Ohio asked his extradition. It was for this purpose alone that the State of Pennsylvania handed one of her citizens over to the officers. . . . In this case this machinery (meaning the extradition proceeding) was set in motion by Compton, Ault, & Co. by their application to the governor of Ohio. Good faith upon the part of these applicants, and good faith upon the part of Ohio to the surrendering State, demanded that Wilder, having been by force brought into Ohio for a specific purpose, should not be deprived of any rights, except such as he had forfeited by

the commission of the alleged crime. He cannot be held to have forfeited any right before conviction. It is claimed that he was indebted to Compton, Ault, & Co. If he was, it was his right to be sued in the jurisdiction in which he was domiciled unless he voluntarily came into the jurisdiction of Ohio. It was bad faith in Compton, Ault, & Co. to commence a civil action and attempt to serve a summons and an order of arrest therein upon Wilder before conviction and before he had an opportunity to return to his home. It would be bad faith in this State if her courts should make such service effective." *Compton v. Wilder*, 40 Ohio St. 130.

This case, while relating to the service of a summons and arrest in a civil action, nevertheless strongly supports the doctrine, that, when a person is extradited upon a particular charge, the jurisdiction of the courts to try him should be limited to that case alone, and that, after the disposition of such charge, he should be allowed freedom to depart the jurisdiction into which he was forcibly brought, and a reasonable time given him in which to return to the place of his asylum if he so desires.

1. **May be tried for Other Offences when extradited.**—In the *Noyes Case* (U. S. Dist. Ct. N. J.), 17 Alb. L. J. 407; s. c., 11 Chic. L. N. 9, two questions were discussed: 1, Whether a fugitive from justice extradited from one State to another on the charge of a specified crime can be held by the courts of the State to which he is sent for trial for another and different crime; 2, Whether such person may be detained by the authorities of the State for prosecution notwithstanding it may appear that his arrest under the rendition proceedings was without legal authority. *Judge Nixon*, in this case, says, "It may be true that where a treaty exists between two independent nations in regard to the surrender of fugitives, or a criminal is given up on the allegation that he had committed a specified crime, good faith between the governments requires that he should not be tried for other offences. It may be true that when a citizen has been placed under restraint without lawful cause, and without due process of law, he can hold every one who caused or contributed to his imprisonment to a strict accountability in a civil action. In the one case the right of asylum is sacred, except so far as it has been yielded by the terms of the international compact, and any abuse or perversion by one government of the privileges of arrest granted by the treaty is a just cause of complaint

States has not yet passed upon this question, as it arises under the interstate extradition law; but it has recently authoritatively decided that a criminal extradited pursuant to a treaty with a foreign nation, cannot be tried for any offence other than the one for which he was extradited, and that, after such charge has been disposed of, he is entitled to a reasonable time and opportunity to return to the country of his asylum. And upon principle this case strongly supports the doctrine of the first line of authorities.¹

on the part of the other; in the other case, so jealous is the law in regard to the invasion of the individual liberty of the citizen, that all unauthorized restraint of his person is followed by damages against the offending party. . . . A person arraigned for the commission of a felony cannot plead in bar that he ought to be excused from answering the charge because other parties trespassed upon his personal rights. It is confounding of matters which are essentially separate and distinct. It is a claim on the part of the accused that his criminal violations of the law are to be condoned by his personal injuries. It is asking a court to suspend its most responsible duties; to wit, the trial of alleged offenders against the penal code of the State, while the persons charged with the crime are instituting preliminary investigation into the method adopted to bring them within its jurisdiction. Such a course, for obvious reasons, is allowable in a civil suit between private litigants, but, for like obvious reasons, cannot be and never has been allowed in criminal proceedings when the object of the prosecution is to punish the offender against the public."

A person taken from one State to another in extradition proceedings, after being tried, acquitted, and discharged, may be re-arrested and tried for another and different offence before being permitted to leave the State. *State v. Stewart*, 60 Wis. 587; s. c., 50 Am. Rep. 388.

When a person is charged with crime, the court will not inquire into the circumstances under which he was brought within its jurisdiction. *State v. Brewster*, 7 Vt. 118; *Daw's Case*, 18 Pa. St. 37; *State v. Smith*, 1 Bailey (S. Car.), 283; *State v. Ross*, 21 Iowa, 467; *People v. Rowe*, 4 Park. (N. Y.) Cr. 253; *Ex parte Kraus*, 1 Barn. & C. 258; *State v. Wenzel*, 77 Ind. 428; *Ker v. People*, 110 Ill. 627; s. c., 51 Am. Rep. 706; *Ham v. State*, 4 Tex. App. 645.

But it has been held that when a person is brought within the jurisdiction of a court upon a criminal charge as a mere pretext, for the purpose of proceeding against him in a civil action, he cannot be arrested at the instance of any party concerned in the device by which he was

brought within the jurisdiction. *Wells v. Gurney*, 8 Barn. & C. 769; *Benninghoff v. Oswell*, 37 How. (N. Y.) Pr. 235; *Snelling v. Watrous*, 2 Paige (N. Y.), 214; *Carpenter v. Spooner*, 2 Sandf. (N. Y.) 717; *Ilisley v. Nichols*, 12 Pick. (Mass.) 270, 275; *Wanzer v. Bright*, 52 Ill. 35, 40, 41; *Luttim v. Benin*, 11 Mod. 50.

This rule also applies to cases where the criminal charge is used to bring a person from one State to another for the purpose of holding him in a civil action. *Lagrange's Case*, 14 Abb. (N. Y.) Pr. N. S. 333, n.; *Underwood v. Fetter*, 6 N. Y. Leg. Obs. 66; *Adriance v. Lagrange*, 59 N. Y. 110.

In the case of *Williams v. Bacon*, 10 Wend. (N. Y.) 636, the rule was held not to apply when the charge of crime was made in good faith, and the civil suit was not commenced until after acquittal.

1. The Rule in Extradition under Treaty.

—"Upon a review of these decisions of the federal and State courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." *United States v. Rauscher*, 119 U. S. 407, 429-430; s. c., 9 Crim. L. Mag. 178.

Before this authoritative decision, there was as great a conflict in the authorities as to the right to try a person extradited from a foreign country under treaty stipulations, for any other offence than the one upon which his surrender was obtained, as there is now on the like question involved in a case where a person is extradited under interstate extradition laws. And it is believed that the subsequent decisions on this subject will adopt the rule here stated as being the correct doctrine in cases of

29. *Authority of Courts in Certain Cases.* — Many of the decisions which hold that the circumstances under which the accused is brought into a jurisdiction will not be inquired into on *habeas corpus*, rest upon the principle that the alleged fugitive having been brought within the jurisdiction by the wrongful acts of individuals only, the jurisdiction of the courts of such State is not affected, and the fugitive will have to rely upon his right of action against his forcible or fraudulent abductors.¹ But when the officers of the demanding State, or the executive authority thereof, act fraudulently under color of federal laws, the rule seems to be different. Thus, it has been held by high authority, and with great show of reason and justice, that where the executive authority of a demanding State falsely represents a citizen of another State to be a fugitive from the justice of the demanding State, when in fact he was never actually in such State, and by such representation, and under color of the extradition laws, procures his surrender, removing the alleged fugitive to the demanding State, under color of the federal law, he will be released on *habeas corpus* by the federal courts in the demanding State, and given time to return to the State from which he had been taken.²

interstate extradition. There can certainly be no real grounds for a distinction.

1. "A person arraigned for the commission of a felony cannot plead in bar that he ought to be excused from answering the charge because other parties trespassed upon his personal rights." *In re Noyes* (U. S. Dist. Ct.), 17 Alb. L. J. 407.

"The question is presented whether the people must refrain from arresting a 'fugitive from justice' simply because the complainant, or some one interested in the prosecution, has, in the absence of force, enticed the prisoner into the State by some false and fraudulent representations. . . . The unjustifiable act, if any, was by one or several individuals against another individual and his individual rights. Those of the public were not invaded or affected except remotely, as it might be the duty, or to the interest, of a government to prohibit by law frauds not criminal." Gov. Hill's Op. in *Matter of Brown*, 8 Crim. L. Mag. 313.

"It must be remembered that this view of the subject does not leave the prisoner or the Government of Peru without remedy for his unauthorized seizure within its territory. Even this treaty with that country provides for the extradition of persons charged with kidnapping; and on demand from Peru, Julian, the party who is guilty of it, could be surrendered and tried in its courts for this violation of its laws. The party himself would probably not be without redress, for he could sue Julian in an action of trespass and false imprisonment; and the facts set out in the plea would

without doubt sustain the action." *Ker v. Illinois*, 119 U. S. 436.

"There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court." *Ker v. Illinois*, 119 U. S. 436, citing the following cases: *Ex parte Scott*, 9 Barn. & C. 446; *Lopez v. Sattler's Case*, 1 Dears. & B. C. C. 525; *State v. Smith*, 1 Bail. (S. Car.) 283; s. c., 19 Am. Dec. 679; *State v. Brewster*, 7 Vt. 118; *Dow's Case*, 18 Pa. St. 37; *State v. Ross*, 21 Iowa, 467; *Ship Richmond v. U. S. (The Richmond)*, 9 Cranch (U. S.), 102.

2. A case supporting the text has recently been decided in the United States Circuit Court at Chattanooga, Tenn., the Hon. D. M. Key presiding. This case is, perhaps, as yet unreported; but the writer and his associates having been the petitioner's counsel, he is able to give the main facts in the case. It was alleged that the petitioner, Henry Jackson, while residing in the city of Chicago, and State of Illinois, by means of certain false and fraudulent representations, made through newspaper advertisements and letters sent to one T. H. Ewing of Chattanooga, Tenn., obtained from the said Ewing the sum of four hundred dollars, as the purchase price of a certain horse. An affidavit was made before a justice of the peace, charging the said Jackson with obtaining money under false pretences; and shortly thereafter he

Again, it has been held that where an alleged fugitive has been kidnapped in a foreign jurisdiction, and brought by force, against

was extradited, and taken before said justice to answer said charge. After a preliminary hearing he was committed to the jail of Hamilton County, Tenn., to await the action of the grand jury of said county.

The petitioner thereupon applied to the United States Circuit Court for a writ of *habeas corpus*, stating in his petition, among other things, that at the time it was alleged he committed the crime in the State of Tennessee, he was not within the boundaries of said State, and that he never was actually present in said State, until he was forcibly, and against his will, brought therein under the extradition proceedings; that he was not in fact a fugitive from justice, and that if guilty of any offence, which the petitioner denied, it was one cognizable by the courts of Illinois alone; that the laws of the United States had been wrongfully invoked for the purpose of bringing him within such jurisdiction, and that he was deprived of his liberty without due process of law, and in violation of the Constitution and laws of the United States; that he had been forcibly seized in the night-time in the city of Chicago, by one L. P. Elliott, an officer and agent of the State of Tennessee, and that the said Elliott hastily, secretly, and stealthily removed the petitioner from the State of Illinois to the State of Tennessee, without giving him an opportunity to communicate with his friends, or seek relief from the courts of the State of Illinois; and that the agents of the State of Tennessee falsely and fraudulently represented to the governor of the State of Illinois, that petitioner was a fugitive from justice. The petitioner prayed a release from custody, and that he be allowed to return to his home in the State of Illinois, unmolested.

The court, on a hearing of the cause, made, and entered of record, the following order:—

IN THE UNITED STATES CIRCUIT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE. BEFORE THE HON. D. M. KEY, ONE OF THE JUDGES OF SAID COURT.

Ex parte Henry Jackson

John E. Conner, Sheriff of Hamilton County, Tenn., C. Snyder, Justice of the Peace of Hamilton County, Tenn., and L. P. Elliott, officer and agent of the State of Tennessee.

*Petition
for
Writ of
Habeas
Corpus.*

held and restrained as in the petition alleged, and it being conceded and agreed by the parties that the petitioner prior to his extradition, as stated in the petition, was a citizen and resident of the State of Illinois, and it being further conceded and agreed that the petitioner prior to his extradition was never in the State of Tennessee, and that he had not fled therefrom, and it appearing to the satisfaction of the court that the petitioner was illegally, and in violation of the Constitution and laws of the United States, extradited from the State of Illinois and brought within the jurisdiction of the courts of Tennessee by the respondents, and by the State of Tennessee, its officers and agents, and that he is now, in violation of the Constitution and laws of the United States, detained, and held in custody, as alleged in his petition, it is therefore by me ordered and adjudged, that the petitioner be released and discharged from custody by the aforesaid John E. Conner; and it is further ordered and adjudged, that, upon the release of the petitioner, he be allowed a reasonable and proper time in which to depart from the State of Tennessee, and return to the State of Illinois unmolested, and that he be not again arrested until he shall have had a reasonable and proper time to return to the place whence he was taken: and this order extends to the State of Tennessee, and all her officers, agents, and citizens.

There are other cases, which, while not relating to extradition proceedings, are yet strongly analogous in principle to the Jackson case, *supra*. In the matter of Allen, 13 Blatchf. (U. S.) 271, Justice Blatchford said, "The arrest in New Hampshire was not justified by the order of the district court; and the arrest having been illegal, the subsequent imprisonment in the State of Vermont, in pursuance of the original arrest, cannot be justified. When the original arrest is unlawful, the detention is improper, although the warrant under which the improper arrest is made is valid. The fact that the officer had the power to arrest the bankrupt after he was brought within the State of Vermont, is immaterial, inasmuch as that power was improperly obtained. The principle is thus declared by Lord Holt, — *Suttin v. Benin*, 11 Mod. 50, — 'If a man is wrongfully brought into a jurisdiction, and there lawfully arrested, yet he ought to be discharged, for no lawful thing, founded upon a wrongful act, can be supported.'"

In *Ilsley v. Nichols*, 12 Pick. (Mass.) 270; s. c., 22 Am. Dec. 425, Chief Justice Shaw, after reviewing the authorities, says, "These cases seem to establish the general

his will, within the jurisdiction of the State whose laws he has violated, such person will, on a demand made for his release by the executive authority of the State from which he was thus taken, be discharged from custody, and allowed to return to the place of his asylum.¹ But where the alleged fugitive is decoyed into a jurisdiction by means of falsehoods, artifice, and fraud, and no force is used, the rule is different.²

30. *Jurisdiction of Federal Courts to release.* — A person arrested under a warrant of extradition from one State to another, is in custody under or by color of the authority of the United States, and the federal courts have jurisdiction to inquire by *habeas corpus*

principle that a valid and lawful act cannot be accomplished by unlawful means, and, whenever such unlawful means are resorted to, the law will interpose some suitable remedy, according to the nature of the case, to restore the party injured by means of these unlawful means, to his rights."

1. *When Fugitive will be released.* — "But the facts in this case show that the prisoner was not brought into our jurisdiction in pursuance of the mode regulated by law. That the manner of his arrest, and the means employed to bring him out of the State of New York and within the State of Pennsylvania, constitutes the crime of kidnapping at common law, will not be denied; that it was in express violation of the statutes of the State of New York, punishing the crime of kidnapping, will not be disputed. . . . This, therefore, brings us to face the importance of the question, Shall this prisoner, who stands indicted for violation of law within our jurisdiction, be set at large, only on considerations of utility and mutual convenience of the States of New York and Pennsylvania, *ex comitate ob reciprocam utilitatem*? We are not wholly without precedent, however. In *Dow's Case*, 18 Pa. St. 37, Chief Justice Gibson, a greater judge than whom never lived, said, 'Had the prisoner's release been demanded by the executive of Michigan, we would have been bound to set him at large.' It was not shown nor alleged in that case that any law of Michigan had been violated. But in this case the statutes of the State of New York have been violated, aside from the invasion of her territory. Shall it be said, then, that a court sitting to administer and vindicate the law in this case, shall close its eyes to the violation of the law by which the prisoner is brought within its jurisdiction? That the end to be accomplished justifies the means employed, can not and ought not to become a maxim of legal jurisprudence. To deny this demand for the release of the prisoner would be to encourage the violation of that comity which does now, and ought always to, exist between adjoining States in this

government. It would be, in our judgment, a precedent full of evil consequences to the citizen in his right to be secure in his liberty. When one violates the law, and flees from justice, the Constitution of the United States and the act of Congress thereunder, afford a complete remedy for his arrest and return." *Commonwealth v. Shaw* (Com. Pl. Ct. of Clearfield Co. Pa.), 6 Crim. L. Mag. 245.

2. "The law, in its desire to punish the guilty, will not scrutinize the methods employed in securing the offender, so long as no criminal law is violated, and will not, in such cases, enter into an investigation of such methods, even though it might disclose the fact the prisoner was over-persuaded, unduly influenced, or grossly deceived and misled in his coming into our State. If the prisoner, in his weakness, credulity, or ignorance, yields to the persuasions or misrepresentations of those who are endeavoring to capture him, and voluntarily comes into our State, and is arrested, he has no one to blame but himself. The law has never been construed to prevent the apprehension of a criminal by means of artifice, trick, or misrepresentation." *Gov. Hill's Op. in Matter of Brown*, 8 Crim. L. Mag. 313.

"The question remains, Was the duty of the executive to deliver up the petitioner at all affected by the fact that he was induced by the trickery and fraud of private parties to come within this jurisdiction? I am entirely clear that it was not. The contention that a party charged with crime is entitled to be released on *habeas corpus*, because, by a stratagem, which, though morally reprehensible, is not criminal, in a legal sense, he is induced to come within territory where he may be properly arrested, is not supported by a single authority. . . . The criminal law, administered, as it is, for the protection of the whole people, does not take cognizance of the means by which alleged offenders are apprehended, so long as no act is done which in itself is an infraction of the law." *Ex parte Brown* (U. S. Dist. Ct. N. Y.), 8 Crim. L. Mag. 676.

into the legality of the arrest and imprisonment. And if it appear that the prisoner is deprived of his liberty in violation of the Constitution and laws of the United States, he will be released on *habeas corpus*.¹ And this authority may be invoked on behalf of the prisoner, either at the place of his asylum, or in the demanding State, after his removal thereto.² The federal courts also have jurisdiction to release from imprisonment any person confined under color of the authority of a State without "due process of law," contrary to the fourteenth amendment.³

31. *What is Due Process of Law.*—Due process of law has been defined to mean "a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."⁴ Thus it will be seen that the question of "due

1. "It follows, however, that, whenever the executive of the State, upon whom such a demand has been made, by virtue of his warrant, causes the arrest for delivery of a person charged as a fugitive from the justice of another State, the prisoner is held in custody only by color of authority derived from the Constitution and laws of the United States, and is entitled to invoke the judgment of the judicial tribunals, whether of the State or the United States, by the writ of *habeas corpus*, upon the lawfulness of his arrest and imprisonment." *Roberts v. Reilly*, 116 U. S. 80, 94; *Robb v. Connolly*, 111 U. S. 624, *In re Doo Woon*, 18 Fed. Rep. 898; *Ex parte Morgan*, 20 Fed. Rep. 298; *Ex parte Smith*, 3 McLean (U. S.), 121; *Ex parte McKean*, 3 Hughes (U. S.), 23; *Matter of Leary*, 10 Ben. (U. S.) 197; *Matter of McDonald*, 9 Am. L. Reg. 661; *Matter of Kaine*, 10 N. Y. Leg. Obs. 257.

2. See authorities cited in preceding note, and the Jackson case cited in note 2, p. 651; Cooley's Const. Lim. (4th ed.) 21, 22, note 1.

3. "The petition is based upon the clause of section 1 of the fourteenth amendment, which reads, 'Nor shall any State deprive any person of life, liberty, or property without due process of law;' and sections 751-755 of the Revised Statutes, which provide for the issuing of the writ of *habeas corpus* by the courts and judges of the United States. . . . In relation to the limitation upon the power of the State to 'deprive any person of life, liberty, or property,' Congress has exercised this power in the passage of the act of Feb. 5, 1867 (14th stat. 385; Rev. Stat. § 753), which authorizes the national courts to inquire by *habeas corpus* into the cause of detention of any one who 'is in custody,' whether under the authority of the State or otherwise, 'in violation of the Constitution, or a law or treaty of the United

States,' and to discharge him therefrom in case he is held in contravention thereof. If, then, the petitioner is restrained of his liberty or adjudged to lose his life by the act or agency of the State, without due process of law, he is so restrained or adjudged in violation of the Constitution of the United States, and therefore this court has power, and it is its duty, to interfere and relieve him from such restraint or adjudication." *In re Ah Lee*, 5 Fed. Rep. 899.

"Circuit courts of the United States have jurisdiction on *habeas corpus* to discharge from custody a person who is restrained of his liberty in violation of the Constitution of the United States, but who, at the time, is held under State process for trial on an indictment charging him with an offence against the laws of the State." *Ex parte Royall* No. 1, 117 U. S. 241.

4. Quoted from *Pennoyer v. Neff*, 95 U. S. 714, 733. Chancellor Kent, in his Commentaries, vol. i. 612, says, "The better and larger definition of due process of law is, that it means law in its regular course of administration through courts of justice." Perhaps the most often quoted definition of what constitutes due process of law, or law of the land (which means the same thing), is that given by Mr. Webster in the Dartmouth College case: "By the law of the land is most clearly intended the general law, — a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Every thing which may pass under the form of an enactment is not therefore to be considered the law of the land." *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 519; *Works of Webster*, vol. v. p. 487.

process of law" cannot arise in a case of interstate extradition when the proceedings have all been regular, and the requirements of the Constitution and laws of the United States have been complied with.¹ If, however, after procuring the presence of the accused in the demanding State, it is sought to try him for an offence made punishable under an unconstitutional law, or if for any other reason the State courts have no jurisdiction of the subject-matter or of the person, such person would, under these circumstances, be restrained of his liberty without "due process of law," and he may be discharged by a writ of *habeas corpus*.² The court has a discretion whether it will discharge him in advance of his trial, or after conviction. And after conviction, the court has still a discretion whether the accused shall be put to his writ of error from the highest court of the State, or whether it will proceed by writ of *habeas corpus*, summarily to determine the question of the illegality of his restraint.³

32. *Executive Discretion may be reviewed.* — The judiciary possess no power to compel the executive to surrender a fugitive

1. *Pennoyer v. Neff*, 95 U. S. 714, 733; 1 Kent's Com. 612; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 519.

2. "But with respect to the other propositions, it is clear that, if the local statute under which Royall was indicted, be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity. As was said in *Ex parte Siebold*, 100 U. S. 371, 376, 'An unconstitutional law is void, and is no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.' So in *Ex parte Yarbrough*, 110 U. S. 651, 654, it was said that if the statute prescribing the offence for which Yarbrough and his associates were convicted was void, the court which tried them was without jurisdiction, and they were entitled to be discharged. . . . We are, therefore, of opinion that the circuit court has jurisdiction upon writ of *habeas corpus* to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution." *Ex parte Royall* No. 1, 117 U. S. 241.

"If, then, the petitioner is restrained of his liberty or adjudged to lose his life by the act or agency of the State, without due process of law, he is so adjudged or restrained in violation of the Constitution of the United States, and therefore this court has power, and it is its duty, to interfere and relieve him from such restraint or adjudication." *In re Ah Lee*, 5 Fed. Rep. 899; s. c., 2 Crim. L. Mag. 336.

3. "Undoubtedly the writ should be

forthwith awarded, 'unless it appears from the petition itself that the party is not entitled thereto,' and the case summarily heard and determined 'as law and justice require.' Such are the express requirements of the statute. If, however, it is apparent upon the petition that the writ if issued ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. *Ex parte Watkins*, 3 Pet. (U. S.) 193, 201; *Ex parte Milligan*, 4 Wall. (U. S.) 2, 111. . . . The question as to the constitutionality of the law under which he is indicted, must necessarily arise at his trial under the indictment; and it is one upon which, as we have seen, it is competent for the State court to pass. . . . We are of opinion, that while the circuit court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the national Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. . . . When the State court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. The latter was substantially the course adopted in *Ex parte Bridges*, 2 Woods (U. S.), 428." *Ex parte Royall* No. 1, 117 U. S. 241.

from justice, or in any manner to control his discretion; but after he has acted, and the accused has been taken into custody under his warrant, the case may be investigated on *habeas corpus*, and if his detention be illegal, he will be discharged.¹

33. *Rights of the Alleged Fugitive.* — When a person is arrested in the place of his asylum, and charged with being a fugitive from justice, he has the legal right to demand proof that he was within the demanding State at the time it is alleged he committed the crime charged against him, and that he subsequently withdrew from its jurisdiction.² And for this purpose he should be allowed a reasonable opportunity to apply for a writ of *habeas corpus* before being actually delivered to the agent of the demanding State.³

1. *Executive Action Reviewable.* — “When a party escaped from another State is arrested as a fugitive from justice, the judiciary, by a writ of *habeas corpus*, have jurisdiction to examine into the case; and though the courts possess no power to control the executive discretion, and compel a surrender, yet, the executive having once acted, that discretion may be examined into in every case where the liberty of the subject is involved.” *Matter of Manchester*, 5 Cal. 237.

“The courts have jurisdiction to interfere by writ of *habeas corpus*, and examine the grounds upon which the executive warrant for the apprehension of an alleged fugitive from justice from another State is issued, and, in case the papers are defective and insufficient, to discharge the prisoner.” *People v. Brady*, 56 N. Y. 182; *Ex parte Smith*, 3 McLean (U. S.), 121; *Matter of Briscoe*, 51 How. Pr. (N. Y.) 422; *Jones v. Leonard*, 50 Iowa, 106; s. c., 32 Am. Rep. 116; *Mohr's Case*, 73 Ala. 503; s. c., 49 Am. Rep. 63; *Hartman v. Aveline*, 63 Ind. 344; s. c., 30 Am. Rep. 217.

In *Robb v. Connolly*, 111 U. S. 624, the Supreme Court say, “What we decide — and the present case requires nothing more — is, that, so far as the Constitution and laws of the United States are concerned, it is competent for the courts of the State of California, or for any of her judges, having power, under her laws, to issue writs of *habeas corpus*, to determine, upon writ of *habeas corpus*, whether the warrant of arrest, and the delivery of the fugitive to the agent of the State of Oregon, were in conformity with the statutes of the United States.”

“It must appear, therefore, to the governor of the State to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled,

by an indictment or an affidavit, certified as authentic by the governor of the State making the demand; and, second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*. The second is a question of fact, which the governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in *habeas corpus*, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court.” *Roberts v. Reilly*, 116 U. S. 80, 95. But see *Ex parte Willard* (S. C.), cited *Sergeant's Const. L.* 395.

2. Undoubtedly, the act of Congress did not impose upon the executive authority of the Territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. *Ex parte Reggel*, 114 U. S. 642, 651.

3. The fact is not to be lost sight of, that the extradition remedy, while designed to serve the purposes of public justice in which all the States have a common interest, may, nevertheless, be resorted to in virtual fraud, and for ends unknown to and unintended by the Constitution. It is capable of abuses. That discretion of the executive authority, in both demanding and surrendering persons charged with being fugitive criminals, which is adopted

EXTRA-HAZARDOUS—EXTRAORDINARY—EXTREME.

And some of the States have incorporated this wise and humane principle into a local statute, by which it is provided that the actual surrender of the alleged fugitive shall not be made until an opportunity has been given him to test the legality of his restraint and proposed delivery by a writ of *habeas corpus*.¹

34. *Authorities.*—It is believed that all the important and material questions heretofore considered or passed upon by the courts or writers upon the subject have been fully presented. But doubtless the doctrines involved in both international and interstate extradition will be more fully developed and expanded by future adjudications.²

EXTRA-HAZARDOUS.—See HAZARDOUS.

EXTRAORDINARY.—Beyond the ordinary; what does not ordinarily occur in the transactions of human affairs.³

EXTRAORDINARY CARE. See CARE; NEGLIGENCE. — More than ordinary care; utmost care; the highest degree of care.⁴

EXTREME.—See CRUELTY; DIVORCE.⁵

to be preventive of frauds and abuses, is certainly conducive to the end sought by the Constitution. Moreover, the common law of the land adds to this discretion the writ of *habeas corpus*, as the privilege of every one who is restrained of his personal liberty. Hence the delivering executive who issues his warrant for the arrest and delivery of an accused party, should always direct, that, before his actual delivery to the agent of another State or Territory, he should have a reasonable opportunity to apply for a writ of *habeas corpus*, to the end that he may assert his legal rights before a court of justice, and be discharged from custody if the proceedings against him shall be found illegal. Spear on Extrad. (1st ed.) 339, 340.

As illustrating the importance of this principle, and showing the gross injustice which may result from a denial of the right of the alleged fugitive to a reasonable time and opportunity to apply to the courts for relief by writ of *habeas corpus*, in the State of his residence, before being removed to the demanding State, see Jackson case, note 2, p. 651.

1. See statute of Mass. on this subject.

2. *Authorities for Extradition.*—See, generally, Spear on Extradition; Whart. Cr. Pl. & Pr. (8th ed.); Whart. Confl. of laws; Article on "Fugitives from Justice" (by Thornton), 3 Crim. L. Mag. 787; and note to Fetter Case, 57 Am. Dec. 382. To each of these authorities, and especially to the able work of Dr. Spear, this article is much indebted.

3. *Aveland v. Lucas*, 5 C. P. D. 211; s. c., 49 L. J. R. C. P. D. 643. And see *Leary v. United States*, 14 Wall. (U. S.) 607.

Where a statute allows a second bill of exceptions in extraordinary cases, these are cases which do not ordinarily occur in the transactions of human affairs, as where a supposed murdered man is found to be alive, or where there has been some providential cause, etc. The statute does not include a case of simple after-discovered evidence. *Cox v. Hillyer*, 65 Ga. 57.

A debt created by borrowing money to redeem outstanding obligations of the State is not in conflict with a constitutional provision limiting the power of the State to contract public debts to the "purpose of defraying extraordinary expenditures." The word "extraordinary" is not used in its popular sense, but in contradistinction to "ordinary," which is used in the sense of current or annual expenditures. *Bond Debt Cases*, 12 S. Car. 200, 281.

Where a constitution gives the governor the authority to convene the General Assembly on extraordinary occasions, he is sole judge of what are extraordinary occasions. *Whiteman's Ex'x v. W. & S. R. R. Co.*, 2 Harr. (Del.) 514; s. c., 33 Am. Dec. 411.

4. It is not erroneous to use this phrase in a charge to a jury to express the highest degree of care. *T. W. & W. R. R. Co. v. Baddeley*, 54 Ill. 19.

5. To constitute extreme hazard, which justifies the abandonment of a vessel, her situation must be such that there is imminent danger of her being lost, notwithstanding all the means that can be applied to get her off, all the means within the power of the crew to use, and all the assistance within the power of the master to obtain. *King v. Hartford Ins. Co.*, 1 Conn. 422.

FABRICATE—FACE—FACILITY—FACT.

FABRICATE.¹

FACE.²

FACILITY.³

FACT.—A thing done; reality; not supposition; action; deed.⁴

1. Where an act made it an offence for any one to "fabricate" a voting paper, the word was *held* to import a criminal intention, in the absence of which there could be no offence against the statute. "'Fabricate' implies fraud or falsehood, a false or fraudulent concoction, knowing it to be wrong." *Aberdale Local Board v. Hammett*, L. R. 10 Q. B. 162.

2. An agreement to pay one-half the *face* of a judgment is an agreement to pay one-half the sum for which the judgment was rendered, and does not include accrued interest. *Osgood v. Bringolf*, 32 Ia. 265.

An irregularity on the face of the process is not necessarily an irregularity stated in the writ. It may appear by reference to extrinsic circumstances. *Woodcock v. Bennet*, 1 Cow. (N. Y.) 711; s. c., 13 Am. Dec. 568.

Face to Face.—The constitutional right of a prisoner to meet the witnesses against him *face to face* is not violated by the admission of a deposition, sworn to and reduced to writing in the presence of the accused and a committing magistrate, where the witness himself is dead at the time of the trial. *Johnston v. State*, 2 Yerg. (Tenn.) 58; *State v. McO'Blemis*, 24 Mo. 402; *Commonwealth v. Richards*, 18 Pick. (Mass.) 434; *Summons v. State*, 5 Ohio St. 325. Nor does this right of a prisoner preclude the admission of dying declarations. *Miller v. State*, 25 Wis. 384; *Brown v. Commonwealth*, 73 Pa. St. 321; *Commonwealth v. Carey*, 12 Cush. (Mass.) 246; *People v. Glenn*, 10 Cal. 32; *State v. Nash*, 7 Iowa, 347; *Campbell v. State*, 11 Ga. 353; *Robbins v. State*, 8 Ohio St. 131.

3. A lease of the booming facilities, in connection with the water-front, is a lease of the owner's right to erect booms to aid in storing logs and floating them to market. The lessee has no right to obstruct navigation, his rights being subject to those of the public. Nor has he a right to appropriate the soil under the water. *Sullivan v. Spotswood*, 82 Ala. 163.

Under a statute making it the duty of railroads to provide reasonable facilities for receiving, forwarding, and delivering passengers and goods, and giving railroad commissioners authority to enforce this duty by order, it was *held* that the commissioners had no power to order structural works, such as the enlargement or erection of stations. *S. E. Ry. Co. v. Ry. Commrs.*, 5 Q. B. Div. 217. Nor to take cognizance

of a case of overcharge of fare. *G. W. Ry. Co. v. Ry. Commrs.*, 7 Q. B. Div. 182.

"Facilities" was the name given to certain bank notes in the State of Connecticut, payable two years after the close of the war of 1812. *Springfield Bank v. Merrick*, 14 Mass. 322.

4. Walker Dict. quoted in *Lackey v. Vanderbilt*, 10 How. Pr. (N. Y.) 155. "All of these definitions," said the court, "call, and some of them emphatically, for the truth." There can be but one statement of the truth of a transaction. Consequently, an act abolishing special pleading, and requiring a plain and concise statement of the facts, allows only one statement, and not several counts varying the allegations so as to meet the proofs.

"The terms 'fact' and 'truth' are often used in common parlance as synonymous; but, as employed in reference to pleading, they are widely different. A fact in pleading is a circumstance, act, event, or incident; a truth is the legal principle which declares or governs the facts and their operative effect." *Drake v. Cockcroft*, 4 E. D. Smith (N. Y.), 34.

The word "facts," however, as used in the expression, "Facts constituting a cause of action," or "defence," means, not truths, but physical facts capable of being established by evidence, and from which, when established, the right to maintain the action, or the validity of the defence, is a necessary conclusion of law. *Lawrence v. Wright*, 2 Duer (N. Y.), 673. "Facts are the sources or materials of evidence: evidence is the medium by which facts are presented." *Burrill's Law Dict.*

"Facts constituting a cause of action" are "those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of the facts." *Clay Co. v. Simonsen*, 1 Dak. 403.

"Facts" in the jurat to an answer in equity is equivalent to "matters." *Whelpley v. Van Epps*, 9 Paige (N. Y.), 332; s. c., 37 Am. Dec. 400.

See, in general, on the subject of facts, *Holland's Jurisprudence*, 78, 88, sq., and *Ram on Facts*.

After the Fact.—See AFTER.

Attorney in Fact.—An agent acting under a special power created by deed. *Porter v. Hermann*, 8 Cal. 619.

Errors of Fact.—This phrase, used in a statute allowing the setting aside of the

FACTORY.—A building or collection of buildings appropriated to the manufacture of goods.¹

FAIL.—See FAILURE.²

FAILURE.—Bankruptcy; insolvency; the not meeting of current obligations at maturity.³

verdict of a justice's court therefor, does not refer to any erroneous finding of facts from the evidence by the court or jury, but includes those facts which affect the regularity or validity of the proceedings on the record, and still do not appear upon it or in the evidence, as the infancy or coverture of some of the parties. *Biglow v. Sanders*, 22 Barb. (N. Y.) 147; *Adsit v. Wilson*, 7 How. Pr. (N. Y.) 64; *Kasson v. Mills*, 8 How. Pr. (N. Y.) 377.

Malice in Fact is where the wrongful act is committed with a bad intent from motives of ill will, resentment, hatred, a desire to injure, or the like. It is to be found by the jury from the facts in evidence, and is distinguished from malice in law, which is established by legal presumption. *Pullen v. Glidden*, 66 Me. 202; *Moore v. Stevenson*, 27 Conn. 14; *Hotchkiss v. Porter*, 30 Conn. 414.

Marriage in Fact.—Marriage established by direct evidence, as distinguished from marriage presumed from evidence of cohabitation and reputation. In criminal actions, as for adultery, marriage proved must be marriage in fact. *State v. Winkley*, 14 N. H. 480.

Facts of the Case.—See CASE.

1. *Webster v. Liebenstein v. Baltic Ins. Co.*, 45 Ill. 301. And see *Atwood v. De Forest*, 19 Conn. 518.

"The word 'factory' does not necessarily mean a single building or edifice, but may apply to several, where they are used in connection with each other for a common purpose, and stand together in the same enclosure. This is the popular usage, and also that of the lexicographers." Accordingly, the word, used in an insurance policy, was held to include a building ten feet distant from the main building in which the manufacture of chairs was carried on, which was in use as an engine and dry house. *Liebenstein v. Baltic Ins. Co.*, 45 Ill. 301.

An ashery, a building used for depositing ashes, and converting them into potash, is a factory within a burglary act. *Blackford v. State*, 11 Ohio St. 327.

In a covenant to keep insured, the term "factory" embraces the fixed machinery necessary to operate the factory, as a water-wheel, shafting, and gearing. "A building is no more a factory, without machinery, than machinery would be a factory without a building." *Mahew v. Hardesty*, 8 Md. 479. On the other hand,

a devise of a "factory-estate" was held not to include the machinery. "The word 'estate' is one appropriated to real property, though it is sometimes applied to personal. . . . Had he given his factory merely, it could hardly have been claimed that he gave the furniture of it, or the machinery; and certainly there is nothing is the term 'estate' which will convey a stronger idea of personal property." *Brainerd v. Cowdrey*, 16 Conn. 1.

Factory Prices.—Prices at which goods are sold at the factory, in contradistinction to their prices in the market after they have passed into the hands of middlemen. *Whipple v. Levett*, 2 Mason (C. C.), 89. In *Avery v. Stewart*, 2 Conn. 69, it was left to the jury to find, from the evidence, the meaning of this phrase in a note payable in cotton-yarn at "wholesale factory prices."

2. Where a person objected to his assessment to the poor-rate, and the assessment committee, considering that his case would be governed by a case then pending in a superior court, adjourned their decision until that case was decided, he was held not to have "failed to obtain relief," within the meaning of an act giving an appeal in case of such failure only. *The Queen v. Bedminster Union*, 1 Q. B. Div. 503.

The difference between "refuse" and "fail" is, that the former is an act of the will, while the latter may be an act of inevitable necessity. *Taylor v. Mason*, 9 Wheat. (U. S.) 344.

Fail to prosecute.—A plaintiff fails to prosecute when he fails to appear. *Martin v. Fales*, 18 Me. 23; s. c., 36 Am. Dec. 693.

3. Failure is the outward act that stands for evidence of insolvency. "Insolvency looks to the liability to pay, failure to the fact of payment." Where a bank, whose charter provided that "in case of the failure of said bank" each stockholder should be individually liable to the amount of his shares, suspended specie payments, but continued banking operations for four years longer, there was held to be a failure within the meaning of the charter. *Terry v. Calnan*, 12 S. Car. 220.

O'Neill, J., in a dissenting opinion in *Boyce v. Ewart*, 1 Rice (S. Car.), 126, said, "It is true, in legal parlance, the neglect of any duty may be a failure, and the commission of any default a delinquency; but . . . the word 'failure,' applied to a merchant

FAIR. See **FAITHFUL**. — Characterized by honesty; impartiality; upright; free from suspicion of bias.¹ Equitable.²

FAITH.³

FAITHFUL. See **FAIR**. — Honest; diligent.⁴

or mercantile concern, means an inability to meet his or their debts from insolvency. I take it, then, that the word 'failure' must be regarded as synonymous with insolvency.⁵

"Inability to meet their engagements in the usual course of business has been again and again adjudged to constitute insolvency, within the meaning of the bankrupt law. When, therefore, a merchant fails to pay his notes, or other mercantile obligations, as they become payable, the immediate presumption of inability to pay arises. This is according to the universal sense of the mercantile world. When a merchant does not so pay, he is at once, and everywhere, assumed, in the common language applied to the subject, to have 'failed.'" *Mayer v. Hermann*, 10 Blatchf. (C. C.) 256.

Where, in order to make the deed of an insolvent debtor fraudulent and void, the grantor was by statute required to be in "failing circumstances," these words mean more than actual insolvency, for that is consistent with an honest belief by the debtor of his wealth and prosperity: they imply a knowledge of his inability to pay his debts, and mean "the closing of business by an avowed and deliberate failure." *Utley v. Smith*, 24 Conn. 310; *Bloodgood v. Beecher*, 35 Conn. 482.

1. *Bryan v. C. R. I. & P. Ry. Co.*, 63 Iowa, 464; *State v. Johnson* (Iowa), 34 N. W. Rep. 181. In the latter case it was decided that "fair preponderance of evidence" was a proper expression to use in instructing the jury that there must be a preponderance of evidence in favor of the side for which they find.

In a clause in an insurance policy, avoiding it, if any material fact "has not been fairly represented by the insured," "fairly" does not mean "honestly," but imports that there must be a fair correspondence between the representation and the fact. *Ring v. Phoenix Assur. Co.*, 145 Mass. 426.

An oath by a commissioner, "truly, faithfully, and without partiality, to take the examinations and depositions," etc., materially departs from the requirements of a statute directing that he be sworn "faithfully, fairly, and impartially" to execute the commission. "Truly" and "fairly" are not synonymous. "They have widely different shades of meaning, and convey entirely distinct ideas. Every day's experience teaches us that language may be truly, yet most unfairly, repeated. . . . On

the other hand, language may be fairly reported, yet not in accordance with strict truth." *Lawrence v. Finch*, 17 N. J. Eq. 234. See **FAITHFUL**.

Where it was provided, in a demise of coal-mines, that in case the whole of the coals, so far as the same could be fairly wrought, should have been worked out at any time prior to the expiration of the term, the annual payment was to cease, the question whether the coal could be fairly wrought did not depend on whether it could be worked at a profit, or whether it was worth working. "Fairly wrought means that which can be fairly and properly gotten according to mining usage, without extraordinary difficulty or expense." *Griffiths v. Rigby*, 1 H. & N. 237.

2. An allegation that land cannot be fairly divided, is equivalent to an allegation that it cannot be equitably divided. *Warnock v. Warnock*, 48 Ala. 463. So is an allegation that the land cannot be fairly, beneficially, and equitably divided. *Satcher v. Satcher*, 41 Ala. 26.

3. **Bad Faith.** — In an act imposing a penalty upon insurance companies for failure to pay losses within sixty days, unless they show that the delay is not in bad faith, this expression means any frivolous or unfounded refusal in law and in fact to comply with the requisition of the policy, to pay according to the terms of the contract and the conditions imposed by statute. *C. S. Lf. Ins. Co. v. Edwards*, 74 Ga. 220; *Hull v. A. G. Lf. Ins. Co. (Ga.)*, 3 S. E. Rep. 903.

Full Faith and Credit. — See **CONFLICT OF LAWS**, vol. iii. p. 531, *et seq.*

Good Faith. (See **BILLS AND NOTES**; **BONA**; **FRAUD**; **NOTICE**; **RECORDING ACTS**.) — Good faith is the opposite of fraud. *McConnel v. Street*, 17 Ill. 253; *Parker v. Page*, 38 Cal. 522. It means "with honest purpose," — *Winters v. Haines*, 84 Ill. 585, — and consists "in an honest intention to abstain from taking any unconscientious advantage of another, even though the forms and technicalities of the law, together with an absence of all information or belief of facts which would render the transaction unconscientious." *Gress v. Evans*, 1 Dak. 399.

4. A bond for the faithful performance of the duties of an office is a security, not only for the honesty and integrity of the officer, but also for reasonable and competent skill, and due and ordinary diligence,

FALL.¹

FALSE.— This word means something more than untrue; it means something designedly untrue, deceitful, and implies an intention to perpetrate some treachery or fraud.²

FALSE IMPRISONMENT.

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I. Definition and Nature.— False imprisonment is the unlawful restraint of a person contrary to his will, either with or without process of law.³

in the discharge of his duties. *American Bank v. Adams*, 12 Pick. (Mass.) 303. *Contra, Union Bank v. Classey*, 10 Johns. (N. Y.) 271, where "faithfully" was held to apply to honesty only, and not to the officer's ability to perform his trust. *S.c.*, 11 Johns. (N. Y.) 182.

Where a statute requires commissioners to be sworn to "faithfully, fairly and impartially" execute a commission, it is not sufficient that they be sworn to *faithfully* execute it. "Fairly and impartially" mean something more than is meant by "faithfully." "The word *faithfully*, as it respects temporal affairs, means diligently, without unnecessary delay. . . . An agent may be very faithful, yet very partial to his employer." *Perry v. Thompson*, 16 N. J. 72. But under a statute requiring an officer to give bond "for the faithful performance of his duties," a bond stipulating that he "shall well and truly, faithfully, firmly, and impartially execute and perform the duties," etc., does not unlawfully exact other conditions than faithful performance. "The words 'well,' 'truly,' 'firmly,' and 'impartially,' are redundant: they are comprised in their legal signification in the word 'faithfully.' It is an error to suppose that the agreement to perform the duties of the office faithfully, means merely that the incumbent will not wilfully do any wrong act." *Mayor, etc., of Hoboken v. Evans*, 31 N. J. 342.

1. The "falling through" of a sale, though a term not susceptible of a precise definition, is broad enough to comprehend

the failure of the contract through the refusal of the buyers to pay the price. *Norris v. Maitland*, 9 Phila. (Pa.) 7.

2. *Mason v. Ins. Co.*, 18 U. C. C. P. 19. And see *Anderson v. Fitzgerald*, 4 H. L. 484.

An account, to be false, must be wilfully incorrect. *Putnam v. Osgood*, 51 N. H. 191.

An indictment for uttering a "false, forged, altered, and counterfeited bill," is repugnant. These are different things. Although "false" might be applied to any one of them in a loose way, it is not to be so used in construing a statute of crimes. A false bill may be only an illegitimate impression from a genuine plate. *Kirby v. State*, 1 Ohio St. 185.

False Swearing.— In a clause in an insurance policy, avoiding the same for "false swearing" by an applicant for insurance, this phrase means "a verified false assertion, which does deceive, or is fitted and likely to deceive, the one to whom it is made." But if the facts sworn to are known by the company's agents to be false, and they are not deceived, the policy is not rendered void thereby. *Maker v. Hibernia Ins. Co.*, 67 N. Y. 283.

"False swearing," in this connection, means *wilful* false swearing. The word false is not synonymous with untrue. *Mason v. Agric. Mut. Assur. Assn.*, 18 Up. Can. C. P. 19; *Franklin Ins. Co. v. Culver*, 6 Ind. 137.

3. *Hilliard on Torts*, 208; *Comer v. Knowles*, 17 Kas. 436.

It is a trespass to the person committed by one against another by unlawfully arresting and detaining him against his will.¹

While it is at common law a crime, it is only in its civil aspect that it is here treated. In its nature it is closely allied to malicious prosecution and assault and battery, and usually includes the latter.

Two things are requisite in order to constitute the offence: 1st, Detention of the person; 2d, The unlawfulness of such detention.²

What constitutes arrest and detention has already been treated of. (See ARREST.) Actual force, however, is not necessary: it may be by a show of force or threats; and such show of force or threats, if submitted to, is as much an arrest as though such arrest had been forcibly accomplished.³

1. *Fuller v. Bowker*, 11 Mich. 204. (See also definitions found in Abb. Law Dict. tit. "False Imprisonment.") Addison on Torts, vol. 2, sect. 708; Cooley on Torts, 169; Bird v. Jones, 7 Q. B. 742; Crowell v. Gleason, 10 Me. 325; State v. Lunsford, 81 N. C. 528; Burns v. Erben, 40 N. Y. 463; Lock v. Ashton, 12 Q. B. 871.

2. Chitty's Blackstone, book 3, star page 128; *Floyd v. State*, 12 Ark. 43.

3. In ordinary practice, words are sufficient to constitute an imprisonment if they impose a restraint upon the person, and the plaintiff is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used.

This principle is reasonable in itself, and is fully sustained by the authorities above cited. Nor does it seem necessary that there should be any very formal declaration of an arrest. If the officer goes for the purpose of executing his warrant, has the party in his presence and power, if the party so understands it, and, in consequence thereof, submits, and the officer, in execution of the warrant, takes the party before a magistrate, or receives money or property in discharge of his person, we think it is in law an arrest, although he did not touch any part of the body. *Pike v. Hanson*, 9 N. H. 491.

It is not necessary, to constitute false imprisonment, that the person restrained of his liberty should be touched or actually arrested if he is ordered to do or not to do the thing, to move or not to move against his own free will, if it is not left to his option to go or stay where he pleases, and force is offered, or there is reasonable ground to apprehend that coercive measures will be used if he does not yield. *Johnson v. Tompkins et al.*, 1 Bald. (U. S. C. C.) 571; Addison on Torts, Woods' ed. vol. 2, p. 13; *Brushaber v. Stegemann*, 22 Mich. 266; *Ahern v. Collins*, 39 Mo.

145; *Mowry v. Chase*, 100 Mass. 79; *Hawk v. Ridgway*, 33 Ill. 473; *Hilliard on Torts*, 1, p. 197; *Floyd v. State*, 7 Eng. (Ark.) 43; *Grainger v. Hill*, 4 Bing. (N. C.) 212, 222; *Smith v. State*, 7 Humph. 43, 45; Cooley on Torts, 170; *Gold v. Bissell*, 1 Wend. (N. Y.) 210; s. c., 19 Am. Dec. 480; *Herring v. State*, 3 Tex. App. 108; *Maner v. State*, 8 Tex. App. 361; *Moses v. Dubois, Dudley (S. C.)*, 209.

It would be a sufficient arrest if one submits to an officer's control, being informed by such officer that he has a warrant for him. *Van Vorhees v. Leonard*, 1 Thomp. etc., 148.

An attorney's clerk accompanied a creditor to his debtor, and pretended he was a sheriff's officer; and the debtor, supposing that they had power to compel him, went unwillingly with them. This was held to be a sufficient arrest and detention to support an action for false imprisonment, although no warrant was produced, and it did not appear that either touched the debtor. *Wood v. Lane*, 6 Cor. & P. 774.

Proof that the defendant induced the plaintiff to go to another place, and there remain in concealment for a time, by threats of a criminal prosecution and the payment of expenses, is not sufficient to maintain the action. *Payson v. Macomber*, 3 Allen, 69. See also *Marshall v. Heller*, 55 Wis. 392.

The wrong (false imprisonment) may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison or within walls, or that he be assaulted, or even touched. *Comer v. Knowles*, 17 Kas. 436; *Doyle v. Boyle*, 19 Kas. 168.

Where a person was arrested and threatened with imprisonment, and was compelled to promise to procure friends to vouch for him that he would not abscond, held, that

It must, however, be an actual detention, — something more than mere loss of power to go in any direction one pleases; and it is no imprisonment to turn one away from the way he desires to go if he is not otherwise restrained, and is *at* liberty to go back, or to go elsewhere than in the direction in which he started.¹

The unlawfulness of the detention is the *gravamen* of the offence, hence it may be committed without malice on the part of the person causing the detention.²

Consequently the question of malice is immaterial, except as it may affect the question of damages.³

The difference in the nature of false imprisonment and assault and battery on the one hand, and malicious prosecution on the other, is quite marked; and although either two, or all three, of these offences may exist together, it is not necessarily so.⁴

If the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution.⁵

he could recover, although he was not actually imprisoned, and did not give the bond required, and there was no proof of express malice. *Bonesteel v. Bonesteel*, 28 Wis. 245.

A false imprisonment may be effected by threats. *Herring v. State*, 3 Tex. App. 108; *McNay v. Stratton*, 9 Ill. App. 215; *Sorenson v. Dundas*, 50 Wis. 335.

Though manual seizure is not necessary, there must be some sort of personal coercion. *Hill v. Taylor*, 50 Mich. 549.

In *Marshall v. Heller*, 55 Wis. 392, an instruction that false imprisonment is an unlawful restraint of a person's liberty by words and an array of force, *held* erroneous under the circumstances of the case. A complaint alleging that defendant locked plaintiff in a room, and by threats, with weapons in his hand, forced plaintiff to acknowledge breach of promise of marriage, and to agree to pay damages therefor, sufficiently charges false imprisonment. *Hildebrand v. McCrum*, 101 Ind. 61. For further authorities, see note to *Bissell v. Gould*, 1 Wend. (N. Y.) 201; s. c., 19 Am. Dec. 480.

1. *Cooley on Torts*, 170; *Bird v. Jones*, 7 Q. B. 743; *Hill v. Taylor*, 50 Mich. 549; s. c., 15 N. W. Rep. 899; *Hart v. Flynn*, 8 Dana, 190; *French v. Bancroft*, 1 Met. (Mass.) 502.

An arrest is not implied from the service of a notice or summons by which no bail is required, and which occasions no restraint of personal liberty. *Hart v. Flynn*, 8 Dana, 190. Even the personal service of a writ of *capias ad respondendum* by delivering a copy thereof to the defendant, is not restraint, being simply a notice to appear. *Huntington v. Shultz*, Harper's Law Rep. 452; s. c., 18 Am. Dec. 660;

Baldwin v. Murphy, 82 Ill. 485. But see *Bloomer v. State*, 3 Sneed (Tenn.), 66, where it is *held* that it is an imprisonment to stop and prevent one by threats from passing along the highway; also, *Harkins v. State*, 6 Tex. App. 452.

It does not consist in a distinct and single act, but in a continuous violation of a person's liberty; and every continuation of the illegal imprisonment constitutes a new trespass for which an action may be maintained. *Ruffner v. Williams*, 3 W. Va. 243.

2. Nor is it necessary that the wrongful act (false imprisonment) be committed with malice or ill will, or even with the slightest wrongful intention. *Comer v. Knowles*, 17 Kas. 436; *Aken v. Newell*, 32 Ark. 605; *Chrismen v. Carney*, 33 Ark. 316; *Baily v. Wiggins*, 1 Houst. (Del.) 299; *Colter v. Lower*, 35 Ind. 285; s. c., 9 Am. Rep. 735; *McQueen v. Heck*, 1 Coldw. 212; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253.

3. *Comer v. Knowles*, 17 Kas. 436.

An imprisonment, even though caused by a malicious prosecution, is not false unless extra-judicial or without legal process. *Murphy v. Martin*, 58 Wis. 276.

4. The wrong constituting false imprisonment differs essentially from the wrongs constituting malicious prosecution, malicious arrest, assault, assault and battery, though all of these wrongs may sometimes be united in one comprehensive and aggregated wrong. *Comer v. Knowles*, 17 Kas. 436; *Murphy v. Martin*, 58 Wis. 276; *Else v. Smith*, 2 Chit. 304; *Nebenzahl v. Townsend*, 10 Daley (N. Y.), 236; *Brown v. Chadsey*, 39 Barb. 253; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316; s. c., 54 Am. Rep. 616.

5. All that is necessary is that the indi-

II. What constitutes. — A pure, naked, unlawful detention, unaffected by any question of motive or purpose, constitutes false imprisonment.¹

The want of lawful authority is an essential element of the offence.² Malice is not.³

One lawfully arrested, but maliciously held an unreasonable time without being permitted to give bail, or maliciously held for unreasonable bail, may recover as for false imprisonment.⁴ But unavoidable delay of a peace officer in taking bail is not false imprisonment.⁵ Every unlawful detainer of a prisoner after he has gained the right to be discharged, is a fresh imprisonment.⁶ A sheriff is liable for arresting the wrong person, even though it be under an honest mistake.⁷

The unauthorized continuance of an imprisonment, which was lawful at first, becomes a false imprisonment.⁸

vidual be restrained of his liberty without any sufficient legal cause therefor. *Comer v. Knowles*, 17 Kas. 436.

1. Nor would the plaintiff be defeated by showing that the defendant acted in good faith, and upon probable cause, provided the whole of the proceedings of the justice were void, — *Bauer v. Clay*, 8 Kas. 580, — though a recovery might be had if permitted by a code in the same action, by showing that a warrant, regular on its face, and protecting the constable, had been procured by the defendant through malice and without probable cause. *Bauer v. Clay*, 8 Kas. 580.

Malicious prosecution, and not false imprisonment, is the proper remedy, where one has procured the arrest of another on a criminal charge, simply for the purpose of enforcing the payment of a debt. *Mullen v. Brown*, 138 Mass. 114; *Herzog v. Graham*, 9 Lea (Tenn.), 152; *Woodward v. Washburn*, 3 Den. (N. Y.) 369.

2. *Barber v. State*, 13 Fla. 675; *Waterman v. State*, 13 Fla. 683.

One who procures the arrest and imprisonment of another upon a void process is liable in an action for false imprisonment; and mere good faith in making the affidavit by virtue of which the arrest is made, is no defence. *Painter v. Ives*, 4 Neb. 122; *Murphy v. Martin*, 58 Wis. 276.

3. *Akin v. Newell*, 32 Ark. 605; *Christman v. Carney*, 33 Ark. 316; *Mullen v. Brown*, 138 Mass. 114. But see *Maloney v. Doane*, 15 La. 278; s. c., 35 Am. Dec. 204; *Diehl v. Friester*, 37 Ohio St. 473.

4. *Gibbs v. Randlett*, 58 N. H. 407; *Manning v. Mitchell*, 73 Ga. 660.

5. *Cargill v. State*, 8 Tex. App. 431.

The duty of a person causing the arrest to have the party conveyed without delay before the most convenient officer authorized to issue a warrant, is not discharged

by delivering him to a police officer. The imprisonment would not be legal beyond a reasonable time for procuring a warrant. *Ocean S. S. Co. v. Williams*, 69 Ga. 251. But an officer is not liable for locking up for an hour one arrested without a warrant for drunkenness, while committing a breach of the peace, notwithstanding the person's proposal to give bail. *Beville v. State*, 16 Tex. App. 70. And one arrested under a peace warrant, and brought before a justice late Saturday eve, crazed with drink, is properly committed over Sunday in default of bail, and this although no express authority is conferred by statute. *Pepper v. Mayes*, 81 Ky. 674.

6. Woods' ed. *Addison on Torts*, 802.

A person went to a bank on business, and remained after the usual time of shutting the same, and the teller locked the door, and detained him thereby: *held*, that the detention was wrongful, notwithstanding the person detained knew the usual hour of shutting the bank. *Woodward v. Washburn*, 3 Denio (N. Y.), 369.

7. *Scheer v. Keown*, 29 Wis. 586; *Hoy v. Bush*, 1 Man. & G. 775.

Though, if the person arrested brought on the arrest by his own misrepresentations, then the officer would not be liable. *Hays v. Creary*, 60 Tex. 445; Woods' *Addison on Torts*, 805.

8. 1 Hilliard on *Torts*, 200.

As when the imprisonment was continued beyond necessary bounds. *Wall v. McNamara*, cited 1 T. R. 536. And when a captain of a man-of-war imprisoned the defendant three days for supposed breach of duty, without hearing him, and then released him without bringing him to court-martial. *Swinton v. Mallow*, cited 1 T. R. 537. Plaintiff, being drunk and disorderly, was arrested by a police officer without warrant, as he might do; but after such

The act relied upon as an arrest must have been intended as such, and so understood by the party arrested, or there is no imprisonment.¹

III. Who are liable. — 1. *Parent, or One in that Relation.* — No general rule as to liability of various persons connected with the wrong or false imprisonment can be laid down: the different relations which they sustain to such transaction determines such liability. Cases falling under this head are the relations existing between parent and child, guardian and ward, master and apprentice, teacher and pupil. And in all these relations such restraint is lawful and permissible, as, in the exercise of a sound discretion, the parent, guardian, master, or teacher shall deem necessary. Especially is this so in case of parent and child in a greater degree than in the other cases, as a semi-judicial power is vested in him, for the exercise of which he cannot be held accountable to others except for its manifest abuse. The only limit to the exercise of his authority is the not very certain one, that his correction must be moderate, and dictated by reason, and not by passion.² And it seems that if he exceeds these bounds, he is answerable only to the State, as no case is found where it is held that the child might maintain a civil action against him for an injury thus inflicted. Mr. Cooley suggests that there is no reason, on principle, why the child might not, but that the policy is so questionable that it is doubtful if such right will ever be sanctioned.

a. Guardian. — The guardian of the person of his ward has the same general power over him as a parent, especially if he stand *in loco parentis*. See GUARDIAN AND WARD.

b. Master. — Under the statutes of the various States, the author-

arrest plaintiff was detained an hour, and then discharged without being taken before a magistrate: the defendant was held liable for false imprisonment. *Brock v. Stimpson*, 108 Mass. 520; s. c., 11 Am. Rep. 390; *State v. Parker*, 75 N. C. 249; s. c., 22 Am. Rep. 669. So, where S. was arrested on a warrant charging him with grand larceny, and turned over to the sheriff of the county, who, by virtue of such warrant, kept him confined in the county jail for more than thirty days, and until he was released on *habeas corpus* proceedings, held, that such imprisonment was unlawful, and renders the sheriff liable, *prima facie*, to an action for false imprisonment. *Anderson v. Beck et al.*, 64 Miss. 113. And an action for false imprisonment will lie for the misuse or abuse of legal process after it has issued, beyond the mere fact of arrest and detention. *Wood v. Graves*, 144 Mass. 365.

1. When an officer, having a warrant against a person, shakes hands with him, or informs him he has a warrant for him, and at the same time claps him on the shoulder, without telling him he arrests

him, it is for the jury to say, from all the circumstances, whether the act was intended as an arrest; and unless it was so intended, there would be no imprisonment. *Jones v. Jones*, 13 Ired. L. (N. C.) 448. *Taaffe v. Kyne*, 9 Mo. App. 15. And it must be so understood by the party arrested. There is no imprisonment where the party is not conscious of some restraint of his liberty. A pupil was detained at school until his parents would pay his tuition, but the pupil supposed his detention was only such as was usual in the government of the school. Held, there was no imprisonment. *Herring v. Boyle*, 1 Cramp. M. & R. 377. For various examples as to what constitutes an arrest and imprisonment, see note to *Bissell v. Gould*, 1 Wend. (N. Y.) 210; s. c., 19 Am. Dec. 486. But an action for false imprisonment cannot be maintained for the arrest of one who, while attempting to exercise a right, commits a breach of the peace, and is arrested therefor. *Taaffe v. Kyne*, 9 Mo. App. 15.

2. *Johnson v. State*, 2 Humph. (Tenn.) 283; *Winterburn v. Brooks*, 2 C. & K. 16; *Cooley on Torts*, 170.

ity possessed by the master of an apprentice under the English law is greatly limited; and probably he has little greater right of restraint generally than one would have over his hired hand.

In the relation of a master over the crew of a ship and its passengers, he is entitled to exercise such restraint over both as would be necessary to insure the safety of the ship. And all persons have no just reason to complain of the proper orders of the master.¹

c. Teacher.—The teacher to whom a child has been committed, for the time being, stands *in loco parentis*, and is entitled to such reasonable restraint and punishment as shall be necessary to compel obedience to his lawful orders. This authority must be exercised with moderation. And, while the presumptions are in favor of the correctness of his action,² he is liable, both criminally and in a civil action, for damages in cases where his authority is clearly abused.³

Somewhat analogous to the rights of the persons above named, is the right of the bail in respect to his principal; having become responsible for his good behavior, he has a right, generally, under the restrictions and provisions of the statute, to arrest and surrender him, and thus be discharged of his responsibility.⁴

2. *Those who detain Insane Persons.*—Like the fact of crime, the fact of insanity can only be legally established by a judicial examination. For this purpose the various States have established tribunals. But there arises the necessity of the detention of lunatics, before as well as after such adjudication; and the liability of persons detaining a lunatic is best considered under two heads:—

1st, *Where there has been no adjudication.* Every one has a right to protect himself from the fury of a madman as well as from the malice of the murderer.⁵ And, where the arrest is merely for protection, it is required of the person making it, that he treat the person arrested with the utmost kindness and consideration consistent with the safety of others, and that he do no more in imposing restraint than the protection requires. But he must make sure of his facts, and be certain they will justify him.⁶

If self-protection, and not the benefit of the supposed insane

1. *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Flemming v. Ball*, 1 Bay's, 3; *Budington v. Smith*, 13 Conn. 334; s. c., 33 Am. Dec. 407.

2. *Commonwealth v. Randall*, 4 Gray (Mass.), 36; *Cooper v. McJunkin*, 4 Ind. 290; *Hathaway v. Rice*, 19 Vt. 102.

3. *Lander v. Seaver*, 32 Vt. 114; *Commonwealth v. Randall*, 4 Gray (Mass.), 36. But see *Morrow v. Wood*, 35 Wis. 59.

4. *Parker v. Bidwell*, 3 Conn. 85; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145.

But if bail, in arresting their principal, are guilty of unnecessary violence, they will be liable in an action for false imprisonment. *Pease v. Burt*, 3 Day (Conn.), 485.

5. *Brookshaw v. Hopkins*, Lofft. K. B. 235; *Colby v. Jackson*, 12 N. H. 526.

6. *Cooley on Torts*, 177.

An officer is not authorized to arrest a man without a warrant, on the ground that he is insane, unless he is dangerous. . . . If the plaintiff was insane, the officer had a right to arrest him; but it would, in such case, be his duty immediately to take proper steps to have him committed to a lunatic asylum; and if he failed to do so, he would be liable from the beginning for the arrest. . . . The right which every citizen has, to enjoy personal liberty, is necessarily subject to some exceptions. Most of these exceptions are noted in *Colby v. Jackson*,

person, is made the justification for confinement without adjudication, it must wholly fail if it appears that the insane person is not dangerous, but is afflicted with some mild form of insanity.¹

Even where the statute provides that no one shall be restrained of his liberty as an insane person, except upon the certificate of one or more physicians, still such certificate affords no certain protection, for a physician possesses no judicial powers, and his decision is no adjudication.²

2d, *Where there has been an adjudication*, and the fact of insanity thus legally established, a warrant or order of commitment — proper in form — would certainly protect the person having custody of

12 N. H. 526. Among them is the right to restrain one so insane as to be dangerous to himself and others. In such case, the right to restrain persons has its foundation in a reasonable necessity, and ceases with the necessity. As to insane persons who are not dangerous, they are not liable to be thus arrested or restrained by strangers. *Look v. Dean*, 108 Mass. 116; s. c., 11 Am. Rep. 323.

And if one have the right to restrain an insane person, in order to protect himself from such insane person, this gives him no right to imprison such insane person indefinitely without taking further measures. And should he abandon legal proceedings which had been commenced, and assert the right of confinement for an indefinite period, he becomes a trespasser *ab initio*. *Colby v. Jackson*, 12 N. H. 526.

So, if a person be so insane that it would be dangerous to suffer him to be at liberty, any person may, from the necessity of the case, without warrant, place him under restraint for a reasonable time, until proper legal proceedings can be had to confine him. *Davis v. Merrill*, 47 N. H. 208.

1. *Cooley on Torts*, 177; *Anderson v. Burrows*, 4 C. & P. 210; *Scott v. Wahan*, 3 Fost. & Finl. 328; *Look v. Dean*, 108 Mass. 116; s. c., 11 Am. Rep. 323; *Lott v. Sweet*, 33 Mich. 308. See *Commonwealth v. Kirkbride*, 3 Brewster (Pa.), 586.

2. A person procuring the confinement of another in an insane-asylum is only justified wherein the person was in fact a lunatic. Consequently, in an action for procuring such a confinement, a plea that the person had conducted himself as a person of unsound mind, and incapable of taking care of himself, and as a proper person to be detained under due care and treatment, and that two medical certificates to the effect that the plaintiff was of unsound mind, and ought to be taken charge of, had been duly given, as required by statute, and that the defendant had reasonable cause and did believe the certificate to be true, and the plaintiff to be a person of unsound mind, and dangerous to be at large,

so defendant, the uncle of the plaintiff, and a proper person to act in his behalf, caused him to be confined, is bad. *Fletcher v. Fletcher*, 28 L. J. Q. B. 134.

A declaration alleging that the defendant's practising physicians did falsely and maliciously certify in writing, under oath, that they had examined into the state of health and mental condition of H. L. F., and in their opinion she was insane, and a fit subject to be sent to the insane-asylum, by means of which false certificate the defendant wrongfully, and without reasonable cause, procured the arrest of H. L. F., does not show a legal cause of action, as it fails to aver that the defendants actually procured the arrest, and discloses no facts from which it appears that the false certificate had been the means of procuring the arrest, there being no logical connection between the wrongful act imputed to the defendants — viz., the making the false certificate — and the consequence attributed to it. *Force v. Probasco*, 43 N. J. L. 539; s. c., 25 Alb. L. J. 476.

In an action against the superintendent for the false imprisonment of a patient in an asylum, the broadest latitude should be allowed in showing the jury what the patient said or did, and how she appeared, where there are facts bearing on the question of her sanity; but evidence of her worldly circumstances, and what she did with her goods, and as to what happened to her before she was received at the asylum, is inadmissible, as is evidence to show what the servants or inmates of the institution said or did to her, unless it was said or done by the superintendent's direction; and that money had been sent to her which she did not receive, unless it was shown that it came to the defendant, or that he was instrumental in depriving her of it. *Van Deusen v. Newcomer*, 40 Mich. 90. In this case, the court was equally divided on the point as to whether the superintendent was liable for detaining a sane person whom he believed to be insane. See also *Underwood v. People*, 32 Mich. 1; s. c., 20 Am. Rep. 633.

such insane person. And should the statute, under which such commitment takes place, and by virtue of which such detention is authorized, not provide a practicable and reasonable method of ascertaining when, if ever, such committed insane person was entitled to his liberty, such statute would be unconstitutional.¹

3. *Judicial Officers and Courts.*—The general rule relative to the liability of such officers has been stated in olden times thus:—

“Such as are by law made judges of another shall not be criminally accused, or made liable to an action for what they do as judges.”² The converse of this proposition is equally ancient and true: “When there is no jurisdiction at all, there is no judge: the proceeding is as nothing.”³ So it has been held in modern days that judges of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly.⁴

The distinction, however, is made between acts done by them in excess of their jurisdiction, and acts done by them in the clear absence of all jurisdiction over the subject-matter.⁵ It seems,

1 Underwood v. People, 32 Mich. 1; s. c., 20 Am. Rep. 633.

2 Year Books, 43 Edw. III. 9; 9 Edw. IV. 3; Floyd v. Baker, 12 Coke, 26.

3 Perkins v. Proctor, 2 Wils. 382.

Where he has no jurisdiction *non est judex*. Marshalsea Case, 10 Coke, 65.

4 The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts, existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be effected by any consideration of the motives with which the act is done. The allegation of malicious or corrupt motives could always be made; and if the motives could be inquired into, judges would be subject to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence.

Against the consequences of their erroneous or irregular action from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must in such cases resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed. Bradley v. Fisher, 13 Wall. 335.

To the same effect, and fully sustaining the above, Lange v. Benedict, 73 N. Y. 12; s. c., 29 Am. Rep. 80; Yates v. Lansing, 5 Johnson, 395; s. c., 6 Am. Dec. 290;

Randall v. Brigham, 7 Wall. (U. S.) 523; Busted v. Parsons, 54 Ala. 393; s. c., 25 Am. Rep. 688; Woods' Addition on Torts, 883; Cook v. Bangs (Minn.), 31 Fed. Rep. 640; Johnson v. Moorman, 80 Va. 131.

5. A distinction must here be observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter: where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority; and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where the jurisdiction over the subject-matter is invested by law in the judge or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although, upon the correctness of his determination in these particulars, the validity of his judgments may depend; though if a probate court, invested only with authority over wills and settlements of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But, on the other hand, if a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence which is not by law made an offence,

then, that the only limitation that is placed upon a court of general jurisdiction is, that the act must have been done by the judge in his judicial capacity: it must be a judicial act.¹ The jurisdiction of such a court is presumed. As to courts of limited jurisdiction, the rule is that their judges are liable in a private action for judicial acts which are both in excess and outside of that jurisdiction. And such jurisdiction is not presumed, but must be proved.²

and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although these acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration whenever his jurisdiction over the subject-matter is invoked. *Bradley v. Fisher*, 13 Wall. (U. S.) 335.

1. *Lange v. Benedict*, 73 N. Y. 12; s. c., 29 Am. Rep. 80.

It may be laid down as a universal proposition which admits of no exception, that, for a mere error of judgment in the execution of his office, no action can be maintained against the judge of any court. With respect to limited jurisdictions, it is said that if the judge shall exceed his powers, the whole proceeding is *coram non judici* and void, and that all concerned in such void proceedings, as well the judge as the ministerial officer, are liable in trespass; but while within his jurisdiction, adjudicating upon matters lawfully submitted to him, how erroneous so ever his opinions, he is not liable.

In courts of general jurisdiction, an action never lies against the judge because he has jurisdiction of all causes. In courts of limited jurisdiction it lies only when he exceeds that jurisdiction, and therefore is not in the exercise of his judicial authority. *Little v. Moore*, 4 N. J. L. 74; *Clark v. Holdridge*, 58 Barb. (N. Y.) 61; *Dyer v. Smith*, 12 Conn. 384.

2. In the case of a limited or special jurisdiction, the magistrate attempting to enforce a proceeding founded on any judgment, sentence, or conviction without having gained jurisdiction of the person, or in case his process is illegal, he becomes a trespasser. *Bigelow v. Stearns*, 19 Johns. 39; *People v. Liscomb*, 60 N. Y. 559.

As to a justice of the peace or other magistrate of limited jurisdiction, the rule is, if he has no jurisdiction whatever, and undertakes to act, his acts are *coram non judici* and void, as clearly so as though he were not a magistrate, in which case he is personally liable, — *Adkins v.*

Brewer, 3 Cow. (N. Y.) 209; *Dyer v. Smith*, 12 Conn. 384; *Bauer v. Clay*, 8 Kas. 580; *Waite v. Green*, 5 Park. 185; *Reynolds v. Orvis*, 7 Cow. 269; *Sheldon v. Hill*, 33 Mich. 171; *LaRoe v. Roeser*, 8 Mich. 537, — as when he issues a search-warrant for stolen goods without the oath required, — *Grumon v. Raymond*, 1 Conn. 40, — or adjudges a person guilty of a contempt, and punishes him therefor in excess of the authority given him by statutes, — *Rutherford v. Holmes*, 66 N. Y. 368; *Tracy v. Williams*, 4 Conn. 113, — or issues a warrant without a complaint justifying it, — *Pouik v. Slocum*, 3 Blackf. (Ind.) 421, — or if one being arrested by a magistrate for an offence committed in his presence should be committed without an examination, or without information of the charge against him, — *Touhey v. King*, 9 Lea (Tenn.), 422, — or when the warrant is not valid on its face, although he acted *bona fide*, and there was sufficient proof before him to have authorized his issuing a valid warrant, — *Blythe v. Tompkins*, 2 Abb. Pr. 468, — but a mere informality in the warrant, if the justice had jurisdiction, will not render him liable. *Cooper v. Adams*, 2 Blackf. (Ind.) 294.

A justice committing a person illegally arrested is liable, he having acquired no jurisdiction over the person of the one so arrested. *Dietrichs v. Schaw*, 43 Ind. 175. One imprisoned for violating an injunction granted without the bond required by law, may recover in an action of false imprisonment against the judge imprisoning him; and malice and want of probable cause need not be alleged. *Diehl v. Friester*, 37 O. S. 473. A justice of the peace is liable, as is also the plaintiff, his attorney, and the constable serving a warrant in a civil arrest if the affidavit states none of the grounds required by the statute therefor. *Haus v. Kohlar*, 25 Kas. 640; *Spice v. Steinruck*, 14 Ohio St. 213; *Gorton v. Frizzell*, 20 Ill. 292; *Von Kettler v. Johnson*, 57 Ill. 109; *Johnson v. Von Kettler*, 66 Ill. 63; *Proctor v. Prout*, 17 Mich. 473; *Cody v. Adams*, 7 Gray (Mass.), 59; *Painter v. Ives*, 4 Neb. 122.

Where the facts set forth in an affidavit for an arrest in a civil action, though slight and inconclusive, yet tend to prove the

charge and justify the order of arrest, after an examination thereof, no action lies. *Gillett v. Thiebold*, 9 Kas. 427; *Skinnion v. Kelly*, 18 N. Y. 355; *Outlaw v. Davis*, 27 Ill. 466. But a justice is liable if he issue a warrant upon a complaint void on its face, as one showing the crime charged was barred by the statute of limitations. *Vaughn v. Congdon*, 56 Vt. 111; s. c., 48 Am. Rep. 758. But the complaint must be made by some one authorized by law to make the same; for where the putative father of a bastard child is arrested upon application of an attorney who was not authorized by the overseers of the poor to make such application, the justice is liable for issuing the warrant. *Wallsworth v. McCullogh*, 10 Johns. 93. See *Sprague v. Eccleston*, 1 Lans. (N. Y.) 74; *Rivenburgh v. Henness*, 4 Lans. (N. Y.) 208.

A complaint alleging a criminal offence on information and belief, without stating the facts, protects the justice in issuing a warrant. *Campbell v. Ewalt*, 7 How. Pr. 399. But see *Comfort v. Fulton*, 13 Abb. Pr. 276. A justice must have a statement of facts from the informant. *Wasson v. Canfield*, 6 Black. 406.

A magistrate must have a complaint of some kind before he can render judgment, and without it he becomes liable in sentencing to imprisonment. *Wilcox v. Williamson*, 61 Miss. 310. *Prell v. McDonald*, 7 Kas. 426. But where E., as mayor of the town of H., fined V. for an alleged violation of a town ordinance, without first having an affidavit against him, or warrant for his arrest, V. paid the fine under protest, and then sued E. for false imprisonment, and recovered a judgment against him. There was evidence to the effect that V. waived the making of an affidavit and the issuance of a writ, and the court was asked by E. to instruct the jury, that, if they believed from the evidence that such waiver was made, they should find for the defendant, but the court refused to so instruct. *Held*, that the instruction should have been given, as the waiver, if made, constituted a good defence to the action. *Williamson v. Wilcox*, 63 Miss. 335. But a magistrate may order the arrest of a person for an offence committed in his presence. *Touhey v. King*, 9 Lea (Tenn.), 422. A mayor may order a person arrested for attempting to engage in a fight in his presence. *Johnston v. Moorman*, 80 Va. 131.

If the magistrate has jurisdiction, defects or irregularities in the *mittimus* will not render him liable. *Heard v. Harris*, 68 Ala. 43; *Bean v. Crosby*, 1 Allen (Mass.), 220. Neither is he liable for committing to jail for the non-payment of more costs than the statute allowed to be taxed, — *Butler v. Potter*, 17 Johns. (N. Y.) 145, — nor for wilfully and maliciously entertaining a false

complaint, knowing it to be false, and in like manner sentencing the plaintiff to pay a fine. In this case the courts say, where the subject-matter and the person are within the jurisdiction of the court, the judge, whether of superior or inferior court, is justified. It is alleged that the complaint was false, feigned, and groundless, and that the defendant knew it; but this was the very question to be tried, and the defendant could not judicially know it till a trial. *Pratt v. Gardiner*, 2 Cush. (Mass.) 63. A justice of the peace is liable only where he fails to acquire jurisdiction, and not for an error of judgment. *Carter v. Dow*, 16 Wis. 298.

It would be false imprisonment if a justice ordered a person accused of a criminal offence to be committed until a subsequent day for examination, without the accused being first brought before him. *Pratt v. Hill*, 16 Barb. 303. But a justice may, in New York, commit the mother of a bastard child to prison for her refusal to discover the putative father. *Scott v. Ely*, 4 Wend. (N. Y.) 555. A commissioner of the circuit court of the United States has no power to fine a party as upon final trial; and if he does so, and imprisons him until the fine be paid, he is guilty of false imprisonment. *Vanderpool v. State*, 34 Ark. 174.

If a justice instigates a constable to execute a State warrant for felony nine months after it had issued, from motives of ill will, the party who procured the warrant in the first instance having made no application to have it executed, he is liable. *Garvin v. Blocker*, 2 Brev. (S. C.) 157; *La Roe v. Roeser*, 8 Mich. 537; *Doggett v. Cook*, 11 Cush. (Mass.) 262. So he would be when he committed a party to jail upon a *mittimus* whom he had fined and permitted to go at large for the purpose of extorting money from him, — *Fisher v. Deans*, 107 Mass. 118, — or issued a warrant for the purpose of collecting his own debt. *Dyer v. Smith*, 12 Conn. 384.

If the complaint states facts showing the assault, the justice who issues the warrant is not liable, although the complaint failed to state that the offence was committed within the justice's jurisdiction. *Bocock v. Cochran*, 32 Hun (N. Y.), 521. Otherwise if the offence was committed out of the State, and the justice knew that fact when he issued the warrant. *Miller v. Grice*, 2 Rich. L. (S. Car.) 27; s. c., 44 Am. Dec. 271.

In an action for a certain alleged offence, proof of plaintiff's conviction of an offence different from that recited in the commitment is no defence. *Rogers v. Jones*, 2 Barn. & Cress. 409. But one being convicted before a trial justice of two offences, and committed to the house of correction under two warrants, one legal and one ille-

Quasi judicial tribunals are subject to the same rules.¹

Judges and magistrates have power to punish for contempt of their authority, even to the extent of commitment.²

4. *Officer making Arrest with Process.*—If an officer would justify the making of an arrest with process, the process must have certain requisites. These, in general, are as follows: It must have been issued by a court or officer having authority of law to issue such process, and there must be nothing on the face of the process apprising the officer to whom it is delivered for service, that in the particular case there was no authority for issuing it.³ But if the writ is absolutely void, it will not protect

gal, and he was held in custody under both warrants during the whole time of his imprisonment, the justice, if liable for issuing the illegal warrant, is liable only to nominal damages. *Doherty v. Munson*, 127 Mass. 495. And the warrant under which the imprisonment takes place, produced on the trial by a plaintiff, is evidence of the facts therein recited until gainsaid by proof. *Scott v. Ely*, 4 Wend. (N. Y.) 555.

1. As of a supervisor auditing a claim. *Wall v. Trumbull*, 16 Mich. 228. A mayor acting under jurisdiction conferred on him by law. *Willis v. Havemeyer*, 5 Duer, 447. A coroner. *Thomas v. Churton*, 2 B. & S. 475; *Garnett v. Farrand*, 6 B. & C. 611. And whoever has power given to examine, hear, and punish. *Woods' Addison on Torts*, 890.

2. *Cooley on Torts*, 423. Cases there cited.

And this is so, even though the order for the violation of which the plaintiff is imprisoned is irregular. *Ross v. Griffin*, 53 Mich. 5.

The editor, annotating *Busteed v. Parsons* in 54 Ala. 393; s. c., 25 Am. Rep. on p. 688, from the cases cited, deduces the following rules:—

1. No judicial officer acting without having acquired jurisdiction is exempt from personal liability in a private action for such acts.

2. Every judicial officer is exempt from personal liability for judicial acts if he has acquired and does not exceed the jurisdiction.

3. In the case of courts of general jurisdiction, jurisdiction is presumed.

4. In the case of judges of courts of limited jurisdiction, jurisdiction is not presumed, but must be proved.

5. No judicial officer having jurisdiction is liable for mere errors of judgment in the exercise of that jurisdiction, or as to its extent.

6. Judges of courts of general jurisdiction are not liable in private actions for judicial acts which are both in excess and outside of that jurisdiction.

7. No judge acting without, or in excess of, jurisdiction is personally liable, unless he knew, or had means of knowing, the defect; and this knowledge is always for the plaintiff to prove.

3. *Cooley on Torts*, 172, 459.

There are not a few authorities holding that, when an inferior court exceeds its jurisdiction, its proceedings are entirely void, and afford no protection, not only to the court issuing and the party procuring the issuance, but to the officer executing the process as well.

The leading case discussing the question is *Savacool v. Boughton*, 5 Wend. (N. Y.) 170; s. c., 21 Am. Dec. 181. In that case *Marcy, J.*, after discussing a number of cases, and trying to reconcile some of them, and saying there were others that could not be reconciled, arrives at the conclusions as follows:—

“In my judgment, the same principle which gives protection to a ministerial officer who executes the process of a court of general jurisdiction should protect him when he executes the process of a court of limited jurisdiction, if the subject-matter of the suit is within that jurisdiction, and nothing appears on the face of the process to show that the person was not also within it.

“The following propositions, I am disposed to believe, will be found to be well sustained by reason and authority: That where an inferior court has not jurisdiction of the subject-matter, or, having it, has not jurisdiction of the person of the defendants, all its proceedings are absolutely void; neither the members of the court, nor the plaintiff (if he procured or assented to the proceedings), can derive any protection from them, when prosecuted by a party aggrieved thereby. If a mere ministerial officer executes any process, upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it.

“If the subject-matter of a suit is within the jurisdiction of a court, but there is a

the officer executing it, and it may be void because it does not emanate from the court purporting to issue it; that is, because it is a forgery, or because an unauthorized person has assumed to fill out and issue a process in the name of the magistrate.¹ It may be void because it proceeds from a court or magistrate having no jurisdiction of the subject-matter;² or if so issued by a court or officer of inferior jurisdiction, such jurisdiction is not shown on the face of the process; that is, the process must be fair on its face.³

want of jurisdiction as to the person or place, the officer who executes process issued in such suit is no trespasser, unless the want of jurisdiction appears by such process. *Bull. N. P.* 83; *Willes*, 32, and the cases there cited by Lord Chief Justice Willes. I am, therefore, of opinion that the execution issued by the justice to the defendant, it being on proceedings over the subject-matter of which he had jurisdiction, and the execution not showing on its face that he had not jurisdiction of the plaintiff's person, was a protection to the defendant for the ministerial acts done by him in virtue of that process."

A ministerial officer, acting under process fair upon its face, and issuing from a tribunal or person with apparent jurisdiction to issue such process, is protected thereby in its execution against all irregularities and illegalities, except his own. *Sewell's Law of Sheriff*, 99; *Crocker on Sheriffs* (2d ed.), 38, 39, 126, 383; 2 *Hilliard on Torts*, 184; *Freeman on Execution*, sect. 272; 1 *Watterman on Trespass*, 302; *Bigelow, Lea. Cases on Torts*; Note to *Savacool v. Boughton*, 5 *Wend.* (N. Y.) 170; s. c., 21 *Am. Dec.* 181; *Davis v. Wilson*, 65 *Ill.* 525; *Clay v. Caperton*, 1 *T. B. Mon. (Ky.)* 10; s. c., 15 *Am. Dec.* 77; *Clinton v. Nelson*, 2 *Utah*, 284; *Wheaton v. Beecher*, 49 *Mich.* 348; *Donahoe v. Shed*, 8 *Met. (Mass.)* 326; *Wilmarth v. Burt*, 7 *Met.* 257; *Herzog v. Graham*, 9 *Lea*, 152; *Chase v. Fish*, 16 *Me.* 132; *Slomer v. People*, 25 *Ill.* 70; s. c., 76 *Am. Dec.* 786; *Repler v. Pents*, 86 *Ill.* 275; *Johnson v. Von Kettler*, 66 *Ill.* 63; *Wooster v. Parsons*, *Kirby*, 110; *Trammell v. Russellville*, 34 *Ark.* 105; s. c., 36 *Am. Rep.* 1; *Boaz v. Tate*, 43 *Ind.* 60; *Sleight v. Ogle*, 4 *E. D. Smith*, (N. Y.) 445; *Landt v. Hilts*, 19 *Barb. (N. Y.)* 283; *Allison v. Rheam*, 3 *Serg. & R.* 139; s. c., 8 *Am. Dec.* 644; *Neth v. Crofat*, 30 *Conn.* 580; *Cleveland v. Rogers*, 6 *Wend. (N. Y.)* 438; *Wall v. Trumbull*, 16 *Mich.* 234; *Batchelder v. Currier*, 45 *N. H.* 460; *Gordon v. Clifford*, 28 *N. H.* 402; *Tarleton v. Fisher*, 2 *Doug.* 671; *Erskine v. Hohnbach*, 14 *Wall. (U. S.)* 613; *Lattin v. Smith*, 1 *Breese (Ill.) (Beecher's ed.)*, 361; *Gott v. Mitchell*, 7 *Blackf.* 270; *Smith v. Bowker*, 1 *Mass.* 76; *Haskell v. Sumner*, 1 *Pick. (Mass.)* 459;

Bergin v. Hayward, 102 *Mass.* 414; *Brown v. Henderson*, 1 *Mo.* 134; *Millburn v. Gilman*, 11 *Mo.* 64; *State v. Weed*, 21 *N. H.* 262; *Keniston v. Little*, 30 *N. H.* 318; *Lewis v. Palmer*, 6 *Wend. (N. Y.)* 367; *Deyo v. Van Valkenburg*, 5 *Hill.* 242; *Bennett v. Burch*, 1 *Denio (N. Y.)*, 141; *Hill v. Haynes*, 54 *N. Y.* 153; *Newbury v. Munshow*, 29 *Ohio St.* 617; s. c., 23 *Am. Rep.* 769; *Sprague v. Birchard*, 1 *Wis.* 457; *Young v. Wise*, 7 *Wis.* 128; *McLean v. Cook*, 23 *Wis.* 364; *Lewis v. Palmer*, 6 *Wend. (N. Y.)* 367; *Paton v. Westervelt*, 2 *Duer (N. Y.)*, 362; *Sheldon v. Vanbuskirk*, 2 *N. Y.* 473; *Chegaray v. Jenkins*, 5 *N. Y.* 376; *Kerr v. Mount*, 28 *N. Y.* 659; *Porter v. Purdy*, 29 *N. Y.* 106; *National Bank v. Elmira*, 49 *N. Y.* 54; *Hill v. Haynes*, 54 *N. Y.* 153; *Bradley v. Ward*, 58 *N. Y.* 401; *Roderigas v. Savings Inst.*, 76 *N. Y.* 323; *Nowell v. Tripp*, 61 *Me.* 426; *Sturbridge v. Winslow*, 21 *Pick. (Mass.)* 83; *Bergin v. Hayward*, 102 *Mass.* 414; *Millburn v. Gilman*, 11 *Mo.* 64.

1. Blank warrants were left in the hands of a police sergeant, who was accustomed to fill them up with the name of the person to be arrested, etc., and use them as occasion demanded: *held*, that a warrant so filled up was a nullity. *Rafferty v. People*, 69 *Ill.* 111; s. c., 18 *Am. Rep.* 601; *Peirce v. Hubbard*, 10 *Johns. (N. Y.)* 405; *People v. Smith*, 20 *Johns. (N. Y.)* 63.

2. It is one of the risks and hazards of the sheriff's office, that the sheriff is to determine at his peril whether he can or can not detain a party in custody under a certain writ; and if he detains one under a writ issued from a court having no jurisdiction of the subject-matter, he is liable. *Fisher v. Langbein*, 62 *How. Pr.* 238; *Johnson v. Von Kettler*, 66 *Ill.* 63; *Gold v. Bissell*, 1 *Wend. (N. Y.)* 210; s. c., 19 *Am. Dec.* 480; *Barhydt v. Valk*, 12 *Wend. (N. Y.)* 145; s. c., 27 *Am. Dec.* 124; *Abbott v. Booth*, 51 *Barb. (N. Y.)* 546; *Harwood v. Siphers*, 70 *Me.* 464; *Pearce v. Atwood*, 13 *Mass.* 324; *Gorton v. Frizzell*, 20 *Ill.* 291; *Stoyel v. Lawrence*, 3 *Day (Conn.)*, 1; *Peck v. Rooks*, 22 *Ark.* 221; *Blythe v. Tompkins*, 2 *Abb. Pr.* 468; *Grunum v. Raymond*, 1 *Conn.* 40; *Sheldon v. Hill*, 33 *Mich.* 171; *Moore v. Watts*, 1 *Ill.* 42; *Smith v. Weeks (Wis.)*, 18 *N. W. Rep.* 778.

3. The writ must have a seal, — *State v.*

If not fair on its face, and discloses a defect of jurisdiction, or some other substantial defect or irregularity, it affords no protection to an officer acting under it.¹

Curtis, 1 Hayw. (N. C.) 471,—and the warrant must show on its face the grounds upon which it was granted. *Hall v. Howd*, 10 Conn. 514; *Comfort v. Fulton*, 13 Abb. (N. Y.) 276. The name of the person to be apprehended must also be accurately inserted in the warrant, in order that the officer may know whom to arrest, and that the party whose liberty is threatened may know whether he is bound to submit. *State v. Weed*, 21 N. H. 262; *Miller v. Foley*, 28 Barb. (N. Y.) 630; *Johnston v. Riley*, 13 Ga. 97; *Prell v. McDonald*, 7 Kas. 426; *Mead v. Haws*, 7 Cow. (N. Y.) 332; *Shadgett v. Clipson*, 8 East, 328; *Griswold v. Sedgwick*, 1 Wend. (N. Y.) 126; *Scott v. Ely*, 4 Wend. (N. Y.) 555; *McMahan v. Green*, 34 Vt. 69. Though, if the right man is arrested, he cannot complain: the officer, in such a case, assumes the responsibility of getting the person intended. *Williams v. Tidball et al.* (Ariz.), 8 Pac. Rep. 357. But see *Allen v. Leonard*, 28 Iowa, 529. A warrant regularly issued against a person whose name is unknown, with a blank left for the name, will justify the arrest of the proper person. *Baily v. Higgins*, 5 Harr. (Del.) 462. See *Wells v. Jackson*, 3 Munf. (Va.) 458; *Nichols v. Thomas*, 4 Mass. 232.

A general and uncertain description is insufficient. *Clark v. Bragdon*, 37 N. H. 562; *Sandford v. Nichols*, 13 Mass. 289. A warrant must contain in some shape, however informal, and however abbreviated, an accusation of a criminal offence. *Hall v. Rogers*, 2 Blackf. (Ind.) 429. An officer cannot justify under a process clearly on its face in excess of the jurisdiction of the committing magistrate. *Pooler v. Reed*, 75 Me. 488.

A village charter authorized a fine to be imposed for a certain offence, the same "to be made of the property of the defendant, if any such can be found," and if not, then imprisonment, does not authorize a judgment, that, if the defendant does not at once pay such fine, he shall be imprisoned; and a *mittimus* showing those things is void, and affords no protection to the officer executing it. *Sheldon v. Hill*, 33 Mich. 171.

1. The officer is bound to know what the law is; and if his writ is bad on its face, he must take notice of such fact. *Grunon v. Raymond*, 1 Conn. 39; *Lewis v. Avery*, 8 Vt. 287; *Clayton v. Scott*, 45 Vt. 386. A writ may be valid in part, and void, in part; and in serving such he is liable only for acts not authorized by it. *Gage v. Barnes*, 11 Vt. 195. A process is

void as to all connected with it, when upon its face it wants essential form and substance. A seal, for instance, being one of the legal requisites to give vitality to a process, is essential, and its absence renders the precept absolutely void. If a warrant is issued upon a charge purporting to be based upon a certain law, and that law has been repealed, or never had an existence, the warrant is void; or if the warrant describes no offence, or sets forth no person to be arrested, but, in attempting to do it, is general and unintelligible in one or both respects, or if it issued for an offence not within the jurisdiction of the magistrate to try, or to arrest a person over whom he has no legal authority, and these facts appear upon the papers, they are void; or if an officer undertakes to serve a process not within his precinct, his acts are all void. *State v. Weed*, 21 N. H. 262; s. c., 53 Am. Dec. 188. Where an authority under which an officer acts is voidable only, he may justify under it, but not where the authority is void. *Batchelder v. Currier*, 45 N. H. 460; *Nicholas v. Thomas*, 4 Mass. 232; *State v. McNally*, 34 Me. 210. A sheriff cannot excuse himself from the service of process because it is erroneous or irregular, but only when it is absolutely void. *Stoddard v. Tarbell*, 20 Vt. 321.

If the court has jurisdiction of the subject-matter, it is sufficient to justify the officer executing its process, for he is not bound to examine into the validity of its proceedings. *Warner v. Shed*, 10 Johns. (N. Y.) 138. Process regular on its face protects the officer acting under it, although it may have been issued without authority. — *Noble v. Holmes*, 5 Hill (N. Y.), 194, — though issued irregularly, and through indefensibly bad motives. *Johnson v. Maxon*, 23 Mich. 129. When a writ from a court of competent jurisdiction comes to the hands of an officer, he is bound to execute it without inquiring into the regularity of the proceedings on which it is grounded. *Cody v. Quinn*, 6 Fred. (N. Car.) 191.

In brief, it seems beyond a doubt, that when the warrant is regular and legal on its face, showing all the legal requisites to make it perfect in form, and coming from a court or magistrate having jurisdiction of the subject-matter and person, the officer will be protected thereby, even though either or both the party procuring the issuance, or the magistrate issuing, may be liable, and the same wholly void as to them. *Erskin v. Hohnbach*, 14 Wall. 613; *Lloyd v. Hann* (N. J. 1887), 2 Atl. Rep. 346; *Hines v. Chambers* (Minn.), 11 N.

W. Rep. 129; Henke v. McCord (Iowa), 7 N. W. Rep. 623. The process of a *de facto* court or officer protects to the same extent as that of a *de jure*. Wilcox v. Smith, 5 Wendell, 231; s. c., 21 Am. Dec. 213; Laver v. McGlachlin, 28 Wis. 364.

The law under which a process issues is a part of the process; so, if the law is unconstitutional or void, the process affords no protection to the officer. Fisher v. McGirr, 1 Gray (Mass.), 1; Ely v. Thomson, 3 A. K. Marsh. (Ky.) 70; Milligan v. Hovey, 3 Biss. (U. S.) 13.

State courts having no jurisdiction to enforce maritime liens by process *in rem.*, such a process issuing from a State court will not protect the officer executing it. Campbell v. Sherman, 35 Wis. 103.

An order of a commissioner in bankruptcy to detain the bankrupt until he should pay a debt, being void for want of jurisdiction to make it, affords no protection to the officer. Watson v. Bodell, 14 Mee. & W. 57. So where an execution against the body was issued on a judgment against the plaintiff in a *replevin* suit when the law did not authorize it. Pomeroy v. Crocker, 4 Chandler (Wis.), 174. So where a warrant of arrest for a contempt was signed by only one of the judges, the law requiring that it should be signed by all. Van Sandaw v. Turner, 6 Q. B. (Ad. & El. N. S.) 773. And when the warrant is not authenticated by the officer authorized to issue it. Mericle v. Mulks, 1 Wis. 366.

Where a conviction on an information under which an arrest was attempted to be justified, showed on its face that the defendant was convicted *ex parte* on a default, having been summoned to appear and answer the information in less time than the statute allowed, held no justification, it not being fair on its face. Mitchell v. Foster, 12 Ad. & El. 472.

A warrant not correctly describing the court from which it issued is no protection. Corrett v. Morley, 1 Q. B. (Ad. & El. N. S.) 18. Nor a warrant issued on the sabbath. Pearce v. Atwood, 13 Mass. 324. Nor one directing that the prisoner be forthwith delivered to a United States marshal, thus depriving him of an opportunity to procure bail, the offence being a bailable one. Bagnall v. Ableman, 4 Wis. 163.

Where a process is regular on its face, and such as would protect the officer, if, however, he has personal knowledge of defects in the previous proceedings such as would render the process void, it constitutes no protection to him if such defect is jurisdictional in its character. Bird v. Perkins, 33 Mich. 28; Gott v. Mitchell, 7 Blackf. 270; Grace v. Mitchell, 31 Wis. 533; s. c., 11 Am. Rep. 613; Sprague v. Birchard, 1 Wis. 457; Barnes v. Barber, 6 Ill. 401; Leachman v. Dougherty, 81 Ill.

324; Guyer v. Andrews, 11 Ill. 494. But see Underwood v. Robinson, 106 Mass. 296; Trask v. Payne, 43 Barb. (N. Y.) 569; Abbott v. Booth, 51 Barb. (N. Y.) 546.

Where a statute requires process to be served by a certain person, another is not protected thereby if he make the arrest. Reynolds v. Orvis, 7 Cow. (N. Y.) 269; Wood v. Ross, 11 Mass. 277. Neither does a warrant directed to a private person instead of an officer. Commonwealth v. Foster, 1 Mass. 488. Nor does a warrant directed to any constable of the county protect a special constable. American Express Co. v. Patterson, 73 Ind. 430. But if the writ is issued by a court of competent jurisdiction, the fact that there are defects upon its face which render it voidable merely will not excuse the officer from executing it. Phillips v. Spotts (Neb.), 15 N. W. Rep. 332.

In Georgia, under a statute, in cases of imprisonment under a warrant, neither the party *bona fide* suing out, nor the officer who in good faith executes it, is guilty of false imprisonment, though the warrant be defective in form, or be void for want of jurisdiction; and the good faith must be determined from the circumstances of each case. In cases of arrest without a warrant, the person arresting shall, without delay, convey the offender before the most convenient officer authorized to receive an affidavit and issue a warrant; and no such imprisonment shall be lawful beyond a reasonable time allowed for that purpose. Manning v. Mitchell, 73 Ga. 660.

In this case, which was an action for false imprisonment, the evidence showed in brief as follows: Plaintiff, when arrested, was a shoemaker in Atlanta, engaged in his daily work, and had been so for five years, and a man of excellent character; he resided in the city of Atlanta for years, and his place of business was located in a public situation. He was arrested by certain policemen, including the chief of police of Atlanta, upon a letter from the sheriff of Rockdale County, and without the production of any warrant. He was able and willing to give any bond required, but it was refused; and he was incarcerated in a cell which was loathsome and filthy. The chief of police stated that it would do no good to take out a writ of *habeas corpus*, that they would hold him. Another policeman said that plaintiff was guilty "of every crime except burning a mill-pond, and he is arrested because there is money in it." After the sheriff of Rockdale County arrived (his residence being distant from Atlanta about two hours' ride by rail), and after five hours' imprisonment, bond was taken, and plaintiff released, after payment of costs. The sheriff said he had bench warrants for the plaintiff, which had been

5. *Officer making Arrest without Process.* — While no principle is more firmly fixed in the frame of our law than that no one can be deprived of life, liberty, or property without due process of law, this is co-existent with the right of society to protect itself against sudden assaults.

So it is the well-settled rule that sheriff, constable, or other peace officer, is justified in arresting without process one who is committing a breach of the peace in his presence, or he may, upon reasonable suspicion, arrest a person charged with commission of a felony, although no felony was in fact committed.¹

sent to the chief of police; but when plaintiff, pursuant to his bond, went to answer, no charge was against him in the court of Rockdale County, and he was released. The bench warrants had been issued in 1874, when plaintiff was a boy seventeen years of age, living with his father, and were for vagrancy and carrying concealed weapons. The arrest was made in 1883. *Held*, that the facts made a case of false imprisonment, and it was error for the court to direct a verdict for the defendants.

1. The public safety, and the due apprehension of criminals charged with heinous offences, requires that such arrests should be made without warrant by officers of the law. Constables, and other peace officers, acting officially, the law clothes with greater authority than private persons, and they are held to be justified if they act, in making the arrest, upon probable and reasonable grounds for believing the party guilty of a felony; and this is all that is necessary for them to show in order to sustain a justification of an arrest for the purpose of detaining the party to await further proceedings, under a complaint on oath, and a warrant thereon. *Rohan v. Sawin*, 5 Cush. (Mass.) 281. The liberty of the citizen is so highly regarded that the officer arresting a supposed-felon without warrant must act in good faith, and upon grounds of probable suspicion that the person to be arrested is the actual felon. *Eanes v. State*, 6 Humph. (Tenn.) 53; s. c., 44 Am. Dec. 289; *Hilliard on Torts*, vol. i. p. 207; *Bryan v. Bates*, 15 Ill. 87; *Vandever v. Mattocks*, 3 Ind. 479; *Montgomery v. Sutton*, 14 Rep. N. S. 175; s. c., 12 N. W. Rep. 719; *Regina v. Light*, 27 L. J. M. C. 1; *Taylor v. Strong*, 3 Wend. (N. Y.) 384; *Fulton v. Staats*, 41 N. Y. 498; *Burns v. Erben*, 26 How. Pr. 273; s. c., 40 N. Y. 463; *Quinn v. Heisel*, 40 Mich. 576; *Drennan v. People*, 10 Mich. 169; *Touhey v. King*, 9 Lea (Tenn.), 422; *In re Powers*, 25 Vt. 261; *Russell v. Shuster*, 8 Watts & S. 308; *McCarthy v. DeArmit*, 99 Pa. St. 63; *Scirle v. Neeves*, 47 Ind. 289; *Hutchinson v. Sangster*, 4 G. Greene (Iowa), 340; *Marsh v. Smith*, 49 Ill. 396; *Commonwealth v.*

Tobin, 108 Mass. 426; s. c., 11 Am. Rep. 375; *Holley v. Mix*, 3 Wend. (N. Y.) 350; s. c., 20 Am. Dec. 702; *Johnson v. State*, 30 Ga. 426; *Rohan v. Sawin*, 5 Cush. (Mass.) 281; *Timothy v. Simpson*, 1 C. M. & R. 757; *Wakely v. Hart*, 6 Binn. 316; *Marsh v. Loader*, 14 C. B. (N. S.) 535; *Lawrence v. Hedger*, 3 Taunt. 14; *Keenan v. State*, 8 Wis. 132; *Wade v. Chaffee*, 8 R. I. 224; s. c., 5 Am. Rep. 572; *Doering v. State*, 49 Ind. 56; s. c., 19 Am. Rep. 669; *Neal v. Joyner*, 89 N. C. 287; *State v. Sims*, 16 S. C. 486; *State v. Bowen*, 17 S. C. 58; *State v. Underwood*, 75 Mo. 230; *State v. Grant*, 76 Mo. 236; *Castro v. De Urearte*, 16 Fed. Rep. 93; *Johnston v. Moorman*, 80 Va. 131; *Malcolmson v. Scott*, 56 Mich. 459; *Ballard v. State*, 43 Ohio St. 340.

This power, however, is watched with suspicion by the courts; and it has been held, in not a few cases, that such arrests are illegal, and the officers making them are liable. *Pow v. Beckner*, 3 Ind. 475; *Justice v. Gosling*, 21 L. J. C. P. 443; *Griffin v. Coleman*, L. J. Exch. 134; s. c., 4 Hlt. 265; *Boyleston v. Kerr*, 2 Daly (N. Y.), 220; *Sternack v. Brooks*, 7 Daly (N. Y.), 142; *Schneider v. McLane*, 36 Barb. (N. Y.) 495; *Philips v. Fadden*, 125 Mass. 198; *Moore v. Durgin*, 68 Me. 148; *Brock v. Stimson*, 108 Mass. 520; *Kennedy v. Favor*, 14 Gray (Mass.), 200; *McLennon v. Richardson*, 15 Gray (Mass.), 74; *Prell v. McDonald*, 7 Kas. 426; *Shanley v. Wells*, 71 Ill. 78; *Newton v. Locklin*, 77 Ill. 103.

The following instances illustrate the rule. An arrest for a breach of the peace cannot be legally made without a warrant if not committed in the presence of the officer making the arrest. *People v. Holey*, 48 Mich. 495; s. c., 12 N. W. Rep. 671; *Sternack v. Brooks*, 7 Daly (N. Y.), 142; *Quinn v. Heisel*, 40 Mich. 576; *People v. Bartz*, 19 N. W. Rep. 161. A peace officer without warrant arrested plaintiff five hours after he had been guilty of disorderly conduct; *held* an action for false imprisonment would lie. *Wahl v. Walton*, 30 Minn. 506. A police officer cannot without process arrest one as a common prostitute on the ground that she is a disorderly person,

As to what constitutes reasonable suspicion, of course, must depend upon the facts of each case. On the one hand, the construction ought not to be so strict as not to protect the officer in the execution of his duties; and, on the other, not so liberal as to jeopardize the liberty of the citizens.

The arrest in either case is for the purpose of conveying before a magistrate, and having the charge duly made and examined into; and if this is not done within a reasonable time, the arrest, otherwise lawful, becomes unlawful, and the officer becomes liable.¹

unless the offence was committed in his presence. *People v. Pratt*, 22 Hun (N. Y.), 300. An officer is not liable to one whom he arrests and detains three hours until a regular charge could be made against him, when such person was found by the officer intoxicated in the streets, having just assaulted another. *Wiltse v. Holt*, 95 Ind. 469. If a person, who has been arrested by a police officer without a warrant, under the Pub. Sts. c. 207, § 25, for being intoxicated in a public place, consents to his discharge from custody without a complaint being made against him, intending thereby to release any damages on account of a failure to make the complaint, and such agreement is fairly and intelligently made, he cannot maintain an action against the officer for an assault and false imprisonment. *Caffrey v. Drugan*, 144 Mass. 294. An arrest without warrant for vagrancy can rarely be justified. *In re Way*, 41 Mich. 299.

A constable may arrest for breach of peace committed in his view, but is not authorized to arrest without a warrant, unless the offence is committed in his view, or the act or threat is not fresh. *Shanley v. Wells*, 71 Ill. 78. Five hours is too long a time to intervene. *Wahl v. Walton*, 30 Minn. 506; s. c., 16 N. W. Rep. 397. A police officer is not liable for arresting without warrant one not in fact intoxicated, but believed on reasonable grounds by the officer to be so. *Commonwealth v. Cheney*, 141 Mass. 102; s. c., 55 Am. Rep. 448. When the law clearly defines the duties of a policeman, and does not authorize him, without a warrant, to arrest for carrying concealed weapons, he may not do so. *State v. Holcomb*, 86 Mo. 371. But a policeman is not authorized to arrest on mere belief that a party has been guilty of an offence, or is engaged in the commission of one, if such belief has no basis of fact or circumstances on which to rest. *State v. Grant*, 79 Mo. 113; *People v. Burt*, 51 Mich. 199; s. c., 16 N. W. Rep. 378. The marshal of Alpena arrested a man, on Saturday evening, on the strength of a letter purporting to come from the chief of police of Philadelphia, and signed with his name by some person whose initials only were attached. The letter stated nothing that

would constitute a criminal offence in Michigan, but the marshal detained the prisoner as a matter of "official courtesy." *Held*, that the arrest was illegal. *Malcolmson v. Scott*, 56 Mich. 459.

1. Detention five days, plaintiff having been arrested without a warrant, is clearly unreasonable as a matter of law. *Cochran v. Toher*, 14 Min. 385.

A police officer may arrest without warrant for violation of ordinance committed in his presence, but the offender must be taken before the mayor as soon as practicable, a warrant obtained, and a trial had. *Stote v. Freeman*, 86 N. Car. 683.

In case of an arrest without a warrant, the law requires that the prisoner be immediately and without delay conveyed before the nearest magistrate. *Green v. Kennedy*, 48 N. Y. 653; *Phillips v. Fadden*, 125 Mass. 198; *Patten v. Swindle* (Ga.), 3 So. E. Rep. 94; *Hayes v. Mitchell*, 69 Ala. 452; *Ocean S. S. Co. v. Williams*, 69 Ga. 251. And where the defendant in a peace warrant was brought before a justice at 11.30 P. M. Saturday, being at the time crazed with drink, and manifesting his dangerous character in the presence of the justice, that officer committed him to jail. In an action against the justice for false imprisonment, it is *held* that he acted properly in committing the defendant to jail, as it was too late to try him before midnight; and the law does not require a justice to hold an examining court on the sabbath, although he may do so; nor does the law permit such an officer to try one who is temporarily incapacitated by drink to attend to or understand the charge preferred against him. *Pepper v. Mayes*, 81 Ky. 674.

The ordinances of the incorporated town of D. making drunkenness and breaches of the peace offences, the marshal of the town or his deputy was authorized, without warrant, to arrest a party infringing such ordinances in his view. The fact that the drunken man's proposition when first arrested, to give bond, was refused, and he was confined in the calaboose for an hour, will not authorize a conviction for false imprisonment. *Beville v. The State*, 16 Tex. App. 70.

So, in an action for false imprisonment

6. *Those assisting Officer.* — Every citizen, when duly called upon by an officer, must assist such officer in apprehending a supposed culprit in pursuit, or aid in preserving the peace upon such call.¹ And, as he is punishable if he refuses so to do, it would seem to be a most reasonable rule that would grant such person the largest measure of protection. And this is the general rule.² If, however, he volunteers, he acts at his peril.³ But the general rule is not to be extended any farther than its terms indicate.⁴

7. *Private Citizen making Arrest.* — The right of a private party to arrest without warrant is more restricted than that of an officer, but it is the right and duty of any one who shall witness the commission of a felony to apprehend the offender at once.⁵ So may a by-stander interfere to prevent a breach of the

against a marshal or constable, an answer, that the defendant found the plaintiff on the street intoxicated, and having just assaulted a citizen, and arrested and detained him three hours until he became sober, when a criminal charge was regularly made before a justice, and the plaintiff fined, etc., is good on demurrer. *Wiltse v. Holt*, 95 Ind. 469.

A peace officer may, without a warrant, arrest for a breach of the peace or for a misdemeanor committed in his presence, but has no authority to arrest for a misdemeanor, on mere suspicion, or at the request of another. *Taaffe v. Slevin*, 11 Mo. App. 507.

1. *Coyles v. Hurtin*, 10 Johns. 85.
2. *Kirbie v. Smith*, 5 Tex. App. 60; *Goodwine v. Stephens*, 63 Ind. 112; *Coyles v. Hurtin*, 10 Johns. 85; *Payne v. Green*, 18 Miss. 507; *Kilpatrick v. Frost*, 2 Grant, 168; *Jennings v. Carter*, 2 Wend. 446; s. c., 20 Am. Dec. 635; *Cooley on Torts*, 463. A person is not liable for assisting a constable in making an arrest when no unnecessary force is used, even though the affidavit and warrant for such arrest are erroneous, if the same be not void. *Goodwine v. Stephens*, 63 Ind. 112. Nor has a person called upon to assist an officer any right to demand of the officer an inspection of the warrant under which he is acting. It is sufficient that he is a known public officer, and the command of such officer will be a defence to those rendering assistance in obedience to it. *Main v. McCarty*, 15 Ill. 441. And when one is summoned to assist a known officer, he will be protected in some cases although the officer may be liable, as when the wrong person is arrested, because the assistant must go by the command of the officer, and may not know who is named in the warrant. *McMahan v. Green*, 34 Vt. 69; s. c., 80 Am. Dec. 665. *State v. James*, 80 N. C. 370.

3. A volunteer, however, is held to

knowledge of his (the officer's) right, and acts at his peril; and the guilt or innocence of the arrested party is an immaterial inquiry on his trial for false imprisonment. *Kirbie v. Smith*, 5 Tex. App. 60.

4. If the officer's process is void, all who assist in the arrest are liable. *Batchelder v. Currier*, 45 N. H. 460.

Where the original act of an officer in the execution of civil process is clearly unlawful, as where a sheriff arrests a debtor on execution by breaking open the outer door of his dwelling-house, those aiding him in the performance of it will be trespassers, though they act by his command. *Hooker v. Smith*, 19 Vt. 151. If one not a known public officer, assuming to act by a special appointment, makes an arrest, persons aiding him are bound to know whether or not he is authorized to make the arrest. If he is not, they are liable. *Dietrichs v. Schaw*, 43 Ind. 175. All who aid in the unlawful confinement of another become liable for the false imprisonment, although they rendered no aid in the original arrest, and did not know that the arrest and imprisonment were illegal. *Roth v. Smith*, 41 Ill. 314. Generally, one who, present or absent, aids, encourages, countenances, or approves of a trespass, is liable as a principal. *Cooper v. Johnson*, 81 Mo. 483; *McMannus v. Lee*, 43 Mo. 206; *Brown v. Perkins*, 1 Allen (Mass.), 89.

Where a wrong person is arrested through mistake, all persons causing the arrest are liable for the injury, unless the party complaining has brought the arrest on himself by his own misstatements. *Hays v. Creary et al.*, 60 Tex. 445.

5. *Phillips v. Trull*, 11 Johns. 486; *People v. Adler*, 3 Park. (N. Y.) 249; *Handcock v. Baker*, 2 B. & P. 260; *Taylor v. Strong*, 3 Wend. 384; *Long v. State*, 12 Ga. 293; *Brockway v. Crawford*, 3 Jones (N. C.), L. 433; *Vanderveer v. Mattocks*, 3 Ind. 479.

peace,¹ but he may not without a warrant arrest a person who has been engaged in a breach of the peace after the affray has terminated.²

To justify the arrest by a private person without process of one suspected of felony, the proof must show that the felony had actually been committed, and that the one causing the arrest had reasonable ground for believing the one arrested guilty.³ But one

1. *Knot v. Gay*, 1 Root (Conn.), 66; *In re Powers*, 25 Vt. 261.

2. *Phillips v. Trull*, 11 Johns. (N. Y.) 486; *People v. Adler*, 3 Park. (N. Y.) Cr. 249; *Woods' Addition on Torts*, 804.

3. *Woods' ed. Addition on Torts* 803; *Wakely v. Hart*, 6 Binn. (Pa.) 316; *Commonwealth v. Deacon*, 8 Serg. & R. (Pa.) 49; *Allen v. Wright*, 8 Car. & P. 522; *Renck v. McGregor*, 32 N. J. L. 70; *Allen v. Leonard*, 28 Iowa, 529; *Chinn v. Morris*, 2 Car. & P. 361; *Stonehouse v. Elliot*, 6 T. R. 315; *Brockway v. Crawford*, 3 Jones, L. N. C. 433; *Teagarden v. Graham*, 31 Ind. 422; *Morley v. Chase*, 143 Mass. 396.

"There is certainly an inaccuracy in the charge of the judge, as stated in the bill of exceptions. The judge is represented as laying down the broad proposition, that a felon can in no case be arrested without warrant, when there is time to obtain one. My understanding of the law is, that if a felony has in fact been committed by the person arrested, the arrest may be justified by any person, without warrant, whether there is time to obtain one or not. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrested without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on. These principles will be found substantially in 1 Chit. Crim. Law, 15. The case of *Samuel v. Payne* and others, 1 Doug. 359, supports the distinction in the above proposition. In that case a search-warrant was taken out by Hall, one of the defendants, upon a charge of theft; but the warrant did not authorize the arrest. The goods were not found; but the plaintiff was arrested, and carried before a magistrate, and discharged. On the trial, Lord Mansfield laid down the law, that, if a felony has been committed, any man, upon reasonable, probable ground of suspicion, may justify apprehending the suspected person, and carrying him before a magistrate; but if no felony has been committed, such arrest cannot be justified by anybody.

The court, however, thought the rule too narrow, and said, that if any person charge another with felony, and desire an officer to take him in custody, such charge will justify the officer, though no felony was committed; but the person making such charge will be liable. And upon a new trial a verdict was found against Hall, but in favor of the officers.

"A similar decision was made in *Hobbs v. Brandscomb* and others, 3 Campb. 420, where the plaintiff had been improperly arrested upon a charge of felony where no felony was committed. For the defendants, the case of *Samuel v. Payne* was relied on, and a *nisi prius* decision of Mr. Justice Buller, in which he held that 'if a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but if he receives a person into custody on a charge preferred by another, of felony or breach of the peace, that he is to be considered as a mere conduit; and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable.' Lord Ellenborough said this rule appeared to be reasonable, and that injurious consequences might follow if peace officers under such circumstances were personally responsible, should it turn out that in point of law no felony had been committed." *Holley v. Mix*, 3 Wend. 350; s. c., 20 Am. Dec. 703; *Simmerman v. State* (Neb.), 21 N. W. Rep. 387; *Kennedy v. State*, 107 Ind. 144. As a general principle, no person can be arrested or taken into custody without a warrant. But if a felony or a breach of the peace has, in fact, been committed by the person arrested, the arrest may be justified by any person without a warrant, whether there is time to procure a warrant or not. But if an innocent person be arrested upon suspicion by a private individual, such individual is not excused unless such offence has in fact been committed, and there was reasonable ground to suspect the person arrested. *Burns v. Erben*, 40 N. Y. 466; *Hawley v. Butler*, 54 Barb. 493; *Mandeville v. Guernsey*, 51 Barb. 99; s. c., 50 N. Y. 669; *Brown v. Chadsey*, 39 Barb. 253; *Guernsey v. Lovell*, 9 Wend. (N. Y.) 320. But see *Arnes v. Brunet*, 1 Phil. (Pa.) 175; *Johnson v. Tompkins*, 1

so arrested must be taken with due speed before a magistrate for proper examination and commitment.¹

8. *Party procuring the Arrest.* — A person who procures the arrest of another under a void writ is guilty of false imprisonment.² And this is true whether the writ is void upon its face, —

Bald. (U. S.) 571. Where defendants, without any process, went to the house where the plaintiff was sleeping, searched the house, made her get out of bed, and dress in their presence, and took and lodged her in a police station on a charge of larceny which proved to be wholly unfounded, the defendants offered to prove by one of themselves in mitigation of damages that when he came home in the evening his wife informed him that two hundred dollars were stolen, she having the same day discharged the plaintiff as a servant; but it was held entirely incompetent, as the charge was entirely false, no money having been stolen. *Ryan v. Donnelly*, 71 Ill. 100. So in *Findlay v. Pruitt*, 9 Port. Ala. 195, it is held that mere suspicion that a felony has been committed is no justification. In *Reuck v. McGregor*, 32 N. J. L. 70, plaintiff came to defendant's store with a piece of cloth which he desired to sell to defendant; defendant had a piece of cloth stolen or misplaced, and, after examining the piece brought by plaintiff, thought it the one he had lost, accused plaintiff of stealing it, and, calling a policeman, had him arrested. It was not, in fact, defendant's cloth, but was similar to his: the plaintiff, in an action for false imprisonment, obtained a verdict for three thousand dollars damages. The appellate court say, "We cannot fail to pronounce this a very striking instance of mistaken identity, without any evil design against the plaintiff, and founded upon such reasonable grounds of belief as would be sufficient at least to relieve the defendant of any charge of malicious prosecution, had he made complaint to the magistrate before the arrest, and quite sufficient to authorize the defendant to arrest the plaintiff without warrant, *if the proof that a felony had been committed had been complete.*" The proof is not clear that a larceny of McGregor's cloth had been committed; yet he never found it, and there is nothing in the case to induce us to think that he feigned it, or that he did not believe it, but on the contrary the circumstances would reasonably create the belief in the mind of McGregor that his cloth had been stolen." And the court held, that, while the circumstances did not wholly excuse the defendant, they showed such reasonable grounds of suspicion that the verdict was excessive, and granted a new trial.

So it is held that evidence of a reason-

able suspicion of a felony may be given to mitigate the damages, even where no felony is proven. *Hall v. Booth*, 3 Neb. & M. 316; *Chinn v. Morris*, 2 Car. & P. 361; *Farnam v. Feeley*, 56 N. Y. 451; *Rogers v. Wilson*, Minor (Ala.), 407. The reasonableness of the general rule is well stated in *Brockway v. Crawford*, 3 Jones, L. (N. Car.) 433. "What has the plaintiff (if he be a good citizen) to complain of? A felony is committed, and the felon escapes: he is advertised, and a reward is offered for his apprehension. The plaintiff bears a close resemblance, both in dress and personal appearance, to the suspected person; his associations and fixedness in his position as a member of the community do not place him above the marks of honest suspicion which attached to him because of the close resemblance to the man who figures under the reward as a fugitive from justice. Has he cause to complain? Ought he not rather to congratulate himself that he lives in a land where justice is administered with a steady hand, and if occasionally the wrong passenger is waked up, that every good citizen should bear in mind that it was meant for the best, and will work around for the good of the whole?"

1. If a person be arrested as a fugitive from justice from another State by a private person without warrant, he must be carried, without delay, before the most convenient officer qualified to receive an affidavit, and issue a warrant; and if he be detained beyond a reasonable time without being carried before such officer, the person arresting or detaining him commits the offence of false imprisonment, especially if the person arrested and detained be not the alleged fugitive, but an innocent man, and his detention be accompanied with maltreatment, such as force and chains. *Lavina v. State*, 63 Ga. 513.

2. *West v. Smallwood*, 3 Mees. & W. 418; *Carratt v. Morley*, 1 Q. B. 18; *Gru-mon v. Raymond*, 1 Conn. 40; s. c., 6 Am. Dec. 200; *Poult v. Sloum*, 3 Blackf. 421; *Vaughn v. Congdon*, 56 Vt. 111; *Hoye v. Bush*, 1 Man. & G. 775; *Blyth v. Tompkins*, 2 Abb. Pr. 468; *Flack v. Harrington*, Breese (Ill.), 213; s. c., 12 Am. Dec. 170; *Gold v. Bissell*, 1 Wend. 210; s. c., 19 Am. Dec. 480; *Floyd v. State*, 12 Ark. 43; s. c., 54 Am. Dec. 250; *Mitchell v. State*, 12 Ark. 50; s. c., 54 Am. Dec. 253; *Smith v. Shaw*, 12 Johns. 257; *Miller v. Adams*, 52

a nullity, — or void because the magistrate or court issuing it did not have jurisdiction of the subject-matter.¹

And when the facts stated in the affidavit are sufficient to authorize the issuance of a warrant of arrest, and to give the judicial officer jurisdiction to issue it, and the warrant issued thereon is regular on its face, the person procuring its issuance is not liable in an action for false imprisonment, even though the issuance of such warrant was erroneous because of facts not disclosed.² The party so procuring the warrant would not be liable

N. Y. 409; *Abbott v. Booth*, 51 Barb. 546; *Harwood v. Siphers*, 70 Me. 464; *Gorton v. Frizzell*, 20 Ill. 291; *Sheldon v. Hill*, 33 Mich. 171; *Green v. Elgie*, 5 Q. B. 99; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316; s. c., 25 Am. Rep. 616; *Hackett v. King*, 6 Allen, 58; *Wilson v. Robinson*, 6 How. Pr. 100; *Chapman v. Dyett*, 11 Wend. 31; s. c., 25 Am. Dec. 598; *Roth v. Smith*, 41 Ill. 314; *Vredenburg v. Hendricks*, 17 Barb. 179; *Emery v. Hapgood*, 7 Gray, 55; *Painter v. Ives*, 4 Neb. 122; *Fellows v. Goodman*, 49 Mo. 62; *Gibbs v. Randlett*, 58 N. H. 407; *Diehl v. Friester*, 37 Ohio St. 473; *Bonesteel v. Bonesteel*, 28 Wis. 245; s. c., 30 Wis. 511; *Develing v. Sheldon*, 83 Ill. 390; *Letzler v. Huntington*, 24 La. Ann. 330; *Thorpe v. Wray*, 68 Ga. 359; *Bauer v. Clay*, 8 Kas. 580; *Luddington v. Peck*, 2 Conn. 700. A party is liable for false imprisonment, if it was for his benefit, and he approve of it. *Fenelon v. Butts*, 53 Wis. 344.

1. *Goslin v. Wilcock*, 2 Wils. 302; *Hallock v. Dominy*, 7 Hun (N. Y.), 52; *Grumon v. Raymond*, 1 Conn. 40; s. c., 6 Am. Dec. 200; *Vaughn v. Congdon*, 56 Vt. 111.

So, even though the affidavit upon which the warrant issued was made in good faith, — *Painter v. Ives*, 4 Neb. 122, — and when the party acts by an attorney or other agent in suing out the void process. *Parsons v. Loyd*, 3 Wils. 341; *Barker v. Braham*, 3 Wils. 368; *Guillaume v. Rowe*, 94 N. Y. 268. A party procuring the writ to be issued is not necessarily protected by a writ regular on its face, and one protecting the officer, for it may be shown to be void for facts not appearing on its face. *Ex parte Thompson*, 1 Flipp. 514. As where a party procures a warrant to issue without making the oath required by the statute. *Curry v. Pringle*, 11 Johns. 444; *Stone v. Carter*, 13 Gray, 575; *Hauss v. Kohlar*, 25 Kas. 640; *Vredenburg v. Hendricks*, 17 Barb. 179; *Cody v. Adams*, 57 Gray, 19. And where one causes a person to be arrested for a greater sum than is in fact due, — *Wentworth v. Bullen*, 9 Barn. & Cres. 840, — or for a less sum than that for which the law authorizes an arrest. *Smith v. Cattell*, 2 Wils. 376. See *Gordon v. Upham*, 4 E. D. Smith, 9. One, however,

is not liable for false imprisonment simply because the affidavit and order of arrest were irregular, if the grounds for the arrest actually existed. *Ogg v. Murdock*, 25 W. Va. 139. Neither is one who honestly lays information of a supposed public offence before a justice of the peace responsible for the subsequent wrongful action of such justice and his constable in issuing and executing a warrant. *Teal v. Fissel*, 28 Fed. Rep. 351.

2. "The facts stated in the affidavit upon which the warrant was issued were sufficient to give the judge who issued it jurisdiction; and in issuing it he acted judicially, and made a judicial determination. The warrant was not, therefore, void or voidable, or irregular. It was the result of the regular judicial action of a judicial officer having jurisdiction upon the facts presented to him to issue it. It was subsequently set aside by the judge who issued it, when a new fact, to wit, that the plaintiff had been before arrested in an action against him by these defendants upon an order of arrest issued in the action for the same cause, and upon substantially the same grounds, was brought to his attention. The existence of this fact did not make the warrant void or irregular. When brought to his attention, it furnished the judge a ground for the dismissal of the warrant in the exercise of further judicial action. It matters not whether the warrant was dismissed in the exercise of judicial discretion, or upon the claim by the plaintiff that he could not be twice arrested for the same cause, and hence that he had the absolute legal right to be discharged from the second arrest. It was at most a case where the plaintiff was erroneously arrested. An error was committed, which, upon a proper presentation of the facts, was to be corrected by further judicial action. A warrant, granted under such circumstances, protects against an action for false imprisonment, not only the judge who granted it, but the party who procured it, and instigated its service. The case stands no different from what it would have been if the plaintiff had appeared, and denied the facts alleged in the affidavit upon which the warrant was based, and had thus pro-

in an action for false imprisonment, even though the warrant was procured maliciously and without probable cause, though he would be liable in an action for malicious prosecution.¹

cured his discharge upon the merits; or if the defendants, when they applied for the warrant, had disclosed the fact of the prior arrest, and the judge had erroneously decided that they were yet entitled to it, and his decision had, upon appeal, been reversed; or if, when the fact of the prior arrest was afterward brought to his attention, he had refused to set aside the warrant, and his decision had, upon appeal, been reversed. If a warrant of attachment, or an order of arrest, is issued in an action upon facts giving the judge jurisdiction, and the defendant appears, and by showing new facts, or denying those alleged against him, procures the attachment or the order to be set aside, the process is not void or voidable, or irregular, but simply erroneous, and protects the judge and the party who procures it, although it is set aside, against an action for trespass or false imprisonment. In all such cases, these are regular judicial methods; and that which was legally done at the time cannot be converted into a wrong by relation after the process has by judicial action been set aside. This rule of exemption is founded in public policy, and is applicable alike to civil and criminal remedies and proceedings, that parties may be induced freely to resort to the courts and judicial officers for the enforcement of their rights and the remedy of their grievances without the risk of undue punishment for their own ignorance of the law, or for the errors of courts and judicial officers. The remedy of the party unjustly arrested or imprisoned is by the recovery of costs which may be awarded to him, or the redress which some statute may give him, or by an action for malicious prosecution in case the prosecution against him has been from unworthy motives and without probable cause." *Marks v. Townsend*, 97 N. Y. 590; *Reynolds v. Corp.*, 3 Caines, 268; *Chapman v. Dyett*, 11 Wend. 31; *Hayden v. Shed*, 11 Mass. 500; *Landt v. Hilts*, 19 Barb. 283; *Miller v. Adams*, 52 N. Y. 409; *Day v. Bach*, 87 N. Y. 56; *Wagstaff v. Schippel*, 27 Kas. 450. The party causing process to be issued is not responsible for any thing that is done under it when the process is afterwards set aside, not for irregularity, but for error. There is a manifest distinction between setting aside process for irregularity, and reversing a proceeding on appeal. In the one case, a man acts irregularly and independently without the sanction of any court; but when he relies upon the judgment of a competent court, however erroneous that judgment may be, the party acting upon

the faith of it ought to be protected. *Williams v. Smith*, 14 C. B. (N. S.) 596.

1. When process sued out by a party is afterwards set aside for error, the party is not liable in an action for damages: when it has been set aside for irregularity or bad faith, he may be. *Palmer v. Foley*, 71 N. Y. 106. By irregularity is generally meant some irregular action by the party or his attorney, such as the issuing of a *ca. sa.* before a *fi. fa.* has been issued and returned; and it cannot be predicated of a case where judicial power has been regularly, though erroneously or mistakenly, exercised.

So a person as an infant exempt from imprisonment cannot recover in an action for false imprisonment against one causing his arrest, if he is arrested on a valid writ or process of a court. *Cassier v. Fales*, 139 Mass. 458. Neither is a person making the complaint liable if he state the facts to the magistrate, even though such facts do not authorize the issuance of the warrant. If the magistrate put a wrong construction on such facts, mistaking the law, no one is liable. *Wheaton v. Beecher*, 49 Mich. 348; *Fenelon v. Butts*, 49 Wis. 342; *Von Latham v. Libby*, 38 Barb. 339; *Peckham v. Tomlinson*, 6 Barb. 253; *Lewis v. Rose*, 6 Lans. 206; *McNeely v. Driskill*, 2 Blackf. 259; *Newman v. Davis*, 58 Iowa, 447.

Where the sufficiency of the facts stated in an application for an order of arrest has been passed upon by the judge making the order, the plaintiff is not responsible unless he omitted something he should have averred. *Dusy v. Helm*, 59 Cal. 188. Neither is he responsible if he merely states the facts and circumstances to a prosecuting attorney, and swears to the complaint drawn by such attorney, even though the facts sworn to failed to make out a criminal offence. *Murphy v. Walters*, 34 Mich. 180. But if he justifies because he acted on the advice of counsel, he must have stated all the facts to his counsel. *Clark v. Baldwin*, 25 Kas. 120; *Dolbe v. Norton*, 22 Kas. 101. But the opinion of a justice of the peace, that a certain set of facts narrated to him by the complainant constitute grand larceny, and hence authorize the making of a complaint charging one with grand larceny, is no protection to the complainant when he is sued for false imprisonment, the county attorney being the proper officer designated by law to give such opinion. *Dolbe v. Norton*, 22 Kas. 101; *Murphy v. Larson*, 77 Ill. 172; *Stanton v. Hart*, 27 Mich. 539; *Burgett v. Burgett*, 43 Ind. 78.

Where a statute confers upon a court or magistrate the power to issue an order of arrest in a civil case upon certain conditions, such as filing an affidavit containing a statement of the facts claimed to justify the belief in the existence of the particular fraudulent act set forth, the filing of such affidavit is a condition precedent to the issuance of the order; and an order predicated upon an affidavit which does not contain such a statement is void for want of legal authority in the justice to issue it; and an arrest thereunder is illegal, making the person obtaining such order liable. *Spice v. Steinruck*, 14 Ohio St. 213; *Hauss v. Kohlor*, 25 Kas. 640; *Gorton v. Frizzell*, 20 Ill. 292; *Von Kettler v. Johnson*, 57 Ill. 109; *Johnson v. Von Kettler*, 66 Ill. 63; *Proctor v. Prout*, 17 Mich. 473; *Cody v. Adams*, 7 Gray (Mass.), 59; *Hall v. Rogers*, 2 Blackf. 429; *Taylor v. Moffatt*, 2 Blackf. 305; *Painter v. Ives*, 4 Neb. 122; *Sheridan v. Briggs*, 53 Mich. 569; s. c., 14 N. W. Rep. 189; *Middaugh v. Williams*, 48 Mich. 172; s. c., 12 N. W. Rep. 34.

A person making an affidavit for the purpose of procuring the legal arrest of one, however, will not be liable if without his knowledge, and contrary to his intention, the same is improperly used by an officer to procure an illegal arrest. *Roth v. Smith*, 41 Ill. 314; *Adams v. Freeman*, 9 Johns. 117. Neither is one who has procured an order for the arrest of one in a civil suit liable, if the sheriff by mistake arrest another, even though such other be pointed out as the one to be arrested by a clerk of the attorney of the person procuring the arrest. *Gearon v. Savings Bank*, 50 N. Y. 264. Or if a person does nothing more than to make a complaint to a magistrate against another for an offence, and the latter is arrested under a warrant duly issued by the magistrate, who has jurisdiction of the subject-matter and of the party, the complainant is not liable to an action by the arrested person for assault and false imprisonment, although the complaint is defective. *Langford v. Boston*, etc., R. Co., 144 Mass. 431.

But a person for whose benefit a warrant or *ca. sa.* issues may be liable, though he might not be active in procuring it, if he approved of it. *Fenelon v. Butts*, 53 Wis. 344; *Webber v. Kenny*, 1 A. K. Marsh. (Ky.) 345; *Patterson v. Prior*, 18 Ind. 440. So if an attorney should illegally cause the arrest, the client is rendered liable. *Guilleaume v. Rowe*, 63 How. (N. Y.) Pr. 175; *Parsons v. Lyod*, 3 Wils. 341; *Barker v. Braham*, 3 Wils. 368.

The authority of an attorney at law to collect a debt does not cease on his obtaining a judgment and execution; and if by his procurement, or that of his clerk acting within the general scope of his em-

ployment, the judgment debtor is illegally arrested, the principal of the attorney is liable therefor. *Shattuck v. Bill*, 142 Mass. 56.

But a member of a committee who have counselled and advised the arrest is not liable, unless it be shown that he acted with them. *Develing v. Sheldon*, 83 Ill. 390. And the release of one that is liable can be pleaded as a defence by those who were jointly liable with him. *Stone v. Dickinson*, 7 Allen (Mass.), 26.

Any one who participates in a wrongful arrest, whether directly or by causing others to engage in it by "exciting, directing, consenting to or encouraging," is liable therefor, — *Johnson v. Tompkins*, 1 Bald. (Conn.) 571, *Hallock v. Dominy*, 7 Hun (N. Y.), 52, — even though he may not be present, and may be in another State. *Stoddard v. Bird*, Kirby, 65; *Clifton v. Grayson*, 2 Stew. (Ala.) 412. There must, however, be a positive and active consent to the arrest to render a party liable therefor. *Gilbert v. Emmons*, 42 Ill. 143; *Taylor v. Trask*, 7 Cow. (N. Y.) 249. And where the process which is regular is abused by the advice of a party, he is liable for such abuse. *Snydacker v. Brosse*, 51 Ill. 357. A master is not liable for the injury of his servant, unless the servant act by the express or implied authority of his employer. *Wright v. Wilcox*, 19 Wend. 343. So where those employed in a store called an officer into the store and directed him to arrest and search one suspected of stealing goods, which was done without the knowledge or the implied or express authority of the employer, it was held that the employer was not liable. *Mali v. Lord*, 39 N. Y. 381. One at whose request a police officer makes an arrest for a misdemeanor, the same not having been committed in the presence of the officer, must, to justify himself, show that the charge leading to the arrest was well founded. *Taafe v. Slevin*, 11 Mo. App. 507. But if he merely communicates facts, or circumstances of suspicion, to the officer, leaving him to act on his own judgment, he is not liable. *Brown v. Chadsey*, 39 Barb. (N. Y.) 253. Nor is one liable, who, seeing a man in custody of an officer for a supposed offence, points out another as the real criminal, but without directing the officer to take that one into custody. *Gosden v. Elphick*, 4 Exch. 445. Even malicious motives and the absence of probable cause do not give a party arrested an action for false imprisonment; they may aggravate his damage, but have nothing whatever to do with the cause of action; hence, if in this case the defendant had intentionally withheld from the judge who granted the warrant, the fact of the plaintiff's prior arrest, that fact would have

9. *Attorneys.*—If an attorney shall deliver to an officer an illegal or void writ, with express or implied orders to serve the same, he becomes liable to one illegally arrested thereunder.¹ And he is also liable if he counsel or assist in doing any thing in excess of the command of even a legal process by the officer;² also if he sues out void process under which a party is arrested.³ And generally he is liable if he maliciously and illegally obtains and directs the execution of a void process.⁴

But he will be protected in an action for false imprisonment if he do nothing more than lay the facts supposed to constitute the crime for which the plaintiff was arrested before the magistrate, and leave such magistrate to his own judgment in the issuance of the process; and the writ issued is sufficiently regular to protect the officer serving it.⁵

been quite pertinent to maintain an action for malicious prosecution, but would not have laid the foundation for a recovery in an action for false imprisonment. *Marks v. Townsend*, 97 N. Y. 590; *McQuinty v. Herrick*, 5 Wend. (N. Y.) 240. Generally an action cannot be maintained where the party causing the arrest acted without malice with probable cause upon a valid warrant. *Krebs v. Thomas*, 12 Ill. Ap. 266.

A person who has procured the arrest and imprisonment of another on a lawful warrant is not liable to an action for false imprisonment, although his object in making the complaint upon which the warrant was issued was to enforce the payment of a debt. *Mullen v. Brown*, 138 Mass. 114.

The mere fact that defendant made the affidavit upon which a judgment debtor, after execution returned unsatisfied, was required to appear and answer before a person acting as court commissioner, but without any authority, is not ground for holding *as matter of law* that he was liable for the wrongful imprisonment of such debtor by order of such pretended commissioner for refusal to answer questions put upon such examination; but the question whether defendant did in fact direct or instigate the imprisonment, is for the jury, upon all the evidence. *Fenelon and Wife v. Butts*, imp. 49 Wis. 342.

1. *Burnap v. Marsh*, 13 Ill. 535; *Cooley on Torts*, 131.

2. *Cook v. Hopper*, 23 Mich. 511; *Hardy v. Keeler*, 56 Ill. 152; *Pierson v. Gale*, 8 Vt. 509.

3. *Barker v. Braham*, 3 Wils. 368; *Deyo v. Van Valkenburg*, 5 Hill. (N. Y.) 242; *Sleight v. Leavenworth*, 5 Duer (N. Y.), 122.

4. It was there held in *Stockley v. Hardidge*, 34 Eng. C. L. R. 276, that if the attorneys who commenced the suit alleged to be malicious, knew that there was no

cause of action, and, knowing this, "dishonestly, and with some sinister view for some purpose of their own, or for some other ill purpose which the law calls malicious, caused the plaintiff to be arrested and imprisoned," they were liable. . . . It is true, that when the attorney acts in good faith in prosecuting a claim which his client believes to be just, and is actuated only by motives of fidelity to his trust, he ought not to be held liable, although he may have entertained a different opinion as to the justice or legality of the claims. When the client will assume to dictate a prosecution upon his own responsibility, the attorney may well be justified in representing him, so long as he believes his client to be asserting what he supposes are his rights, and is not making use of him to satisfy his malice. But when an attorney submits to be made the instrument of prosecuting and imprisoning a party against whom he knows his client has no just claim or cause of arrest, and that the plaintiff is actuated by illegal or malicious motives, he is morally and legally just as much liable as if he were prompted by his own malice against the injured party. . . . The attorney, then, cannot always justify himself under the instructions of his client, no matter how positive they may be. . . . An attorney may so act under his general employment to enforce a legal claim, as to render himself alone liable for a malicious prosecution or arrest. *Burnap v. Marsh*, 13 Ill. 535; *Warfield v. Campbell*, 35 Ala. 349. It is *held*, however, that an attorney is not liable, although the process under which he caused the imprisonment was erroneously issued, — not void, — it having been issued upon application to the court, and the court having jurisdiction. *Fischer v. Langbein*, 13 Abb. (N. Y.) N. Cas. 10.

5. A civil action for damages for trespass to the person will not lie against one who has made a criminal complaint, or

10. *Corporations.* — Corporations are liable in actions of false imprisonment. As a corporation can act only by its agents and servants, this is saying that a corporation is liable for the wrongful acts of its servants when such acts result in the wrongful arrest and detention of a person, under the same rules and to the same extent that they are liable for any other tort of such agent or servant. The rule regarding this liability seems to be this: If in the performance of, and within the scope of, his supposed duty, the agent or servant inflicts unwarranted injury upon another, the principal is liable therefor. And it is no defence that the torts thus committed were *ultra vires* to the corporation, for it matters not how much in excess of its authority the wrongful act may be, if such act has been done by the agent while acting within the scope of his authority, either express or implied.¹ Some applications of this rule, in the matter of false imprisonment, are noted below.²

against his attorney, in a case where the warrant issued thereon is sufficiently regular on its face to protect the officer who executes it. *Wheaton v. Beecher*, 49 Mich. 348.

1. Field on Corporations, sect. 331; *Rounds v. D. L. & W. R. R.*, 64 N. Y. 129; s. c., 21 Am. Rep. 597; *Fire Assn. v. Fleming* (Ga.), 3 So. E. Rep. 420.

2. In *Lynch v. Metropolitan Elevated Railway Co.*, 90 N. Y. 77; s. c., 12 Am. & Eng. R. R. Cas. 119; 43 Am. Rep. 141, the company had a rule that a passenger in getting off the train could not pass the gate without showing his ticket or paying fare: the plaintiff had purchased a ticket on entering the car, but had lost it before arriving at his destination. In attempting to pass from the platform on alighting, he was told by the gate-keeper he could not do so until he purchased a ticket or paid his fare. He explained, but was not allowed by the keeper to pass, but, a police officer being called, was placed in custody by the gate-keeper: he was locked up over night, and in the morning the gate-keeper appeared against him before the police magistrate, who discharged him. It was held that the company had no right to detain the plaintiff; that while it had a right to make reasonable rules for the government of its business, a rule that forbade a passenger from passing from the premises without paying his fare was unreasonable, as in effect it was a rule imposing imprisonment for debt; and held further that the gate-keeper was acting within the scope of his authority in detaining and causing the arrest of the plaintiff, and hence that the defendant was liable.

In *Standish v. Narragansett Steamship Co.*, 111 Mass. 512; s. c., 15 Am. Rep. 66, the plaintiff purchased a ticket before going

upon the defendant's steamboat for a passage from Fall River to New York; the company's regulation was, that the passenger should, upon leaving the boat at the end of his passage, deliver up his ticket, or pay his fare; when he reached New York he found he had lost his ticket, and he was prohibited from leaving the boat until he produced a ticket or paid his fare; he was detained two hours, and then under protest paid his fare and left the boat; he sued the company, and recovered fifty dollars. The trial judge charged the jury that "The law gave the defendant a lien on the baggage of the plaintiff, but not on his person; that it had no right to detain him until he did pay his fare or give up his ticket, or to compel him to pay his fare or give up his ticket, but if he knew that he was to give up his ticket before leaving the boat, the defendant had a right, if he did not give it up or pay his fare, to detain him for a reasonable time to investigate on the spot the circumstances of the case, and if the jury found that the defendant detained him for the purpose of compelling him to pay his fare or give up his ticket, or detained him for the purpose of investigating his case an unreasonable time, or in an unreasonable way, he was entitled to recover." The instruction was sustained by the Supreme Court. In *Krulevitz v. Eastern R. Co.* (Mass. Sup. Ct. 1887), 28 Am. & Eng. R. R. Cas. 138, a conductor directed the police officers to take into custody a passenger for attempting to fraudulently evade the payment of his fare. Held, that while the conductor himself, being a railroad police officer under the statute, might have caused the arrest if the offence was committed in his presence, that in not doing so, but in directing his arrest by other officers at the end of the journey, he acted as a conduct-

As to municipal corporations, the rule seems to be without exception, that they are not liable in an action for false imprisonment, either for the acts of their officers while enforcing unconstitutional and void ordinances, or for the illegal and unauthorized acts of their officers.¹

11. *Jailers.* — The rules applicable to officers making the arrest, and under which they may justify, are generally applicable to jailers, or those who detain a party arrested, after such arrest. And there seems to be but little distinction between the liability of an officer making the arrest, and the jailer who detains the person arrested thereafter; the latter being generally treated as the agent of the former.²

IV. *Military Order.* — Military officers are not answerable to the civil courts for arrests made by them in the exercise of their military or naval authority, or for offences against the articles of war, or breaches of military discipline;³ but if they exceed their

or, and made his company liable. But the burden is upon the plaintiff to show that the company's servants had authority (under the rules given) from the company to do the wrongful act complained of. *Goff v. Great N. Ry. Co.*, 30 L. J. Q. B. 148. See also *Owsley v. Montgomery, etc.*, R. R. Co., 37 Ala. 560; *Murdock v. Boston & A. R. R. Co.*, 133 Mass. 15; *American Express Co. et al. v. Patterson*, 73 Ind. 430. A corporation is liable for the tortious acts of its agent done in the line of his employment and in the execution of the authority conferred, although such corporation did not directly authorize the wrong action, or subsequently ratify it. *The Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kas. 350; s. c., 17 Am. & Eng. Corp. Cas. 55.

1. *Odell v. Schroder*, 58 Ill. 353; *Trammel v. Town of Russellville*, 34 Ark. 105; s. c., 36 Am. Rep. 1; *Trescott v. City of Waterloo*, 26 Fed. Rep. 593; *Ogg v. Lansing*, 35 Iowa, 495; *Caldwell v. City of Boone*, 51 Iowa, 687.

But one procuring the arrest of another to recover a penalty under an act of the supervisors, which act the supervisors are not authorized to pass, is liable. *Hallock v. Doming*, 14 N. Y. Sup. Ct. 52.

2. A jailer holding a prisoner as agent for a sheriff who has illegally arrested such prisoner, must stand or fall upon the same defences which the sheriff makes, although the process under which the jailer is acting is regular upon its face. *Artega v. Conner*, 88 N. Y. 403. When the officer has the right to arrest and imprison in the county jail, the jailer has a right to receive and detain the prisoner. Nor does such jailer become liable for the former oppressive acts of the officer because he thus receives the party arrested. *Boaz v. Tate*, 43 Ind. 60.

An officer lawfully arresting another is not liable if he confines the prisoner in a jail other than the one authorized by law, if he does so at the request of the prisoner. *Ellis v. Cleveland*, 54 Vt. 437. A conviction and sentence of a person by a court having no jurisdiction being nullities afford no protection to those who hold him in confinement, they being presumed to know the law. *Patterson v. Prior*, 18 Ind. 440; s. c., 81 Am. Dec. 367.

A jailer is not liable for refusing to discharge a debtor on a defective order for such discharge, being advised that the same was defective by counsel, and this is so although he may have been protected by the order had he discharged the prisoner. *Hayes v. Bowe*, 12 Daly (N. Y.), 193.

3. *Woods' ed. Addison on Torts*, sect. 1307; *United States v. Mackenzie*, 1 N. Y. Leg. Obs. 227, 371; *Johnston v. Sutton*, 1 Term. Rep. 546; *Merriman v. Bryant*, 14 Conn. 200. So an action will not lie in favor of a minor against an officer enlisting him, and commanding him in the army, although the consent of parents was not given. *Boutwell v. Thompson*, *Brayt* (Vt.) 119. And a military officer is justified in seizing a person who is transporting property toward the enemy's country under circumstances creating a reasonable suspicion that he was about to carry the same to the enemy. *Clow v. Wright*, *Brayt* (Vt.) 118. A strong suspicion that the person arrested had aided in the escape of deserters from the military service of the United States was held under the circumstances to afford protection to the officer making it. *Teagarden v. Graham*, 31 Ind. 422. See also *French v. White*, 4 W. Va. 170; *Hickey v. Huse*, 56 Me. 493; *Hawley v. Butler*, 54 Barb. (N. Y.) 490. A sergeant is justified in arresting a citizen for using

authority, and make arrests for offences which are not military offences, they will not be protected from their unlawful acts.¹

V. Form of Action and Pleading.—The common-law form of an action for false imprisonment is trespass, and not case.² Under the code, substance, and not form, being requisite, the material allegations are, that the defendant imprisoned the plaintiff against his will, and without authority of law.³ The *gravamen* of the offence is the unlawful act of the defendant.⁴ The circumstance attending the arrest, or the particular instrumentalities by which it was accomplished, need not be given;⁵ though if they are, and if it appear therefrom that the arrest was not authorized by law, no specific allegation that such arrest was either wrongful, unlawful, malicious, or without probable cause, is necessary.⁶ Under

insulting words to him, even though the citizen is on the streets outside garrison grounds: the sergeant being charged by the laws of the United States with the good order and discipline of the fort, and the citizen becoming a nuisance by reason of his abusive language. *Oglesby v. State*, 39 Tex. 53.

1. Woods' ed. Addison on Torts, sect. 1307; *Mallory v. Merritt*, 17 Conn. 178; *Tyler v. Pomeroy*, 8 Allen (Mass.), 480; *Dynes v. Hoover*, 20 How. (U. S.) 65; *Wise v. Withers*, 3 Cranch (U. S.), 331.

An action will lie in favor of an inferior officer against his superior who imprisons him for disobedience of an order made under color, but not within the scope, of military authority. *Warden v. Bailey*, 4 Taunt. 67.

An officer ordering the arrest of a person is bound to see that his subordinates who make the arrest use no unnecessary severity or cruelty in doing so, and he is liable if undue harshness is practised by them. *McColler v. McDowell*, 1 Abb. 212; and a naval officer is liable in an action brought in a State court for an illegal imprisonment of a subordinate, although the act was done on high seas, and under color of naval discipline. *Wilson v. Mackenzie*, 7 Hill (N. Y.), 95.

Neither has the President of the United States, either in his civil capacity, or as commander-in-chief of the army and navy, any power during a rebellion or insurrection to arrest or imprison any person not subject to military law without an order, writ, precept, or process from some court of competent jurisdiction. *Jones v. Seward*, 40 Barb. (N. Y.) 563.

An order commanding the arrest and detention of deserters, and specifying the persons who are authorized to make such arrests, should be strictly construed. *Trask v. Payne*, 43 Barb. 569. But a subordinate should be held excused in law for acts done in obedience to the orders of his com-

mander, except such orders should be plainly in excess of authority. *Jones v. Seward*, 40 Barb. (N. Y.) 563. But see *Beckwith v. Bean*, 98 U. S. 266.

In an action for false imprisonment, the fact that the acts complained of were committed under the authority, and while in the service, of the so-called confederate States, is no defence. *Carpenter v. Martin*, 4 W. Va. 138; *Caperton v. Nickle*, 4 W. Va. 173; *Caperton v. Bowyer*, 4 W. Va. 176; *Whitmore v. Allen*, 33 Tex. 355.

2. *Maher v. Ashmead*, 30 Pa. St. 344; s. c., 72 Am. Dec. 708; *Baird v. Householder*, 32 Pa. St. 168; *Kramer v. Lott*, 50 Pa. St. 495; *Bebee v. Steele*, 2 Vt. 314; *Holly v. Carson*, 39 Ala. 345; *Price v. Graham*, 3 Jones (N. Car.), L. 545; *Platt v. Niles*, 1 Edm. Sel. Cas. 230; *Castro v. De Uriarte*, 12 Fed. Rep. 250. See, however, *Barhydt v. Valk*, 12 Wend. (N. Y.) 145; s. c., 27 Am. Dec. 124; *Nebenzahl v. Townsend*, 61 How. (N. Y.) Pr. 353.

3. *Painter v. Ives*, 4 Neb. 122; *Dusenbury v. Keiley*, 8 Daly (N. Y.), 537; *Shaw v. Jayne*, 4 How. (N. Y.) Pr. 119.

4. *Diehl v. Friester*, 37 Ohio St. 473.

5. *Shaw v. Jayne*, 4 How. (N. Y.) Pr. 119; *Eddy v. Beach*, 7 How. (N. Y.) Pr. 17; *Akin v. Newell*, 32 Ark. 605.

6. *Colter v. Lower*, 35 Ind. 285; s. c., 9 Am. Rep. 735; *Gallimore v. Ammerman*, 39 Ind. 323; *Diehl v. Friester*, 37 Ohio St. 473; *Spice v. Steinruck*, 14 Ohio St. 213; *Carey v. Sheets*, 60 Ind. 17; *Aken v. Newell*, 32 Ark. 605; *Ahern v. Collins*, 39 Mo. 145.

A complaint alleging that the defendants locked the plaintiff up in a room, and by threats of violence, with weapons in hand, compelled him to confess that he had made and violated a certain promise of marriage, and extorted from him an agreement to pay a sum of money for the breach thereof, sufficiently charges false imprisonment. *Hildebrand et al. v. McCrum*, 101 Ind. 61.

the various codes it makes but little difference whether the petition states a cause of action for malicious prosecution, or one for false imprisonment.¹

Under the general allegation, that the imprisonment was unlawful, if it appears in evidence that the same was malicious or

1. The petition "properly alleges an arrest and an imprisonment, and it alleges that the plaintiff below was arrested and imprisoned 'unlawfully,' but why the arrest and imprisonment were unlawful, is not particularly stated. It may be possible that the pleader believed that they were unlawful wholly because they were malicious and without probable cause, and not even partly because the justice of the peace was outside of his jurisdiction, and his proceedings therefore void; and here we might say that counsel for the plaintiff in error, in their brief, enter into an elaborate disquisition upon the distinctions that existed at common law between the old common-law actions of false imprisonment and malicious prosecution. These distinctions, however, have but little value in this State; for in this State all the old forms of action are abolished, and in their place only one form of action is given, called 'a civil action' (Civil Code, 10); and in this form of action redress for all 'injuries suffered in person, reputation, or property' (Const. Bill of Rights, 18) may be had. In this form of action, the plaintiff, in drawing his pleading, which is called a 'petition,' is not required to know just what could have been set up in the old common-law action of 'trespass' or 'case,' or what the distinctions between 'false imprisonment' and 'malicious prosecution' were; but all that he is required to know or to do is, *to know how to state the real facts of his case as they actually occurred, and to so state them*; and, if these facts show a cause of action, he is entitled to his relief, whether such facts show a cause of action in 'trespass,' or in 'case,' or in both, or for 'false imprisonment,' or for 'malicious prosecution,' or for both; and no objection to the petition could be maintained, even if the facts should show a blending of the two kinds of action. *Bauer v. Clay*, 8 Kan. 580; *Wagstaff v. Schippel*, 27 Kas. 450. The elements of any cause of action are: (1) A right possessed by the plaintiff; (2) An infringement of such right by the defendant: and it can make no difference that such infringement is accomplished partly by a *direct and immediate force*, as that denominated 'a false imprisonment,' and partly by *fraud or indirect force*, as that denominated 'a malicious prosecution;' for prosecutions for wrongs committed by direct force, and those committed without direct force, and merely by fraud or indi-

rection, are not necessarily kept separate in this State. We think it is true that the petition in this case states a cause of action for malicious prosecution; but we think it is also true that it states, or comes very near stating, a cause of action for false imprisonment, and this cause of action was undoubtedly proved. If the petition had said nothing about a 'warrant,' or if it had stated that the 'warrant' was void, — which in fact it was, — then it would have stated a good cause of action for false imprisonment. The object of this present action is to recover damages for the unlawful imprisonment of the plaintiff, for arresting him on June 29, 1883, near midnight, in his own house at Coolidge, and taking him from his bed, and from his wife and children, and carrying him to Dodge City, a distance of a hundred and fifteen miles, and there confining him in jail for about two and one-half days, along with several other persons charged with crime, and amid surroundings loathsome and humiliating; and whether this imprisonment was procured by the defendant in maliciously and without probable cause suing out a valid warrant, or in unlawfully causing his arrest upon a void warrant, can make but very little difference to him. The principal ground for damages in either case is the wrongful imprisonment, with its loathsome and humiliating surroundings." *A. T. & S. F. R. Co. v. Rice*, 36 Kas. 593.

A cause of action for false imprisonment and one for malicious prosecution, when both arise out of the same transaction, may be alleged in different counts of the same complaint. *Bradner v. Faulkner*, 93 N. Y. 515; *Barr v. Shaw*, 10 Hun (N. Y.), 580; *Marks v. Townsend*, 97 N. Y. 590; *Bauer v. Clay*, 8 Kan. 580; *Wagstaff v. Schippel*, 27 Kan. 450; *Castro v. De Uriarte*, 12 Fed. Rep. 250. *Held* otherwise, *Neben-zahl v. Townsend*, 61 How. (N. Y.) Pr. 353. And see *Hezog v. Graham*, 9 Lea (Tenn.), 152. And it is proper to amend a petition charging malicious prosecution so as to charge false imprisonment. *Painter v. Ives*, 4 Neb. 122; *Spice v. Steinruck*, 14 Ohio St. 213. *Held* otherwise, *Johnson v. Corington*, 3 Cin. Bull. 1139. And see *Steel v. Williams*, 18 Ind. 161. Though an imprisonment caused by a malicious prosecution is not "false" unless without legal process or extra-judicial. *Murphy v. Martin*, 58 Wis. 276.

oppressive, the jury may give exemplary damages;¹ but special damages cannot be recovered unless the same are pleaded.² Generally, however, matters of aggravation, as distinguished from grounds of special damages, may be proven, though not pleaded.³

If the defendant answer by general denial, the same must be direct and positive, and not on information and belief;⁴ and under a general denial, facts showing probable cause may be given in evidence.⁵ Justification, however, must be specially pleaded, and cannot be proven under the general denial.⁶

VI. Evidence.—Evidence of malice is not essential;⁷ but want of probable cause is, where the arrest has been made without legal process.⁸

But the plaintiff need not show that the defendant used violence, or shut him up in jail or prison, or even laid hands on him; it

1. A statement in the declaration, that the imprisonment had been effected by means of threats and violence, and was without any reasonable or probable cause, is sufficient averment of malice to prevent proof of it so as to justify a recovery for an aggravation of damages. *Brushaber v. Stegemenn*, 22 Mich. 266.

2. Such as injury to character or reputation. *Comer v. Knowles*, 17 Kan. 436. Costs incurred by plaintiff in an application for discharge on a writ of *habeas corpus*. *Spence v. Neynell*, 2 New Mag. Cas. 19. *Contra*, *Williams v. Garrett*, 12 How. (N. Y.) Pr. 456. Expense incurred by the plaintiff in the suit in which the arrest was made, including attorney's fees. *Krug v. Ward*, 77 Ill. 603; *Blythe v. Thompson*, 2 Abb. (N. Y.) Pr. 468; *Strang v. Whitehead*, 12 Wend. 64. For injury from deficient food during confinement, or from bad condition of the jail. *Johnson v. Von Kettler*, 84 Ill. 315. But under the allegation of general damages from disgrace, anxiety, and pain, a plaintiff may prove that he had no bed nor covering while in the city station-house, and suffered from want and pain. *Abrahams v. Cooper*, 81 Pa. St. 232.

3. *Abbott's Trial Evidence*, 657; *Stan-ton v. Seymour*, 5 McLean, 267.

4. *Lawrence v. Derby*, 15 Abb. (N. Y.) Pr. 346.

5. *Benedict v. Seymour*, 6 How. (N. Y.) Pr. 298; *Radde v. Ruckgaber*, 3 Duer (N. Y.), 684; *Trogden v. Deckard*, 45 Ind. 572. Such as that he acted under the advice of counsel learned in the law, and upon full presentation of the facts. *Wright v. Hanna*, 98 Ind. 217; *Smith v. Davis*, 3 Mont. 109. Otherwise if he acted upon the advice of a justice of the peace. *Dalbe v. Norton*, 22 Kans. 101; *Sutton v. McConnell*, 46 Wis. 269; *Bradner v. Faulkner*, 93 N. Y. 515.

6. *Hilliard on Torts*, vol. i. p. 199; *Boaz v. Tate*, 43 Ind. 60. So under the general denial, the defendant cannot show a judgment and execution against the plaintiff under which the arrest took place. *Coats v. Darby*, 2 Comst. (N. Y.) 517. The defence that the imprisonment was under lawful process, must be specially pleaded. *Allen v. Parkhurst*, 10 Vt. 557. So that the defendant had reason to suspect that a criminal offence had been committed by the plaintiff. *Brown v. Chadsey*, 39 Barb. (N. Y.) 253. So a justice of the peace must plead and show that he was not only *de facto*, but *de jure*, a justice. *Newman v. Tiernan*, 34 Barb. (N. Y.) 159. And the answer must identify the trespass, justified with the one complained of by plaintiff, otherwise it is bad. *Scircle v. Neeves*, 47 Ind. 289; *Gallimore v. Ammerman*, 39 Ind. 323; *Young v. Warder*, 94 Ind. 357. And if the plea professes to answer the whole declaration, but omits to justify the detention of the plaintiff some portion of the time, it is bad. In this case, the officer and his servant joined in the plea; and it, being bad as to one, was bad as to both. *Ellis v. Cleveland et al.*, 54 Vt. 437.

7. *Boaz v. Tate*, 43 Ind. 60; *Platt v. Niles*, 1 Edm. 230; *Chrisman v. Carney*, 33 Ark. 316; *Painter v. Ives*, 4 Neb. 122.

8. *Hawley v. Butler*, 54 Barb. (N. Y.) 490; *Gorton v. De Angelis*, 6 Wend. (N. Y.) 418. But see *Boaz v. Tate*, 43 Ind. 60.

Whenever the arrest has been made without authority of law, the offence of false imprisonment is complete. And while many cases speak of probable cause or reasonable grounds of suspicion, as affording justification, it will be found that these cases discuss the right of magistrates, officers, or others, to arrest, or cause arrests, on suspicion merely, and in which reasonable suspicion is a sufficient authority for the arrest.

being sufficient to show that he was restrained of his liberty, or detained from doing as he desired, or going where he wished.¹

If the plaintiff relies upon irregularities or informalities of proceedings or warrant, he must introduce the same in evidence, and all appropriate recitals therein are *prima facie* evidence against him of the facts recited.² If he relies upon the failure of the judgment to support the process against him, he must show that the judgment introduced was the one on which the process issued, and the defect therein.³ But records unauthorized by law are not competent as evidence unless defendant knew that it was customary to make such records.⁴

If the condition of the pleadings is not such as to require it, the plaintiff cannot introduce evidence of his good character in his testimony-in-chief.⁵

The fact that plaintiff was discharged after a trial or examination, is presumptive evidence of want of probable cause for an arrest.⁶

The plaintiff must prove any special damages he may claim; and he may prove matters in aggravation, though not pleaded.⁷

VII. Matters in Defence.—The defendant may show that the process was legal under a general denial of the allegation that

In cases where want of probable cause must be proved, slighter evidence thereof is required than is necessary to prove an affirmative. *Haupt v. Pohlmann*, 16 Abb. (N. Y.) Pr. 301.

1. *Hawk v. Ridgway*, 33 Ill. 473.

2. *Bradstreet v. Furgeson*, 23 Wend. (N. Y.) 638. See *Scott v. Ely*, 4 Wend. (N. Y.) 555.

3. *Barhydt v. Valk*, 12 Wend. (N. Y.) 145; *Brown v. Demont*, 9 Cow. (N. Y.) 263.

4. *Garvey v. Wayson*, 22 Md. 178; *Whart. Ev.* sect. 639. If the affidavit on which the warrant was issued is lost, the contents thereof may be proven by the justice issuing the warrant, the loss of the affidavit being shown. *Ashley v. Johnson*, 74 Ill. 393.

5. *Cochran v. Toher*, 14 Minn. 385; *Fire Association v. Flemming* (Ga.), 3 S. E. Rep. 420.

Evidence of his good character is admissible, however, in rebuttal, if his reputation for honesty and integrity has been assailed. *American Express Co. v. Patterson*, 73 Ind. 430.

6. *Letzler v. Huntington*, 24 La. Ann. 330; *Miller v. Adams*, 7 Lans. (N. Y.) 131; *American Express Co. et al. v. Patterson*, 73 Ind. 430. But see *Stewart v. Sonneborn*, 98 U. S. 187. And the question of probable cause, if resting on conflicting evidence, must be left to a jury. If the mayor of a great city, together with certain of his police officers, be sued for false imprisonment made in an effort to suppress riot

and arrest a murderer, the evidence on the part of the defendants, showing their good faith and the existence of probable cause, need not be very strong to shift the burden upon the plaintiff to establish want of reasonable cause and malice. *McCarthy v. De Armet*, 99 Pa. St. 63; *Mitchell v. Wall*, 111 Mass. 429; *McDaniel v. Needham*, 61 Tex. 269. *Contra*, *Munns v. Dupont*, 3 Wash. C. C. 31; *Lister v. Perryman*, 4 L. R. H. L. Cas. 521.

The question of reasonable cause and reasonable time may be a question of law or of fact depending upon the circumstances of the particular case. *Cochran v. Toher*, 14 Minn. 385.

7. *Abbott's Trial Evidence*, 657.

Though, where a plaintiff sues a railroad company for false detention over night at the instigation of some of its officers, evidence of his discomfort in the place of his detention, of illness produced by the dampness of the cell in which he was confined, and of indignities at the hands of the police officer, is not admissible to enhance the damages. *Murdock v. Boston & A. R. R. Co.*, 133 Mass. 15. But evidence of the loss of a situation is admissible. *American Express Co. v. Patterson*, 73 Ind. 430.

He cannot, however, introduce evidence of sickness caused unless specially pleaded. *A. T. & S. F. R. R. Co. v. Rice*, 36 Kas. 593.

His recovery, however, is not limited to merely nominal damages, although no special damages have been pleaded or

the imprisonment was without warrant;¹ but generally a justification may not be proven which has not been pleaded, except so far as the facts may tend to mitigate damages. Such facts are not available in bar. Evidence that the defendant acted without malice, or with probable cause, may always be admitted to mitigate exemplary damages,² but not to diminish actual damages.³

A private person, in order to justify an arrest of one accused of a felony, need not prove that the felony was committed beyond a reasonable doubt: a mere preponderance of the evidence is sufficient.⁴ In proof of good faith, an officer may show any communication actually made to him, before he acted, that influenced his action.

An officer *de facto* is presumed to be an officer *de jure*.⁵ And evidence of threats made to an officer by a brother of the plaintiff after the arrest, is admissible for the purpose of justifying the officer in putting the plaintiff in irons.⁶

VIII. Damages.—The restraint being illegal, the plaintiff has always a right to recover such damages as shall fully compensate him,⁷ provided, of course, such damages are not too remote.⁸

Such compensatory damages are expenses reasonably incurred to procure discharge from the restraint;⁹ attorneys' fees¹⁰ for

proven. *Page v. Mitchell*, 13 Mich. 63; *Josselyn v. McAllister*, 22 Mich. 299.

1. *Isaacs v. Camplin*, 1 Bailey, 411; *Boynton v. Tidwell*, 19 Tex. 118. So, under the general issue the defendant may show that he was a justice of the peace, and issued the warrant under which the plaintiff was imprisoned upon complaint duly made. *Bailey v. Wiggins*, 5 Har. (Del.) 462; s. c., 60 Am. Dec. 650. And if one justify by pleading a warrant, he must show that the arrest was made for the same offence charged in the complaint. *Young v. Warder*, 94 Ind. 357.

2. *Comer v. Knowles*, 17 Kas. 436; *Sleight v. Ogle*, 4 E. D. Smith (N. Y.), 445; *Miller v. Grice*, 2 Rich. L. 27; s. c., 44 Am. Dec. 271; *Livingston v. Burroughs*, 33 Mich. 511; *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196; *McCall v. Corning*, 1 Abb. 212; *McDaniel v. Needham*, 61 Tex. 269.

The binding over of the plaintiff is only *prima facie* evidence of probable cause for his arrest. *Bauer v. Clay*, 8 Kas. 580.

So evidence of a reasonable suspicion of a felony may be given in evidence to mitigate the damages where no felony is proven. *Chinn v. Morris*, 2 Car. & P. 361; *Rogers v. Wilson, Minor* (Ala.), 407. Actual knowledge of the law is not so conclusively presumed as to charge with malice one who is acting in reliance on what he reasonably believes to be lawful; and if his act is really unlawful, he cannot be held to the same measure of liability as if he did it in defiance of law. *Hill v. Taylor*, 50 Mich. 549.

3. *Comer v. Knowles*, 17 Kas. 436.

So the facts and circumstances of arrest may be shown in mitigation of exemplary damages. *Johnson v. Von Kettler*, 66 Ill. 63. Also the circumstances under which the affidavit was made. *Roth v. Smith*, 41 Ill. 314.

4. *Lander v. Miles*, 3 Oreg. 35.

5. *Prell v. McDonald*, 7 Kas. 426.

6. *Cochran v. Toher*, 14 Minn. 385.

7. Where a party has been illegally imprisoned, and has been put to expense in procuring his discharge, he may very well urge that fact before the jury as an aggravation. *Bradlaugh v. Edwards*, 11 C. B. 377; *Bonesteel v. Bonesteel*, 30 Wis. 511; *Wentz v. Bernhardt*, 37 La. Ann. 636; *Newton v. Locklin*, 77 Ill. 103; *Carey v. Sheets*, 60 Ind. 17; *Van Deusen v. Newcomer*, 40 Mich. 90.

8. Plaintiff may not recover, because, becoming unwell from his imprisonment, he did not go to a certain place where he would have obtained a situation if he had appeared at the right time. *Hoey v. Felton*, 31 L. J. R. (N. S.) C. P. 105. Neither, having been in prison on shipboard, can he recover the expense he incurred in leaving the ship, and taking passage on another, unless the imprisonment continued to the moment of his transshipment, and was the immediate cause thereof. *Boyce v. Bayliffe*, 1 Campb. 58; *Fuller v. Bowker*, 11 Mich. 204. But see *American Express Co. v. Patterson*, 73 Ind. 430.

9. *Pritchett v. Boevey*, 1 Cro. & M. 775; *Blythe v. Thompkins*, 2 Abb. (N. Y.) Pr. 468; *Ocean S. S. Co. v. Williams*, 69 Ga. 25.

10. *Bonesteel v. Bonesteel*, 30 Wis. 511;

loss of time, interruption of his business, and the suffering, bodily and mentally, which the wrong done him has occasioned.¹ He may also recover for insult and humiliation.² And to enhance such compensatory damages, the filthy condition of the jail in which the plaintiff was confined, or any other discomfort or deprivation, may be shown.³

He may also recover, not only for loss of work up to the time of suit, but also if, by reason of the arrest, he failed to get the work he otherwise would have obtained,⁴ and for the injury to the feelings, and anxiety of mind.⁵ The condition of his family may also be shown.⁶

Beyond merely compensatory damages, the plaintiff may recover punitive or vindictive damages, in case the defendant was actuated by malice or a bad motive in making or continuing the arrest.⁷ While this is so, the jury may not punish the defendant by assess-

Krug v. Ward, 77 Ill. 603; Blythe v. Thompson, 2 Abb. (N. Y.) Pr. 468; Parsons v. Harper, 16 Grat. 64. But see contrary, Gibbs v. Randlett, 58 N. H. 407; Strang v. Whitehead, 12 Wend. (N. Y.) 64; Ocean S. S. Co. v. Williams, 69 Ga. 251.

1. Abrahams v. Cooper, 81 Pa. St. 232; Fenelon v. Butts, 53 Wis. 344; s. c., 10 N. W. Rep. 501; Parson v. Harper, 16 Gratt. 64; Stewart v. Maddox, 63 Ind. 51; Jay v. Almy, 1 Woodb. & M. 262.

2. The question of fact as to whether or not there has been insult and humiliation, must be left to the jury. Catlin v. Pond, 101 N. Y. 649.

3. Fenelon v. Butts, 53 Wis. 344; s. c., 10 N. W. Rep. 501; Kindred v. Stitt, 51 Ill. 401; Abrahams v. Cooper, 81 Pa. St. 232. Such as being manacled, and compelled to labor in common with other persons. McCall v. McDowell, Deady, 233. But where one sues a railroad company for a false imprisonment over night at the instance of one of its officers, he cannot show his discomfort or illness produced by the dampness of the cell in which he was put, or indignities he suffered at the hands of the police officer, to enhance damages. Murdock v. Boston & A. R. R. Co., 133 Mass. 15.

4. Thompson v. Ellsworth, 39 Mich. 719; American Express Co. et al. v. Patterson, 73 Ind. 430, where it is held that damages not yet accrued may be properly included when they are certain to follow, and can be fairly estimated.

5. McCall v. McDowell, Deady, 233.

6. Dodge v. Alger, 53 N. Y. Supm. Ct. 107; Fenelon v. Butts, 53 Wis. 344; s. c., 10 N. W. R. 501.

7. Where a mayor, or justice of the peace, maliciously and without reasonable cause orders the arrest and imprisonment of a

person for an alleged felony or breach of the peace, he will be held liable to the person thus arrested, not only for compensatory damages, but also for exemplary damages, proportioned to the wantonness and oppressiveness of his conduct. McCarthy v. De Armet, 99 Pa. St. 63; Sorenson v. Dundas, 50 Wis. 335; Brushaber v. Stegemann, 22 Mich. 266; Wiley v. Keokuk, 6 Kas. 94; Hall v. O'Malley, 49 Tex. 70; Whitmore v. Allen, 23 Tex. 255; Parsons v. Harper, 16 Gratt. 64; Curry v. Pringle, 11 Johns. (N. Y.) 444; Bissell v. Gold, 1 Wend. (N. Y.) 210; s. c., 19 Am. Dec. 480; Fellows v. Goodman, 49 Mo. 62; Josselyn v. McAllister, 22 Mich. 300; s. c., 25 Am. Dec. 48; Marsh v. Smith, 49 Ill. 396; Floyd v. Hamilton, 33 Ala. 235; Kolb v. Bankhead, 18 Tex. 228; Hamlin v. Spaulding, 27 Wis. 360. So when the imprisonment was malicious, damages to the character and reputation may be allowed. Comer v. Knowles, 17 Kans. 436. But where no actual damage is suffered, no exemplary damages can be allowed. Exemplary damages can never constitute the basis of a cause of action. Shippel v. Norton (Kan. 1888), 16 Pac. Rep. 804. The rule for the measure of damages in cases where the malice necessary to sustain the action is such only as results from a groundless act, and there is no actual malice, or design to injure and oppress, is to allow compensatory damages,—that is, damages to indemnify the plaintiff, including injury to property, loss of time, and necessary expenses, counsel fees, and other actual loss,—but not to allow vindictive or punitive damages to punish the defendant. Ogg v. Murdock, 25 W. Va. 139. Where no malice is shown, the measure of damages against an officer for making arrest under process, through mistake, of one not named in the writ, is the value of time lost, the

ing damages in an arbitrary amount.¹ And such damages should be allowed against a peace officer only where the arrest was made in bad faith, and with some other view than the administration of justice.² But if the arrest is made in bad faith, as where criminal proceedings are made use of for the private ends of the defendant, or in some sham proceedings, the jury should allow liberal punitive damages.³

In all cases, however, where damages, other than those strictly compensatory, are claimed, or where the condition of the evidence is such that exemplary damages might be awarded, the defendant may show good faith, absence of malice, or probable cause, in mitigation of damages.⁴

interruption of business, and the bodily and mental suffering caused by the arrest. *Hays v. Creary et al.*, 60 Tex. 445.

1. *Brown v. Chadsey*, 39 Barb. (N. Y.) 253.

2. *Hamlin v. Spaulding*, 27 Wis. 360; *La Roe v. Roeser*, 8 Mich. 537; *Dinsman v. Wilke*, 12 How. (U. S.) 390. But where the action is against the police officer for false arrest without a warrant, if it appears that there are no circumstances to justify a strong conviction on his part that the party arrested is a felon, the jury may exercise a liberal discretion as to the damages to be awarded. *Marsh v. Smith*, 49 Ill. 396.

3. *Fellows v. Goodman*, 49 Mo. 62; *Marsh v. Smith*, 49 Ill. 396; *McCall v. Corning*, 1 Abb. 212.

4. *Comer v. Knowles*, 17 Kans. 436; *Sleight v. Ogle*, 4 E. D. Smith (N. Y.), 445; *McCall v. Corning*, 1 Abb. 212; *Livingston v. Burroughs*, 33 Mich. 511; *Miller v. Grice*, 2 Rich. & L. 27; s. c., 44 Am. Dec. 271; *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196; *Fenelon v. Butts*, 53 Wis. 344; s. c., 10 N. W. Rep. 501. In an action for false imprisonment the gist of the action is the unlawful detention: the only bearing of evidence to show or disprove malice is upon the question of damages. So also probable or reasonable grounds of suspicion against the party arrested affords no justification of an arrest or imprisonment which is without authority of law. *Brown v. Chadsey*, 39 Barb. (N. Y.) 253.

"Malice and wilfulness may belong to any particular case of false imprisonment; but when they do so belong to such particular case, they belong to it as a portion of the special facts of that case, for which special or exemplary damages may be awarded, and do not belong to the case as a portion of the general and essential facts of the case for which general damages may be awarded. In the present case I should think that the plaintiff below did not claim that the defendant below acted wilfully or maliciously, and did not claim

that he, the plaintiff, had any right to recover enhanced damages on account of any wilfulness or malice. If I am correct in this, then the court below did not err in excluding the defendant's evidence. For all that such evidence tended to prove was, that the defendant acted honestly and in good faith in temporarily depriving the plaintiff of his liberty. Such evidence did not tend to prove that the defendant acted legally, and it could not be introduced for the purpose of diminishing the general and actual damages which the plaintiff sustained. Now, if the plaintiff had claimed enhanced damages, or, in other words, exemplary damages, on account of any wilfulness or malice on the part of the defendant, then said evidence would have been admissible in mitigation of such damages, and the court below in that case could not rightfully have excluded the evidence. But as the plaintiff did not claim any such damages, as we infer, nor, in fact, any damages, except general compensatory damages, I think the court below did not err in excluding said evidence." Per Valentine, J., in *Comer v. Knowles*, 17 Kans. 436.

The facts and circumstances of arrest may be shown in mitigation of exemplary damages. *Johnson v. Von Kettler*, 66 Ill. 63. Also the circumstances upon which the affidavit was made, as that the defendant was persuaded by others to make the affidavit upon which the arrest was made, in order to show animus, and to avoid vindictive damages, but not as a bar. *Roth v. Smith*, 41 Ill. 314. Evidence showing motive is proper to be considered in fixing damages. *Davis v. Wilson*, 65 Ill. 525; *Staples v. State*, 14 Tex. App. 136.

Proof of good faith is admissible to mitigate punitive damages, but not compensatory damages, including those allowed for injury to the feeling. *Fenelon v. Butts*, 53 Wis. 344; s. c., 10 N. W. Rep. 501. So evidence that defendant acted under a military order would be admissible to palliate his offence, and mitigate damages. Car-

As to the amount of damages, of course no rule can be laid down, the jury being the exclusive judges of that under the evidence; and excessive damages furnish no ground for setting aside the verdict, unless so extravagant as to make it probable that the jury was actuated by passion or prejudice.¹

penter v. Parker, 23 Ia. 450. It is, however, no mitigation of damages that plaintiff kept a bawdy-house, and, on the night after the wrong complained of, assaulted one of the defendants. Neal v. Peevey, 39 Ark. 337.

While the advice of an attorney under which the defendant acted will not justify, it may be shown in mitigation of damages. Mortimer v. Thomas, 23 La. Ann. 165; Josselyn v. McAllister, 22 Mich. 301; Fox v. Davis, 55 Ga. 298. See also, as throwing some light on the question, the following cases, although many of them are cases of actions for malicious prosecution: Walter v. Sample, 25 Pa. St. 275; Wicker v. Hotchkiss, 62 Ill. 107; Anderson v. Friend, 71 Ill. 475; Davie v. Wisher, 72 Ill. 262; Ash v. Marlow, 20 Ohio, 119; Eastman v. Keasor, 44 N. H. 519; Hill v. Palm, 38 Mo. 13; Sherburne v. Rodman, 51 Wis. 474; Plath v. Braunsdorff, 40 Wis. 107; Wetmore v. Mellinger, 64 Iowa, 741; s. c., 14 N. W. Rep. 722; Gee v. Culver (Oreg.), 6 Pac. Rep. 775; Sutton v. McConnell, 46 Wis. 269; Brobst v. Ruff, 100 Pa. St. 91. But it is not a mitigation that defendant acted under the instructions of his employer. Josselyn v. McAllister, 22 Mich. 300.

If, however, justification be pleaded and not sustained, the same may be considered by the jury as authorizing additional damages. Ocean S. S. Co. v. Williams, 69 Ga. 251; Warwick v. Foulks, 12 M. & W. 507; 1 D. & L. 638; 8 Jur. 85; 13 L. J. Exch. 109.

1. Schlenecker v. Risley, 3 Scam. (Ill.) 483; s. c., 38 Am. Dec. 100.

So a verdict for \$2,000 was held to be excessive, and ground for a new trial in a case where no malice was shown. Johnson v. Von Kettler, 66 Ill. 63. An arrest and detention for three hours in a lock-up, with no circumstances of special indignity, does not justify a verdict of \$2,917 damages. Woodward v. Glidden, 33 Minn. 108. So where the plaintiff had no property or business, and was imprisoned from Friday to Monday, there being no actual malice on the part of the defendant, \$475 was held excessive damages. Ogg v. Murdock, 25 W. Va. 139. So the evidence not showing that there was any actual arrest or detention or any indignity practised upon the person arrested, or his character in any way affected, or that he was detained for more than one day, \$1,000 was held to be excessive damages. Fire Association v. Flemming (Ga. 1887), 3 S. E. Rep. 420.

So where plaintiff was arrested without warrant for violation of ordinance in view of the officer, was taken before a magistrate who ordered his incarceration for abusive and insulting language, the magistrate having only power to fine for contempt, *held*, that \$200 was greater damages than should have been allowed, but not so excessive as to justify the setting aside the verdict. Newton v. Locklin, 77 Ill. 103.

But on the other hand, where the defendant procured two persons, one to personate a constable, and one a justice of the peace, and by them caused the pretended arrest and fining of a minor for a trivial offence, and detained him two hours, and prevented him from consulting an attorney, it was *held* that a judgment for \$125 was fully justified, if not too mild. Price v. Bailey, 66 Ill. 48. So where the plaintiff had incurred an expense of twenty dollars, was wrongly accused of a felony, was confined in jail nearly three full days, and contracted a hard cold while imprisoned, and was suffering ill health as a consequence, \$100 damages was *held* not excessive, but rather meagre. Clark v. Baldwin, 25 Kans. 120. \$1,000 was *held* not excessive where the plaintiff with a nursing infant had been imprisoned in a filthy cell. Fenelon v. Butts, 53 Wis. 344.

Where the plaintiff was arrested without warrant, even though such arrest was justified, but was detained longer than was necessary to procure a warrant, handcuffed, carried out of the county, and imprisoned for days without a warrant, it was *held* that this was not a case for merely nominal damages, and that \$25 was wholly inadequate. Potter v. Swindle (Ga. 1887), 3 S. E. Rep. 94. The plaintiff was arrested without authority of law, thrust into jail without warning or trial, when there was no suit civil or criminal pending against him, was kept there for ten days with other prisoners, this all for the purpose of compelling payment of money he did not owe. *Held*, a judgment for \$1,000 fully warranted, if not too small. Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kans. 350; s. c., 13 Pac. Rep. 609.

The plaintiff, being unjustly accused of petit larceny, was kept under arrest some three days, and procured his release by the expenditure of twelve dollars. *Held*, that \$150 was not excessive damages. Truesdell v. Combs, 33 Ohio St. 186.

IX. Miscellaneous. — 1. *Waiver.* — The right of action for false imprisonment may be lost by a waiver thereof.¹

2. *Habeas Corpus* is a proper, and the most summary and effectual, remedy for this wrong.²

3. *Privilege.* — Unquestionably, parties privileged from arrest, such as a witness in attendance upon a court, or any one who for the time is exempt from arrest, may, if arrested, obtain their discharge by *habeas corpus*; but it does not seem that one so arrested has any right of action in the nature of false imprisonment for such arrest, either against the officer, or one procuring such arrest, unless such right is specially conferred by statute.³

1. Where, in an action for the arrest of the plaintiff on an execution improperly issued, it appeared that the plaintiff, instead of being discharged from execution by the defendant, after three months' confinement duly obtained his liberation under the acts for the relief of debtors, it was held that he thereby waived the error, and affirmed the execution. *Reynolds v. Church*, 3 Caines (N. Y.), 274.

And when the defendants, being arrested under a judge's order, offered bail to plaintiff's attorney, and induced them to accept the same, and approve the undertaking whereby the defendants procured their discharge from custody, held to be such an act as amounted to a waiver of any objections on the part of defendants to their having been held to bail. *Dale v. Radcliffe*, 25 Barb. (N. Y.) 333. But see *Carleton v. Akron Sewer Pipe Co.*, 129 Mass. 40, where it is held that an illegal arrest is not waived by recognizing, submitting to examination, and taking the poor debtor's oath before the magistrate authorizing the arrest.

An agreement not to bring an action for false imprisonment, if founded on a good consideration, is binding. *Wentworth v. Bullen*, 9 Barn. & Cress. 840.

2. It is not only a constitutional principle that no person shall be deprived of his liberty without due process of law, but effectual provision is made against the continuance of all unlawful restraint or imprisonment by the security of the privilege of the writ of *habeas corpus*. It is a writ of right which every person is entitled to *ex merito justiciæ*. 2 Kent, 26. It is in the nature of a writ of error, revising the effect of the process of the inferior court, not an exercise of original jurisdiction. *Kearney*, 7 Wheat. (U. S.) 38; *Tobias Watkins*, 3 Pet. (U. S.) 193.

But imprisonment under a judgment is not deemed unlawful on *habeas corpus* unless the judgment is an absolute nullity, which cannot be if the court had jurisdiction. *Bell v. State*, 4 Gill (Maryland), 301; s. c., 45 Am. Dec. 130.

3. In *Smith v. Jones*, 76 Me. 138; s. c., 49 Am. Rep. 598, the plaintiff had been a witness, and was returning from court to his home; and the defendant, knowing of his privilege from arrest, had him arrested upon civil process. The court says the plaintiff's privilege was not an absolute right: it was not an absolute right of freedom from arrest. The right of freedom from arrest is afforded by the law, not so much for witnesses as for parties to suits. . . . It is a protection thrown about a witness more for the sake of others than himself. . . . He may take it, or not, as he pleases. . . . He waives the privilege unless he applies for a discharge. . . . He may be discharged by a judge upon summary motion. He may sue out a *habeas corpus*. And the court held that the action could not be maintained. *Vandevelde v. Lluellin*, 1 Keb. 220; *Hilliard on Torts*, vol. i. 205, note a.

A ministerial officer is protected in the execution of process regular on its face, although the party arrested may be privileged from arrest. *Chase v. Fish*, 16 Me. 132; *Tarleton v. Fisher*, 2 Doug. 671. The officer is not bound to take notice of a claim of privilege from arrest, which is personal to the party, since he is not vested with authority to judge and determine the validity of the claim. *Brown v. Getchell*, 11 Mass. 11; *Cable v. Cooper*, 15 Johns. (N. Y.) 152; *Wood v. Kinsman*, 5 Vt. 588. An arrest in virtue of a *ca. sa.* issued upon a valid judgment in tort, though made in violation of a personal privilege of the party, will not form the ground of an action for false imprisonment. *Deyo v. Van Valkenburg*, 5 Hill (N. Y.), 242. Exemption from arrest is a personal privilege which may be waived, and a party will be deemed to have waived his privilege unless he avail himself of the first opportunity to assert and obtain his liberty. *Smith v. Jones*, 76 Me. 138; s. c., 49 Am. Rep. 598; *Dow v. Smith*, 7 Vt. 465; *Woods v. Davis*, 34 N. H. 328; *Hess v. Morgan*, 3 Johns. Cas. (N. Y.) 84.

FALSE PERSONATION.

I. Definition, 695.

II. Offence at Common Law, 695.

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I. Definition. — False personation, as an offence at common law and by statute, is the assuming of the character of another person, and in such character doing any of the following acts; viz., obtaining and receiving money or property belonging to another without such person's consent, and with the intent to convert the same to one's own use;¹ subjecting such person to some liability, civil or criminal, without his consent;² obtaining the entry or registration, or any official act, or the recording of a deed;³ acting, or assuming to act, as a public officer, civil or military, or assuming the dress or badge of such officer, and in such character doing an act to the injury of another;⁴ marrying, or pretending to marry, or to sustain the marriage relation towards another;⁵ or exercising some right or franchise belonging to another.⁶

II. Offence at Common Law. — 1. *As a Cheat or False Pretence.*

— The bare fact of personating another for the purpose of fraud is no more than a cheat or misdemeanor at common law, and punishable as such.⁷ It is a false pretence to assume a fictitious name or trade, profession or office, for the purpose of obtaining money.⁸

1. Pen. Code, N. Y. sect. 564; 37 Geo. III. c. 127; 31 Geo. II. c. 10; 33 & 34 Vict. c. 58; 30 & 31 Vict. c. 131; 28 & 29 Vict. c. 124; 26 & 27 Vict. c. 73; 26 & 27 Vict. c. 28; 24 & 25 Vict. c. 98; 2 William IV. c. 53; U. S. Rev. Stat. sect. 5435.

2. Pen. Code, N. Y. sect. 562; 24 & 25 Vict. c. 98, sect. 34.

3. Pen. Code, N. Y. sect. 562.

4. Pen. Code, N. Y. sect. 562.

5. Pen. Code, N. Y. sect. 562.

6. U. S. Rev. Stat. sect. 5424; 35 & 36 Vict. c. 60; 35 & 36 Vict. c. 33; 22 Vict. c. 35, sect. 9.

7. 2 Russ. on Crimes, 5th Eng. ed. 886; 2 East, P. C. ch. 20, sect. 6, p. 1010.

Conspiracies to falsely personate. — The principal cases in which false personation have been considered as indictable have been laid as cases of conspiracy. Thus, where a woman living in the service of her master conspired with a man that he should personate her master, and in that character should solemnize a marriage with her, which was accordingly done for the purpose of raising a specious title to the property of the master, the indictment was laid for conspiracy, and the conviction was upon that

ground. *Rex v. Robinson*, 1 Leach, 37; 2 East, P. C. ch. 20, sect. 6, p. 1010. See also *Reg. v. Mackarty*, 2 Ld. Raym. 1179; s. c., 3 Ld. Raym. 325; 2 Burr. 1129. The only case reported which seems to bear out an argument that false personation is a crime *per se*, is *Dupee's Case*, 2 Sess. Cas. 11; 2 East, P. C. ch. 20, sect. 6, p. 1010. In that case the defendant was charged with personating the clerk of a justice of the peace with intent to extort money for procuring a discharge of certain persons committed for misdemeanor, and the court refused to quash it upon motion, and put the defendant to demurrer. Mr. East remarks that it might probably have occurred to the court that this was something more than a bare endeavor to commit a fraud by means of falsely personating another; that it was an attempt to pollute and render odious the public justice of the kingdom by making it a handle and pretence for corrupt purposes.

8. *People v. Cox*, 45 Cal. 343; *People v. Garnett*, 35 Cal. 470; *Commonwealth v. Drew*, 36 Mass. (19 Pick.) 179, 183.

Assuming Fictitious Character as an Officer or Jurymen. — See *Scarlet's Case*, 12 Co. 98; *Serlattel's Case*, Latch, 202.

2. *Forming Part of Larceny.*—Money or property may be obtained by falsely personating the owner under such circumstances as to constitute the crime of larceny. Thus, where property left for repair, or deposited in the hands of a third party, for any other such purpose, is obtained by one who represents that he is the owner, it will be larceny.¹

3. *Forming Part of Forgery.*—In many cases of forgery, there is an implied personation of the person whose signature is forged;

Personating Attorney, etc.—It has been held to be a false pretence to represent one's self to be a certain attorney, — *Rex v. Asterley*, 7 Car. & P. 191; or agent of a party, — *Reg. v. Archer*, 6 Cox, C. C. 515; or a certain clergyman of standing, — *Bowler v. State*, 41 Miss. 570; *Thomas v. People*, 34 N. Y. 351; or to be the captain of a company, or an officer of dragoons, — *Hamilton v. Reg.*, 9 Q. B. 271; *Reg. v. Jennison*, 9 Cox, C. C. 158; or falsely personating a physician, and thereby inducing a customer to purchase worthless medicine; or falsely assuming the address of a college student, and thereby obtaining credit. See also *Commonwealth v. Howe*, 132 Mass. 250.

In the case of *McCord v. People*, 46 N. Y. 470, the court held that the design of the New York statute against obtaining money, etc., by false pretences, was to protect those who, for an honest purpose, are induced by false and fraudulent representations to give credit, or part with their property, and not to protect those who do this for illegal purposes. When, therefore, defendant falsely represented that he was an officer, and had a warrant against M., and thereby induced him to deliver up to defendant a watch and diamond ring, the property must have been parted with as an inducement to the supposed officer to violate the laws and his duties, and an indictment could not be sustained.

1. In *Commonwealth v. Collins*, 94 Mass. (12 Allen), 181, the evidence showed that one Sanderson had left his watch at a watchmaker's to be repaired, and that the defendant went to the shop pretending to be Sanderson, asked for the watch, paid for the repairing, and took it away with him. The court said, "These acts constitute larceny at common law. The case is like that of *Rex v. Longstreet*, 1 Moo. C. C. 137. The defendant in that case went to a carrier's servant, and obtained from him a parcel by falsely pretending to be the person to whom it was directed: it was held to be a larceny because the servant had no authority to deliver it to him, so that no property passed to him but a mere possession falsely obtained. So in this case the watchmaker had no authority to deliver the watch to the defendant, and the latter obtained no property in it, not even the

qualified property of a bailee, but a mere felonious possession which is the essence of the crime of larceny." See also *Commonwealth v. Whitman*, 121 Mass. 361.

Personating a Soldier to secure Bounty Money.—That a man, by falsely personating a discharged soldier with intent to steal his bounty money, received from an officer, by whom the bounty was payable, a discharge paper which was incident to and inseparable from the bounty, and converted it to his own use, or deprived the owner of it, was held to warrant his conviction of larceny of that paper. *Commonwealth v. Lawless*, 103 Mass. 425.

Distinction between Larceny and False Pretence by False Personation.—Discussing the distinction between larceny and false pretences, where personation is used to obtain the goods, Mr. Wharton says, "Suppose A. goes to B., and says, 'I am C.; sell me these goods,' and B. delivers the goods to A., believing A. to be C., this being an essential incident in the contract, does any property pass to A.? The better view is in the negative, there being no contract between A. and B. If this be correct, then it is larceny in A. to take goods on this false personation, though there are authorities to the effect that the case is not larceny, but false pretences. *Williams v. State*, 49 Ind. 367; *State v. Anderson*, 47 Iowa, 142; *Pitts v. State*, 1 Tex. App. 122; *Reg. v. Adams*, 1 Den. C. C. 38; *Atkinson's Case*, 2 East, P. C. 673.

"If the pretence be not false personation, but false statement of means, then, as there is a contract of sale, the case is false pretences, and not larceny. And where A. says, 'I am sent by C. to carry the goods to him,' which is false, and thus obtains only possession of the goods, this is larceny in cases in which B. intends to part only with the possession of the goods to A. But here we encounter a subordinate distinction. Suppose A., pretending to be C., goes to B., and fraudulently obtains from B. certain goods of C., which are in B.'s hands as bailee. Is this larceny in A.? It certainly is, because B. has no intention of passing the property in the goods to A., or to any one, he (B.) considering himself to have no property in the goods to pass." 1 Whart. Cr. L. 9th ed. sect. 883.

and it would appear that where the person fraudulently representing himself to be another, in order to obtain the possession of property or money, signs such other person's name, he commits the crime of forgery.¹

III. Statutory Offence. — 1. *General Provisions.* — In England the offence of falsely and deceitfully personating any person with intent fraudulently to obtain money or property, is by statute a felony.² In some of the American States the offence is declared to be a larceny, and punishable as such.³

2. *Personating Pensioners, Soldiers, and Sailors.* — By statute it has in England been made a felony to falsely assume the name or character of any officer, soldier, sailor, or other person entitled to prize-money, pension, or bounty.⁴ It has there been held, that, to constitute the crime, it must be shown that there was such a person of the name and character assumed, who was either entitled, or might at least *prima facie* be entitled, to receive the wages attempted to be acquired.⁵ Under this statute it has been held that an accessory before the fact is properly indicted as a principal.⁶

3. *Personation of Stockholders and Annuitants.* — In England the offence of personating the holders of the public funds, or of stock of any incorporated company, for the purpose of obtaining dividends for moneys due to them, is also governed by statute.⁷ And it has been held that a person is guilty of the offence if he should, by assuming the name and character of another person, obtain a warrant for the payment of a dividend, although there is nothing to show that he had made any application for payment at the pay-office, or took any steps towards obtaining payment.⁸

4. *Personation of Voters.* — It is doubtful whether in England the personation of a voter at a parliamentary election is an offence at common law. It has been held that the personation of voters

1. Dixon's Case, 2 Lewin, 178. In *People v. Peacock*, 6 Cow. (N. Y.) 72, goods were consigned to P. at New York; on their arrival there, they were claimed by another person of the same name; and P., having obtained a permit for the delivery of the goods, indorsed it as security for an advance of money. It was held that this was forgery, and not merely obtaining goods by means of false pretences.

2. 37 & 38 Vict. 30, 36.

3. New York Penal Code, sect. 564; Mass. Gen. Stat. ch. 161, sect. 53.

4. 28 & 29 Vict. ch. 124, sect. 8; 2 Will. IV. ch. 53, sect. 49.

5. *Rex v. Tannet*, Russ. & R. 351; *McAnnelly's Case*, 2 East, P. C. ch. 20, sect. 4, p. 1009; *Brown's Case*, 2 East, P. C. ch. 20, sect. 4, p. 1007.

Person personated Dead. — But a person so attempting to procure payment is guilty of the offence, although the person whose character he assumed was then dead. *Reg. v. Pringle*, 9 Car. & P. 409; s. c., 2 M. &

Rob. 276; *Rex v. Cramp*, Russ. & R. 327; *Rex v. Martin*, Russ. & R. 324.

6. *Reg. v. Potts*, Russ. & R. 353.

On an indictment under 2 Will. IV. c. 53, sect. 49, two persons were charged, one as having falsely personated a soldier entitled to prize-money, and the other as an accessory before the fact, in causing and procuring him to commit the alleged felony. The former, at the instigation of the other, had personated the soldier entitled to prize-money; but the other had represented that he was entitled to the prize-money, and the defence was that he had purchased it from the soldier, which there was no express evidence to disprove. *Held*, nevertheless, that both were guilty. *Reg. v. Lake*, 11 Cox, C. C. 333.

7. 33 & 34 Vict. ch. 58; 30 & 31 Vict. 131; 26 & 27 Vict. ch. 73; 26 & 27 Vict. 28; 24 & 25 Vict. 98.

8. *Rex v. Parr*, 1 Leach, 434; 2 East, P. C. ch. 20, p. 1005. In this case it was held that the fact that the defendant, by

at a municipal election is not such an offence.¹ The matter is now regulated by statute.² It has been held, that, under a statute making it an offence to personate "any person entitled to vote at such election," it was held to be no crime to personate a voter who was dead.³ The offence of inducing another to personate a voter has been held to be complete upon the personator tendering a ballot or "voting paper," although it was rejected.⁴

5. *Personation of Bail.* — In England it has for many years been a felony to personate another in offering bail.⁵ Under the older statute it has been held that the bare personating of bail before a judge at chambers, or the acknowledging thereof in another name, was not felony, but only a misdemeanor, unless the bail was filed,⁶ and that, if bail were put in under the feigned names of persons who had no existence, the offender could not be prosecuted for felony.⁷

personating the proprietor, and by obtaining and indorsing the warrant as such, thereby made an endeavor, as far as it went, towards raising the dividend, and therefore had committed a statutory offence, although he had not attempted to obtain payment.

1. *Reg. v. Bent*, 1 Den. C. C. 157.

Personating Voter at Municipal Election.

— In *Reg. v. Bent*, *supra*, the indictment charged that defendant did falsely, fraudulently, etc., "personate" a voter at a municipal election "against the form of the statute in such case made and provided and against the peace," etc. The court said, "With respect to the conclusion, 'against the form of the statute,' that may be disposed of by observing that there is no such offence as 'false personation' (so described) in the act of Parliament, nor are the words 'personation' or 'personate' to be found in it. It is true, unlawfully giving a false answer to the three allowable questions has acquired the popular appellation of the 'false personation' of a voter; but in the statute itself, there is no language in any degree resembling that which has been used in describing the supposed offence contained in these two last counts. The question therefore arises, Do these counts contain the description of an offence at common law? No case to maintain the affirmation has been found. The precise case, indeed, is not very likely to have occurred, because, until the recent act, no election of councillors for a borough could have been held. But none in principle resembling it was produced. The analogy is all the other way. In certain instances, false personation, as of soldiers, sailors, and bail, for fraudulent purposes, is made an offence." See also *Reg. v. Hogg*, 25 Up. Can. Q. B. 66.

2. 35 & 36 Vict. ch. 60; 35 & 36 Vict. ch. 33, sect. 24; 28 Vict. ch. 56, sect. 11;

23 & 25 Vict. ch. 32, sect. 9; 14 & 15 Vict. ch. 105.

3. *Whiteley v. Chappell*, 11 Cox, C. C. 307. The court say, "The words are, 'personate any person entitled to vote at such election.' Here the man was dead, and so could not vote at the election."

Parliamentary Election. — Evidence. — Sheriff's Writ. — On an indictment for fraudulently personating a voter at an election of a member of parliament for a city being a county of itself, the writ to the sheriff must be produced, in order to prove that the election was duly made. *Reg. v. Vaile*, 6 Cox, C. C. 470.

4. *Reg. v. Hague*, 9 Cox, C. C. 412; s. c., 4 Best & S. 715; 33 L. J. M. C. 81. In this case the person induced to personate the voter tendered a "voting paper" (as it is known in England); but on being asked if he was the person whose name was signed to it, he answered "no," and the vote was rejected. It was held that the person at whose instigation he acted was nevertheless properly convicted.

5. 21 Jac. 1, ch. 26, sect. 2; 24 & 25 Vict. ch. 98, sect. 34.

6. *Beesley's Case*, T. Jones, 64; s. c., 2 East, P. C. ch. 20, § 5, p. 1010; *Timberlye's Case*, 2 Sid. 90; 2 East, P. C. ch. 20, sect. 4, p. 1009; 1 Hawkins, P. C. ch. 47, sect. 5; 1 Hawkins, P. C. ch. 24, sect. 4; 1 Vent. 301.

English Statute of 21 Jac. 1. — The words of the statute 21 Jac. 1, ch. 26, sect. 2, were, "that all and every person or persons which shall acknowledge, or procure to be acknowledged, any fine or fines, recovery or recoveries, deed or deeds enrolled, statute or statutes, recognizance or recognizances, bail or bails, judgment or judgments, in the name or names of any person or persons not privy or consenting to the same," shall be adjudged felons.

7. *Anon.* 1 Str. 384; 1 Hawkins, P. C. ch. 47, sect. 6.

FALSE PRETENCES.

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I. DEFINITION.—Any person who by false and fraudulent representation or statement of an existing or past fact, made with knowledge of its falsity, and with the intent to deceive and defraud, induces another to part with money or property of value, is guilty of a false pretence.¹

II. DISTINGUISHED FROM OTHER OFFENCES.—1. **From Larceny.**—The principal feature which distinguishes false pretences from the offence of larceny is the intention with which the person defrauded parted with the possession of the goods. In the larcenous taking, which is the essential ingredient of larceny, it is always implied that the taking is against the will of the owner of the property, and that therefore he had no intention to confer any title upon the taker. Where property is obtained by false pretences, there is in every case an intention on the part of the owner to part with the possession and the title. Hence the courts lay down the rule, that when possession of the property is obtained by means of fraud, conspiracy, or artifice, with felonious intent, and the title still remains in the owner, the offence is larceny; but where the title as well as the possession is absolutely conveyed, the crime is false pretences.² It has accordingly been held in a number of

1. See 1 Bouv. L. Dict. (15th Ed.) 643. In *Com. v. Drew*, 36 Mass. (19 Pick.) 179, 184, the court, discussing what is a false pretence within the meaning of the Massachusetts statute, said: "It may be defined to be a representation of some fact or circumstance calculated to mislead, which is not true." Mr. Bishop suggests that "A fuller and practically better definition would be: 'A false pretence is such a fraudulent representation of an existing or past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value.'" 2 Bish. Cr. (7th Ed.) § 415; *State v. Vandimark*, 35 Ark. 396. This definition is substantially correct, but does not give sufficient prominence to the intent with which the false representation or statement must be made. The same remark applies to the effect of the representation, for, as will be afterwards shown herein, although the representation "may be adapted to induce" the person defrauded to part with his property, it is not sufficient if the person defrauded did not actually rely upon the pretence.

In *Reg. v. Radcliffe*, 6 Cox C. C. 324, the court succinctly define a false pretence as "A lie told or acted, influencing the mind of one party, and inducing him to intrust the possession of goods to the party telling it."

In *Texas*, the court in defining swindling declared it to be the acquisition of personal or movable property, money, or

an instrument of writing conveying or securing a valuable right by means of some false or deceitful pretence or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring the rights of the party justly entitled to the same. *Mathews v. State*, 10 Tex. App. 279.

2. *Haley v. State* (Ark.), 4 S. W. Rep. 746; *People v. Rae*, 66 Cal. 423; s. c., 56 Am. Rep. 102; 6 Cr. L. Mag. 389; *State v. Anderson*, 47 Iowa, 142; s. c., 2 Am. Cr. Rep. 100; *Miller v. Com.*, 78 Ky. 15; *People v. Morse*, N. Y., s. c., 7 Cr. L. Mag. 211, 383; *Smith v. People*, 53 N. Y. 111; s. c., 13 Am. Rep. 474; *Ross v. People*, 5 Hill (N. Y.), 294; *Canter v. State*, 7 Lea (Tenn.), 349; *Porter v. State* (Tex.), 4 S. W. Rep. 889; *Cline v. State*, 43 Tex. 494; *State v. Vickery*, 19 Tex. 326.

Goods Consigned for Sale.—On an indictment for larceny, it appeared that the defendant, with the design to defraud the complaining witness, induced the latter to ship goods to him with the *indicia* of ownership, under an agreement by which the defendant was to advance the freight, sell the goods, and account for the proceeds, less the freight. The defendant having sold the goods and appropriated the proceeds, it was held that the offence was false pretences, and not larceny. The court say: "The prosecutor reposed confidence in him, trusting the property to him for sale to such person as he might select, intending to part with his

cases, that where an employer, on the representation of his servant, whose duty it is to make payments, that certain payments are due, gives to the servant money to meet such payments when in point of fact no money is due, or a smaller amount than that pretended, the offence is that of obtaining money by false pretences, and not larceny, the employer having intended to part with the property.¹ If the prosecuting witness has parted with the money to shield himself from a threatened criminal prosecution, the offence is also to be deemed false pretences, and not larceny.² But where the property is merely intrusted to the person making the fraudulent representation for a temporary purpose, the offence is larceny, and not false pretences.³ The same rule applies where

title, and never expected to see the malt again. He intended to part with his property before he received the money. The two events were not to be simultaneous. The consent to the transfer was full and without conditions, and in such case there can be no larceny, although the consent was obtained by fraud." *Zink v. People*, 77 N. Y. 114; s. c., 33 Am. Rep. 589.

Money obtained on the representation to a mill owner that his premises had been bonded, that the manager of the mill had sent him with the news and that he was without money to pay his return expenses, is obtained by false pretences, and not by larceny. *Thorne v. Turck*, 10 Daly (N. Y.), 327; s. c., N. Y. Week Dig. 200.

1. Payment of Dock Dues—Exaggeration of Amount.—It was the duty of a servant to ascertain daily the amount of dock dues payable by his master, and, having ascertained it, to apply to his master's cashier for the amount, and then to pay it in discharge of the dues. On one occasion, by representing falsely to the cashier that the amount was larger than it really was, as he well knew, he obtained from the cashier the sum he stated it to be, and then paid the real amount due, and appropriated the difference. *Held*, that his offence was not larceny, but obtaining money by false pretences. *Reg. v. Thompson*, L. & C. 233; s. c., 9 Cox C. C. 222; 32 L. J. M. C. 57; 8 Jur. N. S. 1162; 7 L. T. 393; 11 W. R. 41.

Overcharge in Accounts.—It was the prisoner's duty, as bailiff to the prosecutor, to pay and receive moneys. Upon an account rendered on such payments and receipts, it appeared he had charged his master with five payments of £1 8s, instead of £1 4s, the sums he had actually paid. There was also a similar overcharge of two other amounts. *Held*, that the prisoner was wrongly convicted of larceny, the offence being that of ob-

taining money by false pretences. *Reg. v. Green*, Dears. C. C. 323; s. c., 6 Cox C. C. 296; 2 C. L. R. 603; 18 Jur. 158.

Overstatement of Purchases.—It was the duty of the prisoner, who was a servant of the prosecutors, in the absence of their chief clerk, to purchase and pay for, on behalf of his masters, any kitchen stuff brought to their premises for sale. On one occasion he falsely stated to the chief clerk that he paid 2s. 3d. for kitchen stuff, which he bought for his masters, and demanded to be paid for it. The clerk on this demand paid him 2s. 3d. out of the money which his master had furnished him with to pay for the kitchen stuff. The prisoner applied the money to his own use. *Held*, that as the clerk had delivered the money to the prisoner with the intention of parting with it altogether, the prisoner was not liable to an indictment for stealing the money, but that he might have been indicted for obtaining it by false pretences. *Reg. v. Barnes*, 2 Den. C. C. 59; s. c., 20 L. J. M. C. 34; 14 Jur. 1123; T. & M. 387.

Savings Bank—Representation of Withdrawal—Appropriation of Proceeds of Check.—E. was convicted for stealing a check. He was a clerk to a savings-bank, and received the check from the manager of the bank, upon a false representation that one of the depositors had given notice of withdrawal, and for the purpose of handing it over to the depositor. According to the usual course of business, if a depositor could not attend at a proper time to receive the check, it was handed to E. as the agent of the depositor. *Held*, that the case was one of false pretences, and not larceny. *Reg. v. Essex*, Dears. & B. C. C. 371; s. c., 7 Cox C. C. 384; 27 L. J. M. C. 20; 4 Jur. N. S. 16.

2. Haley v. State (Ark.), 4 S. W. Rep. 746.

3. Property Obtained on Loan.—On an indictment for larceny, it appeared from

the defendant has induced the prosecutor to intrust him with money by any of the numerous swindling devices.¹

2. From Forgery.—In every forgery there is necessarily involved a false pretence, but where property is obtained by use of a fictitious writing it does not necessarily follow that the person using such writing is guilty of forgery, or of uttering a forged document. Where the false document has been used, the test which has been applied has been whether the person using it tendered the document as his own, executed upon authority of the sender, which will make his act a false pretence, or has tendered it as the document of the apparent maker, in which case he is guilty of the offence of uttering a forged document.² It is to be noted that if the money or property is obtained by the use of forged writings, the person

evidence that the prisoner had a wife living, but that he represented himself as a widower, and was paying his addresses to the prosecutrix, who was a widow; that in the course of conversation he told her that his late wife's father had just died (which was true), that his sister-in-law was unable to go to the funeral, being too poor to purchase mourning; that thereupon the prosecutrix, without request or suggestion from him, offered to lend her clothes for the purpose, and gave the articles to the prisoner to take to his sister-in-law. Some of the articles were worn by the prisoner's wife at the funeral, others were found to have been pawned by a woman not identified, who gave her name as that of the prisoner's wife. It was held that the clothing, having originally been lent for a temporary purpose only, and not given with the intention of passing the property, that the offence was larceny, and not false pretences. *Reg. v. Radcliffe*, 12 Cox C. C. 474; s. c., 6 Moak's Eng. Rep. 324.

1. Ring-dropping.—In the practice of ring-dropping the person obtaining the money usually makes use of a pretence of finding a valuable ring, and offers to leave it in the custody of the person from whom he obtains the money, provided the latter deposits money as security. A person who induces another to deliver bank notes or other valuables to him by the practice of ring-dropping, on the condition that if he does not restore them in a certain time the entire value of the ring will belong to the person delivering the notes, is guilty of larceny; for although the possession of the notes is parted with, the property still remains in the owner. *Rex v. Watson*, 2 Leach C. C. 640; s. c., 2 East P. C. 680; *Rex v. Patch*, 1 Leach C. C. 238; s. c., 2 East P. C. 678; *Rex v. Marsh*, 1 Leach C. C. 345.

Aiding or Abetting Ring-dropping.—

To aid and assist a person, to the jurors unknown, to obtain money by the practice of ring-dropping, is felony, if the jury finds that the prisoner was confederating with the person unknown to obtain the money by means of this practice. *Rex v. Moore*, 1 Leach C. C. 314; s. c., 2 East P. C. 679.

Under Color of Betting.—If there is a plan to cheat a man of his property, under color of a bet, and he parts with the possession only to deposit it as a stake with one of the confederates, the taking by such confederate is felonious.

Rex v. Robson, R. & R. C. C. 413.

Loan in Gambling-Rooms.—The evidence showed that the defendant induced the prosecuting witness to enter a gambling-room, and persuaded him to lend him money to play with. The defendant and other players promised that the money would be refunded at the end of the game. When the game was finished, the lights were put out and the defendant refused to return the money. It was held that the evidence was sufficient to sustain a conviction of theft under the Texas Penal Code, art. 727. *Porter v. State (Tex.)*, 4 S. W. Rep. 889.

2. Mann v. People, 15 Hun (N. Y.), 155. See *infra* this work, tit. FORGERY.

Receipt Required.—A servant of A applied to B for payment of 17s. due from B to A. B refused to pay it without A's receipt. The servant went away and returned with this document, whereupon B paid the debt. *Held*, a question for the jury, whether the servant tendered the receipt as the handwriting of A, which would make him liable on an indictment for forgery, or his own, which would make his act a false pretence. *Reg. v. Inder*, 1 Den. C. C. 325; s. c., 2 Car. & K. 635.

so obtaining it must be indicted for the forgery, and not for obtaining property by false pretences.¹

3. From Embezzlement.—Where property or money is obtained by embezzlement, an honest intention at the time of receiving the goods is usually to be inferred, a subsequent fraudulent conversion constituting the offence. The distinction between embezzlement and false pretences is accordingly to be found in the means by which the property is obtained. In the case of false pretences there is from the first an intention to defraud.²

4. From Passing Counterfeit Coin.—The courts hold that paying or exchanging counterfeit money for goods is not obtaining money or goods under false pretences.³ But to constitute the offence of passing counterfeit coin, the spurious tokens must be representations of genuine coin on both sides: if the tokens used have the representation of a coin on one side only, and merely an advertisement on the other, and do not purport to be a coin, the passing of them will be a false pretence if the other requisites of that offence be present.⁴

III. AT COMMON LAW.—At common law only such cheats as are effected by means of any false token having a semblance of public authority, or in some manner affecting the public interest, are punishable.⁵ It is essential that the cheats used should be such as common prudence could not guard against, and the offence was confined to the use of false weights and measures, or false tokens, or cases where there was a conspiracy to cheat.⁶ Thus if a

1. Forged Order, Effect of.—A person who obtained goods on delivering a forged letter in the following terms: "Please to let the bearer, W. T., have for J. R. four yards of linen," signed J. R., was held not to be indictable for obtaining goods by false pretences, as this was uttering a forged request for the delivery of goods, which was a felony under 1 Geo. IV. and 1 Will. IV. c. 66 § 10. *Rex v. Evans*, 5 Car. & P. 553.

By the *Texas statute*, an indictment for swindling will not lie where the facts constitute a different offence; accordingly it has been held that if money has been procured by a person, by a forged endorsement on his own check, an indictment will not lie for swindling. *Hirshfield v. State*, 11 Tex. App. 207.

2. Distinguished from Embezzlement.—It has been said that "if a person honestly receives the possession of goods, chattels, or money of another upon any trust, expressed or implied, and, after receiving them, fraudulently converts them to his own use, he may be guilty of the crime of embezzlement, but cannot be convicted of larceny, except as embezzlement is by statute made larceny. If the possession of such property is obtained by

fraud, and the owner of it intends to part with his title as well as his possession, the offence is that of obtaining property by false pretences, provided the means by which they are acquired are such as in law are false pretences. If the possession is fraudulently obtained with intent, and on the part of the person obtaining it at the time he receives it, to convert the same to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offence is larceny." *Com. v. Barry*, 124 Mass. 325; s. c., 7 Cent. L. J. 98.

3. *Cheek v. State*, 1 Coldw. (Tenn.) 172; *Roberts v. State*, 2 Head (Tenn.), 501. The jury found by a special verdict that the defendant sold to the prosecutor a pair of shoes at \$1.40. The prosecutor in payment gave him \$1.50, and the defendant returned the ten cents change in counterfeit coin. It was held that this was not obtaining money by false tokens.

4. *State v. Alfred*, 84 N. C. 946; s. c., 3 Cr. L. Mag. 264.

5. *Roberts v. State*, 2 Head (Tenn.), 501.

6. *Tit. CHEAT, ante*, Vol. III. See

person obtained possession of a note under pretence of wishing to look at it, and carry it away, he could not be indicted at common law.¹ Nor could he be indicted for pretending to be prepared to pay a debt, and thereby obtaining a receipt in discharge of the debt without paying the money;² or for obtaining a false credit by other means than the use of a false token;³ nor for obtaining by false pretences, possession of a deed lodged in the hands of a third person as an escrow.⁴ It has been held in Massachusetts that the statute 33 Henry VIII. c. 1, which punishes the obtaining money, etc., by privy tokens, or counterfeit letters, is a part of the common law of that State;⁵ but in Pennsylvania the courts have held that the statute is not in operation there.⁶ At common law an intention to cheat is not indictable.⁷

IV. STATUTORY OFFENCE.—The offence of obtaining money or property by false pretences is now almost entirely regulated by statute. By the statute of 30 George II. c. 24, from which most of the American statutes have been drawn, it is enacted that “all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares, and merchandise, with intent to cheat or defraud any person or persons of the same, shall be deemed offenders against law and the public peace.” The statute of 7 and 8 George IV. c. 30, declares any person who by false pretences obtains “any chattels, money, or valuable security, with intent to cheat or defraud,” is guilty of a misdemeanor. It has generally been considered that the object of these statute is not to enlarge the application of the common law, but to create a new offence, which had not previously been provided for.⁸

V. ESSENTIALS OF THE OFFENCE.—1. **The Intent.**—To a conviction for obtaining money or property by false pretences, it is essential in every case that there should be an intent to cheat and defraud,⁹

Cross v. Peters, 1 Me. (1 Greenl.) 387; s. c., 10 Am. Dec. 78; Com. v. Warren, 6 Mass. 72; Com. v. Morse, 2 Mass. 139; Com. v. Hearsay, 1 Mass. 137; Lambert v. People, 9 Cow. (N. Y.) 588; People v. Miller, 14 Johns. (N. Y.) 371; People v. Johnson, 12 Johns. (N. Y.) 292; People v. Babcock, 7 Johns. (N. Y.) 201; s. c., 5 Am. Dec. 256; People v. Stone, 9 Wend. (N. Y.) 187; State v. Justice, 2 Dev. (N. C.) L. 199; State v. Patillo, 4 Hawk. (N. C.) L. 348; State v. Vaughn, 1 Bay (S. C.) L. 282; State v. Wilson, 2 Mills (S. C.) Const. 135; State v. Stroll, 1 Rich. (S. C.) L. 244; Hill v. State, 1 Yerg. (Tenn.) 76; s. c., 24 Am. Dec. 441; Com. v. Speer, 2 Va. Cas. 65; United States v. Watkins, 3 Cr. C. C. 441; tit. CHEAT, 2 East. P. C. c. 18, § 4, p. 821; 2 Hawk. P. C. c. 22, § 1; 2 Russ. on Cr. (6 Am. Ed.) 275.

1. People v. Miller, 14 Johns. (N. Y.) 371.

2. People v. Babcock, 7 Johns. (N. Y.) 201; s. c., 5 Am. Dec. 256.

3. Hartmann v. Com. 5 Pa. St. 60.

4. Com. v. Hearsay, 1 Mass. 137.

5. Com. v. Warren, 6 Mass. 72.

6. Res publica v. Powell, 1 Dall. (U. S.) 47; bk. 1 L. Ed. 31.

7. Com. v. Morse, 2 Mass. 139.

8. 2 Wart. Cr. L. (9th Ed.) § 1130. Dr. Wharton says: “The distinction is this: no cheat is indictable at common law unless effected by conspiracy, or unless it be marked by a latency, subtlety, and generality of operation so as to effect all likely to come within its range: whereas under the statute now before us it is made indictable to obtain money or goods from individuals by any designedly false statements of facts likely under the particular circumstances to deceive.”

9. Carlisle v. State, 76 Ala. 75; Todd v. State, 31 Ind. 514; People v. Wakely (Mich.), 8 Cr. L. Mag. 322; People v.

although such intent may be inferred from the circumstances attending the act itself.¹ The intention must be to deprive the owner wholly of the property in the chattel; and consequently it has been held that the obtaining by false pretences of the use of a chattel for a limited time only is not within the statute.² The question of intent is for the jury, and must be submitted to it.³ The pretences must also have been made with the knowledge of their falsity.⁴ It is no justification to the defendant that he intended to repay the money or restore the property obtained, and evidence of ability to make repayment or restoration is immaterial.⁵ Nor will it be a justification to the defendant that the person from whom he obtained money laid a plan to entrap him into the commission of the offence.⁶

2. The Obtaining.—The property must be obtained by the prisoner.⁷ But it is not essential that the defendant himself should

Getchell, 6 Mich. 496; Bowler *v.* State, 41 Miss. 570; State *v.* Norton, 76 Mo. 180; People *v.* Baker, 19 N. Y. Week. Dig. 316; Rex *v.* Williams, 7 Car. & P. 354; Reg. *v.* Stone, 1 F. & F. 311.

1. State *v.* Neimeier, 66 Iowa, 634; s. c., 4 Am. Cr. Rep. 249; People *v.* Getchell, 6 Mich. 496.

Intention to Cheat and Defraud is the gist of the offence of obtaining goods by false pretences. Clark *v.* People, 2 Lans. (N. Y.) 332; Brown *v.* Peowle, 16 Hun (N. Y.), 537; People *v.* Kendall, 25 Wend. (N. Y.) 399; s. c., 37 Am. Dec. 240.

Obtaining Goods by False Pretence.—The gist of the offence is the intent, and the act itself consists in fraudulently inducing the owner to part with his property by wilful falsehoods in representing one's self to be in a condition in which he knew that he was not; and it is not necessary that the sale should be made in reliance solely upon the false representations. See People *v.* Kendall, 24 Wend. (N. Y.) 401; Foote *v.* People, 17 Hun (N. Y.), 222; Hersey *v.* Benedict, 15 Hun (N. Y.), 288.

An Infant may be convicted of obtaining goods by false pretences where he purchases such goods on credit by falsely representing that he is a joint owner with his father of certain property. People *v.* Kendall, 25 Wend. (N. Y.) 399; s. c., 37 Am. Dec. 240.

2. Reg. *v.* Kilham, 1 L. R. C. C. 261; s. c., 39 L. J. M. C. 109; 11 Cox C. C. 561.

3. State *v.* Norton, 76 Mo. 180.

4. Com. *v.* Devlin, 141 Mass. 423.

Instruction to Jury.—If the jury have already been instructed that the alleged false pretences must have been made designedly and with an intent to defraud, and that they must have been false, it is

not essential that the court should also instruct them that the falsity of the pretences was not enough unless the defendant also knew that they were false. Com. *v.* Devlin, 141 Mass. 423.

5. Com. *v.* Coe, 115 Mass. 481; State *v.* Thatcher, 35 N. J. L. (6 Vr.) 445; Reg. *v.* Naylor, 1 L. R. C. C. 4; s. c., 35 L. J. M. C. 1; 10 Cox C. C. 151.

Obtaining Railroad Pass by.—In Reg. *v.* Boulton, 1 Den. C. C. 508, the prisoner was convicted of obtaining a railroad pass by false pretences. He obtained it on the understanding that it was to be returned at the end of the journey. The court held that the intended restoration did not affect the question.

6. Rex *v.* Ady, 7 Car. & P. 140.

Conspiracy to Entrap in the Offence.—The court say in the case of Rex *v.* Ady, *supra*: "If I understand the defence set up, it is nothing more or less than this, that a conspiracy existed between the prosecutor and the magistrate to entrap the defendant into the commission of the offence. You will judge for yourselves whether this be so or not. Still, if the defendant did obtain the money by false pretences, and knew them to be false at the time, it does not signify whether they intended to entrap him or not."

7. Bracy *v.* State, 64 Miss. 26. In this case the clerk of court issued a false witness certificate, which he put into the hands of a third person, who offered to sell it to F, who, upon the representation of the clerk of the court that it was all right, purchased it. No part of the money was received by the clerk. It was held that if the third person to whom the certificate was delivered acted honestly and the clerk received none of the money paid for the certificate, the latter is not guilty of obtaining money by false pretences.

actually receive the money or property in person. It is sufficient if it be delivered in accordance with his wish, or for his advantage, or for the purpose of effecting some object of the defendant.¹

3. Deception of Party Injured.—It must be shown that the person from whom the property was obtained was deceived. If he knew when he parted with his money or property that the representations were false, an indictment cannot be sustained.² It follows necessarily that, if representations are true, an indictment will not lie, although the prosecutor may have parted with his property to his prejudice.³ It has also been held that a pretence which is false when made, but true by the act of the party making it, when the prosecutor relies upon it, and parts with his property, is not a false pretence within the statute.⁴

See also *Willis v. People*, 19 Hun (N.Y.), 84; *State v. Shaeffer*, 89 Mo. 271.

Payment to Another Person.—It is sufficient if the money is paid to another at the request of the person making the false pretences and in payment of his debt.

1. *Reg. v. Garrett*, Dears. C. C. 232; s. c., 6 Cox C. C. 260; 23 L. J. M. C. 20.
2. *Trogon v. Comm.*, 31 Gratt. (Va.) 862.

Representations as to Work Done.—Knowledge of Party Paying.—The defendant represented to the prosecutor that he had done a certain quantity of work, and claimed a certain sum as due to him in respect of such work. The prosecutor paid him the amount claimed, although he knew that the representations were untrue. *Held*, that this was not an obtaining money by means of false pretences. *Reg. v. Mills*, 7 Cox C. C. 263; s. c., Dears. & B. C. C. 205; 26 L. J. M. C. 79; 3 Jur. N. S. 44.

Begging Letter.—Knowledge of Recipient.—Attempt to Obtain Money.—The prisoner wrote a begging letter to the prosecutor, in which, by certain false statements, he attempted to obtain money. The prosecutor sent the prisoner five shillings, but stated at the trial that he knew the pretences were false. *Held*, that he might be convicted of an attempt to obtain money by false pretences. *Reg. v. Hensler*, 11 Cox C. C. 570; s. c., 22 L. T. 691; 19 W. R. 108. See also *Reg. v. Keighley*, Dears. & B. C. C. 145; s. c., 7 Cox C. C. 217.

Laying Trap for Defendant.—In the case of *Rex v. Ady*, 7 Car. & P. 140, however, it was held that it was no defence to an indictment that a person from whom the money was obtained laid a plan to entrap the defendant into the commission of the offence.

3. Defective Chattel Mortgage.—Representations.—On the trial of an indictment it appeared that the defendant represent-

ed that a certain crop to be raised was not subject to a mortgage, and that the defendant had actually granted a mortgage which, it was alleged, covered the crop in question. It appeared, however, that the mortgage did not specify the land on which the crop was to be raised. The court held that no property passed by such mortgage; that the mortgage could not be applied by parol evidence, and that there was therefore no false representation. *State v. Garris* (N. Car.), 4 S. E. Rep. 633.

4. *In re Snyder*, 17 Kan. 542; s. c., 2 Am. Crim. Rep. 238; 5 Cent. L. J. 307;

Representation False when Made.—True when Property Obtained.—The defendant had obtained money upon a draft on the representation that he had purchased cattle which he was to ship to the drawee. On the day on which the representation was made he had not actually completed the purchase, although he had been in negotiation with the seller. On the day following, when he obtained the money, the terms of the purchase had been adjusted. The court say: "Is a pretence which was false when made, within the statute, if true when the property is parted with? We think not. The pretence employed is only the means by which the offence is perpetrated. The substance of the offence consists in the obtaining of the property, and thereby with fraudulent intent depriving the lawful owner of that which properly belongs to him. If a party by his own acts makes the false representations good before obtaining the property, there is no consummation of the crime, and there is no criminal attempt, for it follows that when there is a change of purpose on the part of the person seeking to obtain property by a false pretence before any other wrongful act is committed than the making of the false pretence, the crime of the attempt is taken away."

4. Pretences Obviously False.—It has been laid down that in order to constitute a false pretence within the statute, the false representation or statement must be such as is calculated to mislead and deceive a person of ordinary intelligence, prudence, and caution.¹ The effect of this rule has, however, been modified to such

1. *Shaffer v. State*, 82 Ind. 221; s. c., 4 Am. Rep. 462; *Miller v. State*, 73 Ind. 88; *State v. Orvis*, 13 Ind. 569; *Johnson v. State*, 11 Ind. 481; *State v. Magee*, 11 Ind. 154; *Com. v. Grady*, 13 Bush (Ky.), 285; s. c., 2 Am. Cr. Rep. 105; 26 Am. Rep. 192; *People v. Williams*, 4 Hill (N. Y.), 9; s. c., 40 Am. Dec. 258; *People v. Stetson*, 4 Barb. (N. Y.) 156; *Dord v. People*, 9 Barb. (N. Y.) 674; *Scott v. People*, 62 Barb. (N. Y.) 75; *People v. Crissie*, 4 Den. (N. Y.) 528; *Long v. Warren*, 68 N. Y. 432; *People v. Haynes*, 14 Wend. 557; *State v. Simpson*, 2 Hawks (N. Car.), 460; *Com. v. Hutchins*, 1 Pa. L. J. Rep. 302; s. c., 2 Pars. Sel. Cas. (Pa.) 309; *Com. v. Toulson*, 2 Pars. Sel. Cas. 326; *State v. Stroll*, 1 Rich. (S. C.) L. 244; *Delaney v. State*, 7 Baxt. (Tenn.) 28; *Buckalew v. State*, 11 Tex. App. 352.

Means of Detection.—In *Com. v. Grady*, *supra*, the court say that "in the case of the *Com. v. Haughey*, 3 Met. (Ky.) 223, it was charged that Haughey obtained credit on a note he owed R. R. Jones, upon the false and fraudulent pretence and representation that a large quantity of tobacco which Jones then purchased would average in quality with a sample which Haughey then and there exhibited to said Jones.

"This court affirmed the judgment of the lower court dismissing the indictment, and say that a common caution on the part of Jones would have protected him from any injury; he could, without trouble, have retained his note until after the tobacco was delivered; and if, upon an offer to deliver by Haughey, it was not equal in quality to the sample exhibited, he could have rejected it.

"So, in this case, O'Bannon could have refused to execute and deliver his note to appellee, or even to pay him the \$125 in money, till he stepped to the clerk's office and ascertained from the records of the Henry County Court whether the title to the house and lot was such as represented.

"In Wharton's Criminal Law, vol. 2, § 2129, the doctrine is laid down, that 'a representation, though false, is not within the statute (meaning the statute against obtaining money and property by false pretences), unless calculated to deceive persons of ordinary prudence and

discretion;' and this author further says that the statutes against obtaining money, etc., by false pretences ought not to be so interpreted as to include cases where the party defrauded had the means of detection at hand.

"Here O'Bannon had the means of detection at hand; for, by a visit to the clerk's office, he could soon have ascertained whether the appellee had the unencumbered title to the house and lot as represented by him."

Assignment of Agency.—In keeping with this rule it has been said, that as an appointment as agent for the sale of grain is not assignable, a person has no right to rely on a representation that an assignment would vest in him the title to the grain, or power to sell it. *Shaffer v. State*, 82 Ind. 221.

Encumbrance upon Realty.—It has also been held that a false statement that a house and lot were unencumbered, is not a false pretence within the statute, when the party defrauded has a means of verifying the statement by recourse to the records. *Com. v. Grady*, 13 Bush (Ky.), 285; s. c., 2 Am. Cr. Rep. 105.

Sale by Sample.—In *Com. v. Haughey*, 3 Met. (Ky.) 223, the defendant was charged with obtaining credit on a note upon the false and fraudulent pretence that a large quantity of tobacco, which the holder of the note had purchased, would average in quality with the sample exhibited. The court affirmed the judgment of the lower court dismissing the indictment, saying that a common caution on the part of the holder of the note would have protected him from injury. He could, without trouble, have retained his note until the tobacco was delivered, and if, upon offer of delivery it was not equal in quality to the sample exhibited, he could have rejected it.

Representation as to Quality.—In *State v. Young*, 76 N. Car. 258, a representation to a purchaser, that cotton sold was of the grade "good middling," was held not to be within the statute, because the purchaser might have examined the cotton himself.

Changing Coin—Representation as to Incorrectness.—In *Com. v. Norton*, 93 Mass. (11 Allen) 266, a representation that on a previous occasion the prosecuting witness had omitted to return the proper

an extent as almost entirely to abrogate it, by the adoption by some of the courts of the rule that the question, whether the pretext was one calculated to deceive, must be left to the jury, and must be determined by the circumstances of each particular case.¹ In England, and many of the States, a contrary rule, however, is adopted, and any pretence which deceives a person defrauded is deemed sufficient to sustain an indictment, although it would not have deceived a person of ordinary prudence.² Whether the false pretences did deceive the prosecuting witness is properly left to the jury.³

5. Inducement to Part with Property.—Even though the false pretence be made with fraudulent intent and the person defrauded part with his property, the offence is not complete except the property has been parted with upon and under the inducement of the false pretence.⁴

amount of change to the person making the representation, and thereby inducing him to correct the supposed mistake, was held not to be within the statute.

Knowledge of Falsity.—In *Texas*, the court holds that a false pretence need not be such an artificial device as cannot be guarded against by ordinary caution, but if the pretence was so absurd and irrational, or if the injured party knew its falsity, or had the means of instantly detecting it, he could not have believed it or been deceived, and accordingly the pretence was not within the statute. *Buckalew v. State*, 11 Tex. App. 352. In this case the defendant was indicted for obtaining \$5 from C., by representing to C. that a third person had told him that C. had killed and appropriated one of the defendant's hogs. The court held that the pretence was such that C. must have known it was false, and therefore was not sufficient to sustain a conviction.

1. *Wagoner v. State*, 90 Ind. 504; *People v. Dimick*, 41 Hun (N. Y.), 616; *People ex rel. v. Oyer and Terminer*, 83 N. Y. 353; *People ex rel. v. Oyer and Terminer*, 83 N. Y. 436; *People v. Henssler*, 48 Mich. 49.

2. *Johnson v. State*, 36 Ark. 242; *State v. Fooks*, 65 Iowa, 196, 452; *State v. Montgomery*, 56 Iowa, 195; *People v. Pray*, 1 Mich. N. P. 69; *State v. Williams*, 12 Mo. App. 415; *Buckalew v. State*, 11 Tex. App. 353; *Colbert v. State*, 1 Tex. App. 314; *Re Greenough*, 31 Vt. 279; *Reg. v. Woolley*, 3 Car. & K. 98; s. c., 4 Cox C. C. 191; 1 Den. C. C. 559.

Condition of Defrauded Party.—In considering whether the false pretences were sufficient to deceive, the jury should look at the age of the defrauded party, his experience and general knowledge, his health, and all the evidence bearing upon

the subject. *State v. Montgomery*, 56 Iowa, 195.

Real Estate Transactions.—In sales of real estate, it has been held that the fact that a purchaser or lender has relied upon the representations made, and his neglect to examine the records, although he might easily have done so, does not affect the criminal responsibility of the person making the representations. *State v. McConkey*, 49 Iowa, 499; *State v. Hill*, 72 Mo. 191; *Thomas v. People*, 113 Ill. 531; s. c., 5 Am. Cr. Rep. 458.

Bank Notes.—Defendant fraudulently offered a new Irish bank note as a note for £5, and obtained change as for a £5 note. The person from whom the change was obtained could read, and the note upon its face clearly offered the means of detecting the fraud. *Held*, that this was obtaining money by false pretences. *Reg. v. Jessop, Dears. & B. C. C.* 442; s. c., 7 Cox C. C. 399.

Lodge Dues.—Where A, the secretary of a lodge of Oddfellows, told B, a member of the lodge, that he owed the society 13s. 9d., when in fact B only owed 2s. 3d., and A, by his false pretences obtained the money of B, *held*, that this was an obtaining of money by false pretences. *Reg. v. Woolley*, 3 Car. & K. 98; s. c., 4 Cox C. C. 193; 1 Den. C. C. 559; T. & M. 279; 4 New Sess. Cas. 341; 19 L. J. M. C. 165; 14 Jur. 465.

3. *State v. Montgomery*, 56 Iowa, 195.

4. *Pendry v. State*, 18 Fla. 191; *State v. Metsch* (Kan.), 15 Pac. Rep. 251; *Therasson v. People*, 82 N. Y. 238; *People v. Baker*, 19 N. Y. Week. Dig. 316; *Com. v. Chambers*, 15 Lan. Bar (Pa.) 39; s. c., 2 Chest. Co. Rep. 63; *Buckalew v. State*, 11 Tex. App. 353; *Trogon v. Com.*, 31 Gratt. (Va.) 862.

Inference from Proof of Pretences and

It necessarily follows that any pretence made after the obtaining, cannot be taken into account, for it could not have been an inducement to the prosecuting witness to part with his property, although it may have influenced him to refrain from taking immediate steps to recover it back.¹ The fact that the false pretence did not constitute the sole inducement under which the prosecutor parted with his property, is not sufficient to take the case out of the operation of the statute. It is sufficient to render the defendant criminally liable if pretences are used which are part of the moving cause, and without which the defrauded party would not have parted with his property.²

Intent.—Upon the trial of an indictment for obtaining the signature of a discharge of a mortgage by false pretences, the prosecuting witness, although examined for the prosecution, did not give any testimony upon the question whether she was influenced or induced to sign by the pretence used. The court refused the defendant's request to charge that although the jury might believe the false pretences to have been made and the necessary fraudulent intent, the jury could not consider these questions, or the evidence as to them, in determining whether the signature of the discharge was induced by them. On appeal, *held*, that such refusal was erroneous; that although the falsity of the representation and the fraudulent intent were both necessary elements, the question whether the prosecutrix signed the discharge upon the inducement of the pretence was a distinct one, having no necessary connection with the others, and that the proof of these others reflected no light upon it. *Therasson v. People*, 82 N. Y. 238.

Reliance upon Representations.—A prisoner was charged with obtaining a filly by the false pretence that he was a gentleman's servant, and lived at Brecon, and had bought twenty horses in Brecon fair. It appeared that he bought the filly of the prosecutor for £11, making him this statement, which was false, and also telling him that he would come down to the Cross Keys and pay him. The prosecutor stated that he parted with his filly because he expected the prisoner would come to the Cross Keys and pay him, and not because he believed that the prisoner was a gentleman's servant. *Held*, that if the prosecutor did not part with his filly by reason of the false pretence charged, or any part of it, the prisoner must be acquitted. *Rex v. Dale*, 7 Car. & P. 352.

Running Away with Money to be Changed.—G., the prisoner, and another, were in a boat on the bay; they agreed to take M., the prosecutor, to meet the steam-

er, G. saying the charge would be seventy-five cents at the steamer. The prosecutor, according to his own account, took out a \$2 bill at the steamer, saying he would get it changed. Prisoner said: "I'll change it," upon which the prosecutor handed it to him, and he shoved off with it. Other witnesses represented the prisoner's statement to be that he had change. The prosecutor did not say what induced him to part with the money. *Held*, that a conviction could not be sustained. *Reg. v. Gemmell*, 26 Up. Can. Q. B. 312. See *Reg. v. Campbell*, 18 Up. Can. Q. B.

Knowledge of Prisoner.—In *Michigan* it has been held that there can be no conviction under the statute unless the defendant knew or had reason to believe that his representations were relied upon as the ground of credit. *People v. McAllister*, 49 Mich. 12.

1. *State v. Church*, 43 Conn. 471.
2. *Woodbury v. State*, 69 Ala. 242; s. c., 44 Am. Rep. 515, 201; *Beasley v. State*, 59 Ala. 20; *Cowen v. People*, 14 Ill. 348; *Fooks v. State*, 65 Iowa, 196, 452; *In re Snyder*, 17 Kan. 542; s. c., 2 Am. Cr. Rep. 228; 5 Cent. L. J. 307; *State v. Tessier*, 32 La. Ann. 1227; *State v. Dunlap*, 24 Me. 77; *State v. Mills*, 17 Me. 211; *Com. v. Stevenson*, 127 Mass. 446; *Com. v. Coe*, 115 Mass. 481; *Com. v. Morrill*, 62 Mass. (8 Cush.) 571; *Smith v. State*, 55 Miss. 513; s. c., Am. Cr. Rep. 92; *Bowler v. State*, 41 Miss. 570; *State v. Vorback*, 66 Mo. 168; *State v. Thatcher*, 35 N. J. L. (6 Vr.) 445; *People v. Baker*, 96 N. Y. 340; *Webster v. People*, 92 N. Y. 422; *People v. Blanchard*, 90 N. Y. 314; *People v. Oyer and Terminer Court*, 83 N. Y. 436; *Morgan v. Skiddy*, 62 N. Y. 319; *Thomas v. People*, 34 N. Y. 351; *People v. Stetson*, 4 Barb. (N. Y.) 151; *Skiff v. People*, 2 Park. Cr. Rep. (N. Y.) 139; *People v. Herrick*, 13 Wend. (N. Y.) 87; s. c., 7 Am. Dec. 364; *People v. Haynes*, 11 Wend. (N. Y.) 557; s. c., 14 Wend. (N. Y.) 547; s. c., 28 Am. Dec. 530; *People v. Stone*, 9 Wend.

6. Property Parted with for Illegal Purposes.—There is a direct conflict of authority upon the question whether a defendant can be convicted for false representations inducing the prosecutor to enter into a transaction which would have been unlawful if the representations had been true. In New York and Wisconsin the rule followed is that the person defrauded is *particeps criminis*,—that the statutes are for the protection of honest people and not to facilitate and protect rogues in their dealings with one another,—and consequently no conviction can be had.¹ In Indiana, Massachu-

(N. Y.) 182; *Com. v. Daniels*, 2 Pars. (Pa.) 333; *Com. v. Lundsberg*, 43 Leg. Int. (Pa.) 260; *Britt v. State*, 9 Humph. (Tenn.) 31; *Fay v. Com.*, 28 Gratt. (Va.) 912; *Com. v. Herschell*, Thach. C. C. 70; *Rex v. Ady*, 7 Car. & P. 140; *Reg. v. Lince*, 12 Cox C. C. 171; *Reg. v. English*, 12 Cox C. C. 171; *Rex v. Eagleton*, Dears. C. C. 515; *Reg. v. Hewgill*, Dears. C. C. 315; 24 Eng. C. L. & Eq. 556.

Need not be Sole Inducement.—In *People v. Haynes*, 14 Wend. (N. Y.) 546-555; s. c., 28 Am. Dec. 530, the court say: "It is not necessary to constitute the offence of obtaining goods by false pretences that the owner should have been induced to part with his property solely and entirely by pretences which were false; but if the jury are satisfied that the pretences proved to have been false and fraudulent were a part of the moving causes which induced the owner to part with his property, and that the defendant would not have obtained the goods if the false pretences had not been superadded to statements which may have been true, or to other circumstances which may have been true, or to other circumstances having a partial influence upon the mind of the owner, they will be justified in finding the defendant guilty of the offence charged, within the letter as well as within the spirit of the statute on this subject. One false pretence was sufficient to constitute the crime, although other false pretences were also charged in the indictment. As a general rule, if an averment in an indictment is divisible in its nature, and any one part thereof is sufficient of itself to constitute the crime, the other parts of the averment need not be proved, unless they are descriptive and material to the identity of that which is essential to the charge contained in the indictment."

1. Compounding Felony.—New York Doctrine.—In New York, there are decisions to the effect that if a person parts with his property to one who falsely represents that he is an officer authorized to arrest him, and that unless he receives money or valuables he will put the warrant into force, there can be no conviction. *McCord v.*

People, 46 N. Y. 470; *People v. Stetson*, 4 Barb. (N. Y.) 151.

Falsely Representing One's Self to be an Officer.—In *McCord v. People*, *supra*, the court say: "If the prosecutor parted with his property upon the representation set forth in the indictment, it must have been for some unlawful purpose—a purpose not warranted by law. There is no legitimate purpose to be attained by delivering the goods to the accused, upon the statements made and alleged as an inducement to the act. What action by the plaintiff in error was promised or expected in return for the property given, is not disclosed. But whatever it was, it was necessarily inconsistent with his duties as officer, having a criminal warrant for the arrest of the prosecutor, which was the character he assumed. The false representation of the accused was, that he was an officer, and had a criminal warrant for the prosecutor. There was no pretence of any agency for or connection with any person, or any authority to do any act, save such as his duty as such pretended officer demanded. The prosecutor parted with his property as an inducement to a supposed officer to violate the law and his duties; and if in attempting to do this he has been defrauded, the law will not punish his confederate, although such confederate may have been instrumental in inducing the commission of the offence. Neither the law nor public policy designs the protection of rogues in their dealings with each other; or to insure fair dealing and truthfulness, as between each other, in their dishonest practices. The design of the law is to protect those who for some honest purpose are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not protect those who for unworthy or illegal purposes part with their goods."

In a Transaction itself Unlawful.—In *People v. Stetson*, *supra*, the language of the court was as follows: "In all the numerous reported cases under the English and American statutes to prevent the obtaining money, etc., by false tokens and pretences, I have not found one which was

setts, Michigan, and Texas a different rule has been adopted and the conviction will be sustained although the prosecutor has parted with his property to further an intended illegal transaction.¹

7. The Property Obtained.—The offence is not complete under the statute except something of value be obtained by the defendant.²

held to be within the statute, in which the transaction on the part of the person injured would not have been lawful, provided the representations or pretences were true, nor where such representations or tokens, if true, were not in violation of law. I cannot believe the statute was designed to protect any but innocent persons, not those who appear to have been in any degree *particeps criminis* with the defendant. To determine what attitude he occupies in that respect, it should be assumed that all the representations made to him, whether in words or tokens, were true, because it is an essential ingredient of the case that he believed them to be true; otherwise he could not claim that he was influenced by them. Looking at his conduct in that light, and with the assumption if in parting with his money or property, or yielding his signature, he was himself guilty of a crime, it cannot be that he is within the protection of the statute. Testing the case under consideration by these rules, it is impossible, in my opinion, to sustain the indictment. Barlow believed that the defendant was a constable, and had a warrant against him for rape. He is chargeable with knowledge that the law forbade any settlement or compromise of the matter, and that it would be a misdemeanor in the defendant to neglect to execute the process. In attempting to cheat the law he has himself been defrauded of his watch."

In Sale of Counterfeit Money.—In *State v. Crowley*, 41 Wis. 271; s. c., 22 Am. Rep. 719, money was paid by the prosecuting witness to obtain the possession of boxes falsely represented to contain counterfeit money. The prosecuting witness desired to obtain the money with a view to uttering it. One of the defendants afterwards pretended to be a constable, and obtained a further sum to prevent the arrest of the prosecuting witness for having the counterfeit money in his possession. The boxes in fact contained only sawdust. The court held that a conviction could not be sustained.

1. Compounding Felony.—**Indiana Doctrine.**—In Indiana an indictment will lie against a defendant for falsely representing himself to be an officer having a warrant for the arrest of another, but that he had power to compromise the crime for money and would do so upon receiving the payment of cash and the note for a further

sum. It was held that the pretence was sufficient to the indictment. *Perkins v. State*, 67 Ind. 270.

False Pretences by Person Defrauded — Effect of, as a Defence.—In *Com. v. Morrill*, 62 Mass. (8 Cush.) 571, the defendants pleaded that the person defrauded made false representations to them as to the goods obtained, but it was held that the defence was not sufficient to constitute a justification. The court say; "If it were true that the party, from whom the defendants obtained goods by false pretences, also made false pretences as to his goods, which he exchanged with the defendants, that would be no justification for the defendants when put on trial upon an indictment, charging them with obtaining goods by false pretences, knowingly and designedly in violation of a statute of this commonwealth. Whether the alleged misrepresentation of Lynch, being a mere representation as to the value or worth of a certain watch, and an opinion rather than a statement of a fact, would be such false pretence as would render him amenable to punishment under this statute, might be questionable; but supposing that to be otherwise, and it should appear that Lynch had also violated the statute, that would not justify the defendants. If the other party has also subjected himself to a prosecution for a like offence, he also may be punished. This would be much better than that both should escape punishment, because each deserved it equally."

Dishonest Use of Indorsement.—In *Michigan* the view adopted is that the penalty is imposed on public grounds; and if the indorsement be obtained by false pretences, the fact that the indorser knew that the indorsement was to be dishonestly used will not release the defendant. *People v. Henssler*, 48 Mich. 49.

Defrauding Person Not Justly Entitled to Property.—In *Texas* it has been held that the crime of swindling may be perpetrated upon one who is not even justly entitled to the property out of which he is swindled. *May v. State*, 15 Tex. App. 430.

2. State v. Lewis, 26 Kan. 123; s. c., 27 Com. Rep. 113; *Com. v. Van Tuyl*, 1 Met. (Ky.) 1; s. c., 71 Am. Dec. 455; *State v. Shaeffer*, 89 Mo. 271; *Willis v. People*, 19 Hun (N. Y.), 84; *Jones v. United States*, 5 Cr. C. C. 647.

It has accordingly been held that no offence is committed where the property or writing obtained is without value; e.g., a check on the bank not stamped as required by law,¹ or the note of a minor,² or a receipt in the discharge of a debt,³ or books of account,⁴ or a chance in a raffle.⁵ A check representing funds in a bank is a "thing of value" within the meaning of the statute,⁶ as also is a promissory note without regard to the value of the note, or whether it is negotiable or not.⁷

8. Property Obtained in Payment of Debt.—If the creditor by false pretences induces the debtor to make payment of a debt already due, he does not commit the offence of obtaining money by false pretences.⁸ Evidence of the indebtedness is competent for the pur-

1. *Rex v. Yates*, Car. C. L. 333; s. c., 1 Moo. C. C. 170.

2. *Com. v. Lancaster*, Thatch. C. C. 428.

3. *Moore v. Com.*, 8 Pa. St. 260; *Com. v. Chambers*, 15 Lan. Bar (Pa.), 39; s. c., 2 Chest. Co. Rep. 63.

Satisfaction of Debt.—In *Jamison v. State*, 37 Ark. 445; s. c., 40 Am. Rep. 103, the defendant was indebted to one Thompson, and Thompson owed one Mattingley the same amount and had the money to pay him. The defendant by false pretences induced Mattingley to satisfy Thompson's claim against the defendant by giving Thompson credit for the amount, and taking from the defendant a worthless mortgage to secure it. It was held that a conviction could not be sustained. The court say: "There is no evidence that the defendant obtained any money from Mattingley. Proof that by the false pretences alleged he procured the satisfaction of his indebtedness to Thompson by him, though sufficient to sustain an action by Mattingley against him for money lent, was irrelevant to the charge in the indictment. The money must have been actually and not merely impliedly or constructively obtained, and must have come into the defendant's possession."

4. *United States v. Carico*, 2 Cr. C. C. 446.

5. *Rosales v. State*, 22 Tex. App. 673.

Chance in a Raffle.—In *Rosales v. State*, 22 Tex. App. 673, it was charged that the defendant, by means of a fraudulent pretence that the price on a chance in a raffle for an organ had been raised, and that the owner would have to pay the increase or lose her chance, thereby obtained a transfer of the right to the chance. It was also averred that when the pretences were made the raffle had already taken place, and that the chance parted with had won the organ, as the defendant knew. *Held*, that the indictment did not charge with sufficient certainty whether the de-

fendant had obtained the chance in the raffle, or had swindled the prosecutrix out of the organ; and that if it charged the former such charge was not sufficient to support the indictment, as a chance in a raffle is not such a "valuable right" as could be enforced by law, and therefore would support an indictment for swindling under the *Texas* statute.

6. *Tarbox v. State*, 38 Ohio St. 581.

Evidence of Value.—In *Com. v. Coe*, 115 Mass. 481, the check obtained was drawn on a bank, and the evidence showed that the drawer at the time made deposits in two banks, and was in the habit of drawing on the money deposited in one of them. *Held*, sufficient to warrant the jury that the check was of value.

7. *State v. Porter*, 75 Mo. 141. See also *People v. Reed*, 70 Cal. 529.

The Term "Valuable Security," used in the Consolidated Statutes of *Canada*, c. 92, s. 72, means a valuable security to the person who parts with it on the false pretence; and the inducing a person to execute a mortgage on his property is thereof one not obtaining from him valuable security within the act. *Reg. v. Brady*, 26 Up. Can. Q. B. 13.

8. *Com. v. McDuffy*, 126 Mass. 467; *People v. Getchell*, 6 Mich. 496; *People v. Thomas*, 3 Hill (N. Y.), 169; *State v. Hust*, 11 W. Va. 54; s. c., 3 Am. Cr. Rep. 100.

Obtaining Goods in Satisfaction of Debt.—A owed B a debt, of which B could not get payment. C, a servant of B, went to A's wife and obtained two sacks of malt from her, saying that B had bought them of A. C knew this to be false, but took the malt to B, his master, to enable him to pay himself the debt. *Held*, that if C did not intend to defraud A, but merely to put it into his master's power to compel A to pay him a just debt, C ought not to be convicted of obtaining the malt by false pretences. *Rex v. Williams*, 7 Car. & P. 354.

pose of showing the defendant's belief and the intent with which he obtained the property.¹ If, however, the creditor obtain a greater amount than is due, although he is not guilty of obtaining the whole by false pretences, he is guilty of obtaining the excess beyond the amount of the debt.² If a person by false and fraudulent representations obtains the consent of a defendant to the entry of a judgment in his favor, in an action then pending, and the payment of a sum of money in satisfaction of that judgment, he cannot be convicted of obtaining the money by false pretences.³

Representing Note Lost or Destroyed—Negotiation after Payment.—In *People v. Thomas*, 3 Hill (N. Y.), 169, Jones having executed a negotiable note to Thomas, payable one day after date, the latter called for payment, falsely pretending that the note had been lost or burned up, whereas in truth the note had neither been lost nor burnt. Thomas negotiated the note for value without apprising the indorsee that it had been paid. The court say: "*Non constat* from the indictment, that Jones sustained any damage by the false representation, nor that there was an intent on the part of Thomas at the time of the representation to work any danger. The note was due, and payment made. This was the only consequence—a thing which Jones was bound to do. A false representation, by which a man may be cheated into his duty, is not within the statute. It was said in argument that the subsequent negotiation of the note by Thomas obviated the difficulties adverted to. The note being overdue when latter fact took place, it is difficult to see judicially that Jones would be injured by it. Whether he would or would not, is merely speculative, depending on his precaution in providing himself with proper evidence."

False Representations to Obtain Payment of Just Debt.—In *State v. Hurst*, 11 W. Va. 54; s. c., 3 Am. Cr. Rep. 100, the court say: "It is doubtless immoral for a person by false pretences to obtain the payment of a just debt. The end sought may be just, but such end will not, by a correct code of morals, justify the use of improper means; but the law does not, in many instances, attempt the enforcement of good morals, and the question is, whether the use of false pretences, to obtain a claim justly due, is, within the true meaning of this criminal statute, a fraud. To so construe this statute, would, in my judgment, consign to the penitentiary as thieves many persons who cannot be classed with common thieves, without breaking down all our ideas of distinction in degrees of immorality. I think, there-

fore, that within the true meaning of this statute, a man cannot be held guilty of procuring money by false pretences, with intent to defraud, who has merely collected a debt justly due him, though in making the collection he has used false pretences."

1. *Com. v. McDuffy*, 126 Mass. 467; *People v. Getchell*, 6 Mich. 496.

2. *State v. Hurst*, 11 W. Va. 54; s. c., 3 Am. Cr. Rep. 100.

3. *Com. v. Harkins*, 128 Mass. 79.

Obtaining Consent to Judgment by False Representations.—In *Com. v. Harkins*, *supra*, the defendant was indicted for obtaining money from the city of Lynn by false pretences. The indictment alleged in substance that the defendant falsely represented to the city of Lynn through its agent, the city solicitor, that a street which the city was bound to repair had been suffered to be out of repair, and that the defendant, while travelling thereon with due care, was injured by the defect; that the defendant at the same time exhibited an injury to his foot and ankle, and represented that it was caused by the alleged defect. It was further alleged that the city and its solicitor were deceived by these representations, and, being induced thereby, agreed to the entry of a judgment against the city in a suit pending in favor of the defendant in this case; and upon the entry thereof paid the amount of the same to him. The court held that the indictment was defective, saying: "The facts stated do not constitute the offence of obtaining money by false pretences. The allegations are, that an agreement that judgment should be rendered was obtained by the pretences used, and that the money was paid by the city in satisfaction of that judgment. It is not alleged that after the judgment was rendered, any false pretences were used to obtain the money due upon it; and, even with proper allegations to that effect, it has been held that no indictment lies against one for obtaining by such means that which is justly due him. There is no legal injury to the party who so pays what in law he is bound to pay. *Com.*

9. Nature of the Pretence.—a. Existing or Past Fact.—To constitute the crime of obtaining money or property by false pretences under the statute, it is essential that the false statement or representation should be of an existing or past fact. If the property is parted with on the inducement of a promise to perform some act in the future, no criminal offence is committed.¹ Within

v. McDuffy, 126 Mass. 467; *People v. Thomas*, 3 Hill (N. Y.), 169; *Rex v. Williams*, 7 Car. & P. 354. A judgment rendered by a court of competent jurisdiction is conclusive evidence between the parties to it that the amount of it is justly due to the judgment creditor. Until the judgment by the defendant was reversed, the city was legally bound to pay it, notwithstanding it may have then had knowledge of the original fraud by which it was obtained; and with or without such knowledge it cannot be said that the money paid upon it was in a legal sense obtained by false pretences, which were used only to procure the consent of the city that the judgment should be rendered."

1. *Colly v. State*, 55 Ala. 85; *Burrow v. State*, 12 Ark. 65; *Horgan v. State* 42 Ark. 131; s. c., 48 Am. Rep. 55; *McKenzie v. State*, 11 Ark. 594; *Ryan v. State*, 45 Ga. 128; *Gage v. Lewis*, 68 Ill. 604; *Keller v. State*, 51 Ind. 111; s. c., 1 Am. Cr. Rep. 211; *State v. Magee*, 11 Ind. 154; *In re Snyder*, 17 Kan. 542; s. c., 2 Am. Cr. Rep. 228; *Com. v. Whitney* (Ky.), 3 S. W. Rep. 533; *State v. Hill*, 73 Me. 238; *Long v. Woodman*, 58 Me. 49; *Com. v. Stevenson*, 127 Mass. 446; *Com. v. Drew*, 36 Mass. (19 Pick.) 179; *State v. Janson*, 80 Mo. 97; s. c., 7 Cr. L. Mag. 802; *State v. Evers*, 49 Mo. 542; *People v. Blanchard*, 90 N. Y. 314; *Ranney v. People*, 22 N. Y. 413; *People v. Tompkins*, 2 Edm. Sel. Cas. (N. Y.) 191; *State v. Phifer*, 65 N. Car. 321; *Dillingham v. State*, 5 Ohio St. 280; *Com. v. Moore*, 99 Pa. St. 570; s. c., 4 Am. Cr. Rep. 230; *Com. v. Fisher*, 9 Phila. (Pa.) 594; *State v. Hines*, 23 S. C. 170; *Canter v. State*, 7 Lea (Tenn.), 349; *Johnson v. State*, 41 Tex. 65; *Matthews v. State*, 10 Tex. App. 279. See 9 Tex. App. 138; *Allen v. State*, 16 Tex. App. 150; *Sawyer v. Prickett*, 86 U. S. (19 Wall.) 146; bk. 23, L. ed. 105; *Ex parte Burrell*, L. R. 1 Ch. D. 552; *Reg. v. Henderson*, Car. & M. 328; *Rex v. Parker*, 7 Car. & P. 825; s. c., 2 Moo. C. C. 1; *Reg. v. Woolley*, 1 Den. C. C. 559; s. c., 1 Eng. L. & Eq. 537; *Reg. v. Burgon*, D. & B. C. C. 11; s. c., 7 Cox C. C. 131; 2 Jur. N. S. 599; 25 L. J. M. C. 105; *Reg. v. Woodman*, 14 Cox C. C. 179; *Reg. v. Lee*, 9 Cox. C. C. 304;

s. c., 8 L. T. 437; 11 W. R. 761; L. & C. C. C. 309. See, as conflicting with this rule, *State v. Nichols*, 1 Houst. Cr. Cas. (Del.) 114. Compare *Rex v. Young*, 1 Leach C. C. 505; s. c., 2 East P. C. 82, 833; 3 T. R. 98; *Reg. v. Jones*, 6 Cox C. C. 467.

Promise to Pay for Goods.—To charge the offence of swindling by false pretences, it is not enough to charge promise to pay for property when delivered. *Allen v. State*, 16 Tex. App. 150.

Misrepresentation by Hotel-keeper.—A false statement by a hotel-keeper that a certain person had boarded with him, whereby he induces another person to board with him and advance money for his board, is not a criminal false pretence. *Horgan v. State*, 42 Ark. 131; s. c., 48 Am. Rep. 55.

Status or Collateral Fact.—Where the false pretence is as to the status of the party at the time, or as to any collateral fact supposed to be then existing, it will equally support an indictment. *Reg. v. Bates*, 3 Cox C. C. 201.

Money to Pay Rent.—The prosecutor lent £10 to the prisoner on the false pretence that he was going to pay his rent, and if the prisoner had not told him that he was going to pay his rent the prosecutor would not have lent the money. *Held*, that this was not a false pretence of any existing fact to warrant a conviction. *Reg. v. Lee*, 9 Cox C. C. 304; s. c., 8 L. T. 437; L. & C. 309; 11 W. R. 761.

Subscription to Directory.—The prisoner obtained money by representing that he was collecting information for a new county directory that W. & Co. were getting up, and that by paying one shilling the prosecutor could have his name inserted in large type, and would receive other advantages. There were several similar charges. W. & Co., an existing firm, were now getting up a new county directory, and the prisoner was not employed by them to canvass or collect information. The prisoner's defence before the magistrate (in evidence at the trial) was that he was going to bring out a directory, and that he was not aware that he was doing wrong in using the name of W. & Co. At the trial the prisoner's counsel urged that

this rule, if a person obtains a note or money on the promise to apply it in payment of another note then due, the representation is purely promissory, and will not support an indictment; ¹ but if

there was no misrepresentation of an existing fact, but only a promise to do something in future. *Held*, that this was a misrepresentation of an existing fact. *Rex v. Sneed*, 46 L. T. 174; s. c., 46 J. P. 451. See *Reg. v. Woolley*, 3 Carr. & K. 98; 1 Den. C. C. 559; s. c., T. & M. 279; 4 New Sess. Cas. 341; 4 Cox C. C. 193; 19 L. J. M. C. 165; 14 Jur. 465.

Promise to Procure Release on Bail.—In a prosecution for obtaining money or property by false pretences, the indictment must contain averments that the accused made false representations as to the state of things, past or present, and it will not be good if the alleged false representations refer to the future only. A promise is not a pretence within the meaning of the statute, even when the party making the same does not intend to keep it. Hence an indictment charging the defendant with falsely offering or promising to procure the release on bail of a person in actual custody, by means of which he obtained money, does not disclose an offence covered by the statute. *State v. Colly (La.)*, 2 S. Rep. 496.

Promise to Ship Cotton Crop.—Defendant was indicted for obtaining goods by falsely pretending that he was planting cotton, and by promising to ship his cotton to the person furnishing the goods. *Held*, that as the promise was not a false pretence of an existing fact, instructions which permitted the jury to ignore the pretence, and to convict for the breach of the promise, afforded ground for reversal. *State v. Haines*, 23 S. C. 170.

Shipment of Goods.—The indictment alleged that defendant had falsely stated that he was about to ship and had shipped certain goods, and that upon the faith of the coming thereof he obtained the money in question. *Held*, not obnoxious to the objection that it set out the representation of a future event merely. *State v. Janson*, 80 Mo. 97; s. c., 7 Cr. L. Mag. 802.

When one obtains credit by falsely pretending that he is the owner of the property which he does not own, the fraud consists not in misrepresenting his intentions to pay, but in his misrepresenting his ability to pay. *State v. Hill*, 73 Me. 238.

Intention to Commence Business.—An indictment charged one Gregory with having obtained £30 from prosecutor, Woodman, on the false pretence that he,

the said Gregory, then wanted the loan of £30 to enable him to take a public-house at Melksham, by means of which said false pretence the said Gregory did then unlawfully and fraudulently obtain the said sum from the said Samuel Woodman with intent to defraud. Whereas the said Gregory was not then going to take a public-house at Melksham, . . . as he, the said Gregory, well knew. And whereas the said Gregory did not then want a loan of £30 or any money to enable him to take the said house. *Held*, not a false pretence as to an existing fact. *Reg. v. Woodman*, 28 Cox C. C. 561; s. c., 14 Cox C. C. 179.

Promise of Payment.—In an indictment for obtaining goods by false pretences, an averment that defendant fraudulently represented to R. that C. was indebted to defendant, and had told him to get the goods from R.'s store, and C. would pay for them, is sufficient, notwithstanding the averment relates to a fact to take place in the future, as such statement was not the false pretence authorizing the conviction. *Com. v. Whitney (Ky.)*, 3 S. W. Rep. 537.

Promise of Marriage.—Money was obtained by the prisoner from an unmarried woman on the false representations that he was a single man, and that he would furnish a house with the money, and would then marry her. *Held*, that the false representation of an existing fact (that he was a single man) was sufficient to support a conviction for false pretences, although the money was obtained by that representation, united with the promise to furnish a house and then marry her. *Reg. v. Jenkinson, L. & C.* 157; s. c., 9 Cox C. C. 158; 31 L. J. M. C. 146; 8 Jur. N. S. 442; 6 L. T. 256; 10 W. R. 488.

Promise of Employment.—The defendant promised to employ the prosecutor in a certain way, and thereby induced him to deposit money as security, with intent to defraud him of the deposit. *Held*, that there was no "false pretence." *Ranney v. People*, 22 N. Y. 413.

1. Procuring Indorsement to Promissory Note.—Defendant procured the prosecutor's indorsement of the defendant's promissory note on the representation that he would use the note so indorsed to take up and cancel another note of the same amount then about to mature, and upon which the prosecu-

the representation is coupled with the statement that the defendant only requires such money or note to help to make up the amount, and that he is prepared with the balance, the statement that he has the balance in his possession will, if false, be such a representation of an existing fact as will support the indictment.¹ In keeping with this rule, it has been held that a false assertion of a power to do something, whether the power is physical, moral, or supernatural, if used for the purpose of obtaining money or goods, is indictable as a false pretence.² It must be

tor was liable as indorsee. In place of doing so, the defendant used the promissory note for other purposes. It was held that the representation was not such as would support an indictment for false pretences. *Com. v. Moore*, 99 Pa. St. 57; s. c., 4 Am. Cr. Rep. 230.

Failure to Perform Promise.—The prisoner, with one D., whose note he held, came to the store of H. & F., where an agreement was entered into between the parties that D. would pay for all the goods furnished by H. & F. to the prisoner, on the amount being indorsed on his (D.'s) note held by the prisoner. The prisoner several times called at H. & F.'s with the note mentioned, obtained goods, and had the amount indorsed on the note. Afterwards he called without the note and got goods, on his promising to bring the note in a day or two and have the amount indorsed thereon. Prisoner saw D. the next day after, and directed him not to pay anything more than the amounts indorsed on the note, and he never afterwards presented the note to have the amount indorsed thereon. *Held*, that there was no false representation or pretence of an existing fact, but a mere promise of defendant, which he failed to perform. *Reg. v. Bertles*, 13 C. P. 607.

Representations regarding Check.—An indictment charging that defendant falsely represented to A. that he had then and there in his possession a check for the payment of money drawn by him in favor of A., from the proceeds of which he intended to pay certain bills due from A. to other persons, does not set out a false pretence within the statute. *Com. v. Stevenson*, 127 Mass. 446; s. c., 1 Cr. L. Mag. 806.

1. **Obtaining, as a Loaning**, from the drawer of a bill, accepted by the prisoner and negotiated by the drawer, part of the amount, for the purpose of paying the bill, under the false pretence that the prisoner was prepared with the residue of the amount, is an offence within 7 & 8 Geo. IV. c. 29, § 53, the prisoner being

shown not to be so prepared, and not intending so to apply the money. *Rex v. Crossley*, 2 M. & Rob. 17; s. c., 2 Lewin C. C. 164.

Obtaining Payment of Negotiated Note by Falsely Pretending to be Still the Owner.

—The prisoner sold a mare to B., taking his notes for the purchase-money, one of which was for \$25, and a chattel mortgage on the mare as collateral security. After this note had matured he threatened to sue, and B. got one R. to pay the money, the prisoner promising to get the notes from a lawyer's office, where he said they were, and give them up next morning. This note, however, had been sold by the prisoner some time before to another person, who afterwards sued B. upon it and obtained judgment. *Held*, that the prisoner was properly convicted of obtaining the \$25 by false pretences. *Reg. v. Lee*, 23 Up. Can. Q. B. 340.

2. *Reg. v. Giles*, L. & C. 502; s. c., 10 Cox C. C. 44; 34 L. J. M. C. 51; 11 Jur. N. S. 119; 11 L. T. 643; 13 W. R. 327.

Spiritualistic Mediums.—The defendant was convicted of attempting to obtain money upon false pretence that he had power to communicate with the spirits of deceased and other persons, although such persons were not present in the place where he then was; and also that he had power to produce and cause to be present such spirits as aforesaid in a materialized or other form, and also that divers musical instruments, by the sole means of such spirits so caused to be present, produced musical and other sounds. *Held*, that the defendant was thereby charged with falsely pretending an existing fact, and that the indictment so alleging the false pretence was good and valid within 24 & 25 Vict. c. 96. *Reg. v. Lawrence*, 36 L. T. 404.

In *Com. v. Keeper of County Prison* (Pa.), 20 Cent. L. J. 263, it was held that self-styled spiritualistic mediums charging admission fees to exhibitions, in which they profess to call up the spirits of deceased persons, are guilty of obtain-

kept in view that if the defendant has made a false representation concerning the existing or past fact, the fact that he also made a promise or declared an intention as a future event is not sufficient to take the case out of the operation of the statute. The false representation as to the existing or past fact is sufficient to sustain the indictment of itself.¹

b. Matters of Opinion.—A mere falsehood, or false assertion, concerning anything which may be deemed purely a matter of opinion, will not expose the person making it to a punishment for false pretences,² especially when the representation is made with

ing money by false pretences. The court said: "It has been held in *England*, under a statute similar to our own, that a defendant falsely pretending that he had power to communicate with the spirits of deceased persons, and that he could cause such spirits to be present in a material form, and play upon musical instruments, made a pretention of existing facts, and that obtaining money on such pretences came within the statute against false pretences. *Reg. v. Lawrence*, 36 L. T. N. S. 404; *Rex v. Giles*, 11 L. T. N. S. 643. Although the fraudulent misrepresentation of an existing fact was accompanied by an executory promise to do something at a future period, it was none the less a false pretence. *Reg. v. West*, 8 Cox C. C. 12; *Reg. v. Jennison*, 9 Cox C. C. 158. The lady who testified in this case paid her money on the faith of the representations of the relators, which proved to be false; and thus we have a clear case of obtaining money by false pretences."

1. *State v. Rowley*, 12 Conn. 101; *State v. Montgomery*, 56 Iowa, 195; *State v. Cowdin*, 28 Kan. 269; *Com. v. Lincoln*, 93 Mass. (11 Allen) 233; *State v. Hill*, 72 Me. 238; *Com. v. Wallace*, 114 Pa. St. 405; s. c., 60 Am. Rep. 353; 23 Rep. 28; *Reg. v. Jennison*, L. & C. 157; 9 Cox C. C. 158, 31 L. J. M. C. 146; 6 L. T. 256.

Combined Falsehood and Promise.—A fraudulent misrepresentation of an existing matter of fact, accompanied by an executory promise to do something at a future period, as that the prisoner had bought certain skins and would sell them to the prosecutor, is a false pretence within the statute, although it appears that the promise, as well as such misrepresentations of fact, induced the prosecutor to part with the money. *Reg. v. West*, Dears. & B. C. C. 575; s. c., 8 Cox C. C. 12; 27 L. J. M. C. 227; 4 Jur. N. S. 514.

Intention to Open Store.—An indictment for obtaining goods under false pretences is not invalidated by alleging one

representation concerning something in the future; as, for instance, that the defendant was about to open a store at a certain place; the others being within the statute. *State v. Vorback*, 66 Mo. 168.

2. *State v. Penley*, 27 Conn. 587; *State v. Tomlin*, 27 N. J. L. (15 Dutch.) 513.

Value of Business.—A false representation as to the value of a business will not sustain an indictment for obtaining money by false pretences. *Reg. v. Williamson*, 11 Cox C. C. 328.

Location and Value of Lots.—Statements as to the value of lots, or that they are "nicely located," are matters of opinion, and not facts, and therefore not within the statute. *People v. Jacobs*, 35 Mich. 35; s. c., 2 Am. Cr. Rep. 102.

Selling Price and Value of Stock.—A conviction may be had for falsely representing that the stock of a corporation was selling at a certain price, but not for falsely representing that it was worth a certain price. *Com. v. Wood*, 142 Mass. 459.

Soundness of Horse.—An indictment under Bat. Rev., ch. 32, § 67, charging that defendant "did designedly, unlawfully, and falsely pretend that a horse in his possession was sound and healthy, whereas in truth and in fact the said horse was not sound and healthy, well knowing the same to be false," by which he obtained goods of another, with intent, etc., is defective. There is no averment of false pretences, but only of a falsehood or false affirmation. *State v. Holmes*, 82 N. C. 607; s. c., 2 Cr. L. Mag. 421.

Business and Standing of Tenant.—An indictment alleged that the defendant, to induce M. to sign a lease to C., falsely represented that C. was a liquor-dealer, doing business as such in B.; that C. was a man worth \$10,000, and that a certain person, whom the defendant pointed out to M., was C. *Held*, that the first allegation was of a representation of a material fact; that the second was not; and it

reference to facts open to the present observation of the person defrauded.¹

c. Remoteness.—A false pretence knowingly made to obtain money is indictable, though the money is obtained by means of a contract which the prosecutor was induced to make by the false pretence.² If it appeared that statements were made on different

seems that the third was not. *Com. v. Stevenson*, 127 Mass. 446.

A False Representation made by a Broker in the course of inducing the complainant to make a purchase, and consisting in declaring that he did not think the seller would take less than a specified sum, was held to be sufficient. *Scott v. People*, 62 Barb. (N. Y.) 62.

1. *Woodbury v. State*, 69 Ala. 242; s. c., 44 Am. Rep. 515.

2. *Reg. v. Abbott*, 1 Den. C. C. 273; s. c., 2 Car. & K. 630; 2 Cox C. C. 430; *Reg. v. Dark*, 1 Den. C. C. 276; *Reg. v. Kendrick, D. & M.* 208; s. c., 5 Q. B. 49.

Continued Negotiations.—An indictment alleged that the defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, and that he required forty coal bags. The evidence was that he saw the prosecutor and gave him his card, "J. Willot & Co., timber and coal merchants;" and said that he was largely in the timber and coal way, and inspected some coal bags, but objected to the price. The next day he called again, showed the prosecutor some correspondence, and said that he had a lot of trucks of coal at the railway station under demurrage, and that he wanted some coal bags immediately. The prosecutor had only forty bags ready, and it was arranged that the defendant was to have them, and pay for them in a week. They were delivered to the defendant, and the prosecutor said he let the defendant have the bags in consequence of his having the trucks of coal under demurrage at the station. There was evidence as to his having taken premises and doing a small business in coal, but he had no trucks of coal on demurrage at the station. The jury convicted the defendant. *Held*, that the false pretence charge was not too remote to support the indictment, and that the evidence was sufficient to sustain it. *Reg. v. Wilmot*, 12 Cox C. C. 68; s. c., 24 L. T. 758.

Executory Contract of Sale.—In *Reg. v. Martin*, 36 L. J. M. C. 20; s. c., L. R. 1 C. C. Res. 56; 10 Cox C. C. 383, the defendant was indicted for obtaining a van by false pretences. It was proved that the prisoner by false pretences induced

the prosecutor to contract to build a van; that the prosecutor, on the faith of those pretences, built and delivered the van, in pursuance of the original order, although the prisoner had countermanded the order after the building and before the delivery. *Held*, that to bring the case within the statute, it is not necessary that the chattel should be in existence when the false pretence is made, but that the obtaining is within the statute if the pretence is a continuing one, so that the chattel is made and delivered in pursuance of the pretence; that the question, whether the pretence is a continuing one, is a question of fact for the jury, and that there was such evidence in the case as warranted the jury in inferring that the pretence was a continuing one. The court say: "The first point taken in the argument was, that, in order to convict of obtaining a chattel by false pretences under this statute, the chattel must exist at the time when the pretence was made. That has been completely answered by my brothers Blackburn and Wiles during the argument. Take the case of a coat obtained by a false pretence, or of money, say £500. A man may not carry £500 about with him, and it may be that the bank notes obtained by the pretence are not printed when the pretence is made. Can anybody doubt that such a case would be an obtaining within the statute, the pretence and the delivery being connected together? So, as to obtaining a valuable security in the shape of a note or bill of exchange, which does not exist at the time when the prisoner asks for it, but is made afterwards. Again, take the case of coal, which is not dug at the time of making the pretence, and which, at common law, is not, till severed, the subject of larceny. A vast variety of similar cases might occur in which it would be an absurdity to say that the offence was not within the statute. In all cases, of course, the pretence must precede the delivery of the chattel. What, then, is the test as to the distance of time between them. The real test is, whether or not there is a direct connection between the making of the pretence and the delivery; or, in other words, whether the pretence is a continuing one:

—continuing during the interval between the time of making the pretence and the time of the delivery. It would be for the jury in all cases to say whether that was so in fact. In this case there is evidence from which the jury might draw the conclusion that the false pretence so continued. *Reg. v. Gardner*, 25 L. J. M. C. 100, was not quite as it is cited in the books. There the pretence was made in order to take the lodgings. The prisoner occupied them for one week, and after he had become the lodger the false pretence was exhausted. The contract was for lodgings only, and under that he became the lodger, having had no board at first, and no board being contemplated between one party and the other. There was no connection between the pretence and the obtaining of the board on the ground. In *Reg. v. Bryan*, 2 F. & F. 567, the prisoner was indicted for obtaining board and lodgings, and 6*d.* in money, but the point as to the board was not raised. The point was to the loan of 6*d.* When the objection was taken that *Reg. v. Gardner* applied, the question was as to the money, and the only point was as to the 6*d.* The obtaining of the 6*d.* in that case was quite as remote from the original contract for the board and lodging as the obtaining the board was from the contract for the lodging in *Reg. v. Gardner*. Hill, J., there followed *Reg. v. Gardner*. Here, when the false pretences were made, the parties originally contemplated the making of the van and the delivery. The second point argued was, that what took place afterwards took the case out of the statute. It is for the jury to say whether the chattel was delivered in pursuance of the false pretence. The circumstance of the countermand might be of importance to the jury in deciding whether or not the chattel was delivered in pursuance of the pretence, but it was entirely for them."

Obtaining Board.—In *Reg. v. Gardner*, D. & B. C. C. 40; s. c., 7 Cox C. C. 136; 25 L. J. M. C. 100; 2 Jur. N. S. 598, which is criticised by the court in *Reg. v. Martin*, 36 L. J. M. C. 20; s. c., L. R. 1 C. C. Res. 56; 10 Cox C. C. 383, A, by means of false pretences, engaged with the prosecutrix for lodging at 10*s.* a week. He accordingly became a lodger in her house, and a few days afterwards expressed a wish to become a boarder. He was then supplied with board as well as lodging at £1 1*s.* per week. He was afterwards indicted for obtaining goods (the board) by means of false pretences, and convicted. *Held*, that the conviction could not be supported, as the goods were

supplied too remotely from the false pretence.

It has been stated that the cases, *Reg. v. Gardner*, D. & B. C. C. 40; s. c., 7 Cox C. C. 136; 25 L. J. M. C. 100; 2 Jur. N. S. 598; *Reg. v. Bryan*, 2 C. F. & F. 567, cannot now be considered as authorities. See 2 Russ. on Cr. (5th Eng. Ed.) 554*n.*

Sale of Horses with Warranty.—In *Reg. v. Kimrick*, 5 Q. B. 49, the evidence was in effect that the prosecutor was told by both defendants that two horses had been the property of a lady deceased, and were then the property of her sister, and never had been the property of a horse-dealer, and that they were quiet and tractable, all these statements being absolutely false, and the defendants knowing that nothing but a full belief in their truth would have induced the prosecutor to make the purchase, as he repeatedly informed them that he wanted the horses for his daughters' use. The evidence was that the defendants, in order to induce the prosecutor to make the contract of purchase, made the false pretences aforesaid respecting the horses, and thereby induced him to buy them and part with the price. The conspiracy was made out to the entire satisfaction of the jury, who convicted; and upon a motion for a new trial, it was contended that nothing was proved by a warranty, which was indeed false, and must, after verdict, be assumed to have been wilfully so; but that was not the ground of an indictment. In that case Lord Denman, C. J., says: "A general question seems here to be raised, whether, if money be obtained through the medium of a contract between the defendant and the party defrauded, the charge of false pretences can be sustained. With some plausibility the thing obtained through the false pretences may be said to be the contract, and not the money which is paid in fulfilment of it, and which the party is probably by its terms liable to repay. This was the ground in which my brother Littledale directed an acquittal in *Rex v. Codrington*, 1 Car. & P. 661. But that decision was lately much doubted by the judges with reference to a case reserved by the Recorder of London. *Reg. v. Adamson*, 2 M. C. C. R. 286. A person who falsely pretended that he was an emigration commissioner, thereby induced the prosecutor to enter into a contract with him, and to pay him under it a sum of money. An objection was taken that the verbal representation could not be received in evidence, and the judges unanimously approved of his decision. Hence it follows that the execution of a

occasions, it is a question of fact for the jury whether they are so connected as to form mere continuing representations.¹ If a particular result is designed to be accomplished by making the false pretence, which however fails, and another thing of value is obtained and accepted with like intent to defraud, the law imputes to the person making the false pretence or design from the beginning to consummate the latter result.²

d. False Representations to Agent.—To constitute the crime of obtaining money or property by false pretences it is not essential that the pretences should be made directly to the party defrauded.³ False representation to an agent, if he has authority to sell the articles obtained, will be sufficient to sustain an indictment, although the principal acted upon the representations only through the agent.⁴

contract between the same parties does not secure from punishment the obtaining money under false pretences in conformity with that contract. Generally speaking, indeed, there would be little satisfaction in suing parties guilty of such a proceeding. But in the greater number of such cases it is more probable that a contract should intervene in the transaction than otherwise. Though many breaches of contract may be of such a nature as to be the subject of an action, and not of any criminal proceeding, it is clear that the liability to an action cannot of itself furnish any answer to an indictment for a fraud. We think that in this case the two ingredients of the offence of obtaining money under false pretences were proved by the evidence. The pretences were false, and the money was obtained by their means." *Reg. v. Kendrick*, 5 Q. B. 49.

Repetition of Pretences—Where, by means of false statements, the prosecutor was induced to enter into an arrangement under which he supplied goods to the defendant from time to time, but the false statements were repeated each time the goods were delivered, it is not error to refuse an instruction requested by the defendant, leading the jury to suppose that goods obtained after the arrangement was entered into were obtained by means of the contract, and not by means of the false pretences. *Smith v. State*, 55 Miss. 513; s. c., 3 Am. Cr. Rep. 92.

Prize in Swimming Race—Remote Pretences.—The prisoner was charged with obtaining a prize in a certain swimming race by false pretences. He obtained his competitor's ticket for the race by representing himself to be a member of a certain club, and by a letter purporting to be written by the secretary of the club. On the faith of these representations, which turned out to be false, he was allowed

twenty seconds' start in the race, and won the prize. *Held*, by the Common Sergeant after consulting Stephen, J., that the false pretences were too remote, and that the count charging them could not be sustained. *Reg. v. Larner*, 14 Cox C. C. 497.

1. *Reg. v. Welman*, Dears. C. C. 188; s. c., 8 Cox C. C. 153; 22 L. J. M. C. 118.

Different Representations at Different Times—Connectible.—In this case the defendant told the prosecutrix that he belonged to a club called the "Instant Benefit," and that he was canvassing for members. He said it was a very large club, and had a large sum of money in bank. The prosecutrix declined to enter. The defendant called upon the prosecutrix again about a month later. He still praised the club, but only said it was strong and respectable. The prosecutrix then entered, upon the faith of this representation, and paid her fee. The jury were told that they might take into account what passed at the first as well as what passed at the second meeting, and upon a case reserved, it was held that this direction was correct, for if the representations were connectible, it was for the jury to determine whether in fact they had been connected.

Note Secured by False Pretences—Exchange for Another Note.—A note was obtained by false pretences. A few hours afterwards the respondent induced the prosecutor to exchange that note for a second of the same tenor, because the first was written in pale ink. It was held that the evidence was sufficient to sustain the allegation of the indictment, which charged the obtaining of the second note by means of the false pretences, it being all one transaction. *Jones v. State*, 50 Ind. 473; s. c., 1 Am. Cr. Rep. 218.

2. *Todd v. State*, 31 Ind. 514.

3. *Roberts v. People*, 9 Colo. 458.

4. *Com. v. Harley*, 48 Mass. (7 Metc.)

e. Acts and Conduct.—False pretences need not necessarily or solely be made by words either spoken or written. If a person by his acts or conduct induces another person to believe that a fact really is an existence, when in reality it is not, and thereby obtains money or property, he comes within the scope of the statute against false pretences.¹ But mere silence, suppression of the

463; *People v. Wakley* (Mich.), 8 Cr. L. Mag. 322.

Representation to Agent.—In *Com. v. Call*, 38 Mass. (21 Pick.) 515, s. c. 32 Am. Dec. 284, the indictment charged that the defendant obtained money from one Parker by a false pretence. The evidence showed that the false representation was made to Parker's agent, who communicated it to Parker, and thereupon, by Parker's direction, paid the money to the defendant out of Parker's funds. It was held that this was not a variance. The court say: "A false representation made to the agent of Parker, and by him communicated to Parker, upon which he acted, was, in legal contemplation, a false representation to Parker himself. It was designed to influence him, and whether communicated to him directly or through the intervention of an agent can make no difference. It was intended to reach and operate upon his mind. It did reach it, and produced the desired effect upon it, viz., the payment of the money. And it is immaterial whether it passed through a direct or circuitous channel. So the payment by the agent of Parker, according to Parker's orders, out of his money in the hands of the agent, was legally a payment by Parker of his own money according to the allegation in the indictment.

False Pretences to Partner.—In *Com. v. Moore*, Thach. C. C. (Mass.) 410, pretences proved to have been made to one partner were held to sustain an indictment for obtaining goods from a mercantile firm.

1. *People ex rel. v. Oyer and Terminer*, 83 N. Y. 436; *State v. Allred*, 84 N. C. 749; *State v. Alphin*, 84 N. C. 745; *Reg. v. Kelleher*, 14 Cox C. C. 48; *Reg. v. Radcliff*, 6 Cox C. C. 374; *Reg. v. Giles, L. & C.* 510; s. c., 11 Cox C. C. 44; 34 L. J. M. C. 51.

Falsely Representing One's Self to be Another Person.—In an indictment which charges upon the defendant false pretences in representing that he was one B, is sustained by evidence that defendant by false actions induced the defrauded party to believe that he was B. It was not necessary to prove that defendant said that his name was B. *State v. Goble*, 60 Iowa, 447.

Falsely Personating Student at University.—Where a person at Oxford, who was not a member of the university went to a shop for the purpose of fraud, wearing the commoner's gown and cap, this was held a sufficient false pretence to satisfy the statute, although nothing passed in words. *Rex v. Barnard*, 7 Car. & P. 784.

Falsely Representing One's Self to be the Person Named in a Post-office Order.—The prisoner was indicted for unlawfully producing to A. B., etc., of the Nottingham post-office, a money-order for the payment of one pound to one John Storer, and for unlawfully pretending to the said A. B. that he was the person named in such order, with intent, etc., whereas, etc. It appeared in evidence that the prisoner had gone to the post-office and inquired for letters for John Story, whereupon, by mistake, a letter for John Storer, containing the money-order, was delivered to him. He remained a sufficient time to read the letter, and then presented the order to A. B., who desired him to write his name upon it, which he did in his real name, John Story, and received the money. The terms of the letter clearly explained that the order could not have been intended for the prisoner, who, on being apprehended, denied that he had ever received the money, but afterwards assigned the want of cash as the reason of his conduct. Chambers, J., left it to the jury to find against the prisoner if they were satisfied that he had, by his conduct, fraudulently assumed a character which did not belong to him, although he made no false assertions. The jury found him guilty. The judges held the conviction right, being of the opinion, 1st, that the prisoner writing his own name on the order did not amount to a forgery; and, 2d, that by presenting the order for payment, and signing it at the post-office, he was guilty of obtaining money by false pretences within the statute. *Rex v. Story*, Russ. & Ry. 81.

Presentment of Account.—In *Roberts v. People*, 9 Colo. 458; s. c., 13 Pac. Rep. 630, a county assessor rendered an account to the county commissioners for services alleged to have been rendered by a clerk. The services charged were, in point of fact, fictitious. The board, assuming the

truth, or withholding of knowledge, which would naturally influence another, is not sufficient to constitute the offence.¹

f. Charitable Donations.—The fact that the person from whom the money or property was obtained gave it to the defendant in charity does not free the latter from responsibility, the statute being designed for the protection of persons who part with money from motives of benevolence, as well as those who part with it from motives of self-interest.²

account to be correct, passed it, and the assessor received payment of the amount charged. The court held that the mere act of causing the account to be laid before the board amounted to a representation that the amount was due, and that to render the assessor criminally responsible it was not essential that he should have gone before the board and made his representations verbally.

Obtaining Property by Means of a Worthless Check.—If property is obtained through the instrumentality of a worthless check, it is not essential to a conviction that the defendant should have told the owner of the property that he had the money in bank. *People v. Donnalson*, 70 Cal. 116.

1. *People v. Baker*, 18 N. Y. Week. Dig. 112; s. c., 5 Cr. L. Mag. 914.

Taking Part of Property—Knowledge of False Representation.—One is not guilty of obtaining property by false pretences by merely being present when the property is received, and taking part of it, even if he had then knowledge of the representations made to obtain it. *People v. McClure*, 44 Mich. 490.

2. *Reg. v. Jones*, T. & M. 270; s. c., 1 Den. C. C. 551; 3 Car. & K. 346; 4 Cox C. C. 198; 19 L. J., M. C. 162; 14 Jur. 543.

A Begging-Letter Making False Representations as to the condition and character of the writer, by means of which money is obtained, is a false pretence. *Reg. v. Jones*, T. & M. 270; s. c., 4 New Sess. Cas. 353; 1 Den. C. C. 551; 3 Car. & K. 346; 4 Cox C. C. 198; 19 L. J. M. C. 162; 14 Jur. 533.

Obtaining Loan for Travelling Expenses. It has been held to be a false pretence within the meaning of the statute to obtain from a masonic lodge a small sum of money for travelling expenses, although the defendant may have promised to repay it. *Strong v. State*, 86 Ind. 208; s. c., 44 Am. Rep. 292.

Donation of Goods Out of Charity.—A person who obtains goods by falsely stating that they are needed to bury her sister-in-law's child, who has just died, is guilty of a false pretence, and may be punished accordingly, notwithstanding the fact that the owner may have parted with

the goods out of charity. *State v. Matthews*, 91 N. C. 635.

Charitable Donations to a Pretended Minister.—In *Com. v. Whitcomb*, 107 Mass. 486, the defendant falsely pretended to a Methodist clergyman that he was himself a Methodist clergyman, and pastor of a Methodist church in Kansas; that on the preceding Lord's day he had preached in the church of the Rev. Charles Fowler, in Chicago; that he was poor, penniless, and utterly destitute, and had that day been robbed of all his money, and thereby obtained from the clergyman \$6 as a charity. *Held*, that these facts were sufficient to sustain an indictment for false pretences. The court said: "He afterwards admitted that these representations were false. His only defence is, that the statute does not include cases where the money is parted with as a charitable donation. But it is obvious that the case comes within the words of the statute. It comes also within the reason of the statute. There is as much reason for protecting persons who part with their money from motives of benevolence, as those who part with it from motives of self-interest. The law favors charity as well as trade, and should protect the one as well as the other from imposture by means of false pretences. Obtaining money, by means of letters begging for charity, on false pretences, is held to be within the *English* statute (7 & 8 Geo. IV. c. 29, § 53), which is quite similar to ours. *Reg. v. Jones*, 1 Den. C. C. 551; *Reg. v. Hensler*, 11 Cox C. C. 570. A contrary doctrine had been held in *New York*, *People v. Clough*, 17 Wend. (N. Y.) 351; s. c., 31 Am. Dec. 303. The court admitted that the crime was of a dark moral grade, and was within the words of the statute of *New York*, which was copied from the *English* statute of 30 Geo. II. c. 24. They adopted that construction chiefly on the ground that the preamble to the statute referred to trade and credit. But our statute, like the existing *English* statute, refers to no such matter, and is not restricted by any preamble." The case of *People v. Clough*, *supra*, has been superseded by statute. See L. 1851, c. 144.

VI. BY PURCHASERS OF GOODS.—1. In General.—It may be said generally, that any false pretences used by a purchaser of goods to induce the seller to part with the goods upon credit will be sufficient to sustain an indictment for obtaining them by false pretences. Thus statements as to the purchaser's business, social standing, or wealth are sufficient to subject him to an indictment under the statute.¹ But it must be kept in view that false repre-

New York Rule.—In *New York* the court holds that if a donation has been given out of charity, the person obtaining it was not indictable, although he had made use of false pretences. *People v. Clough*, 17 Wend. (N. Y.) 351; s. c., 31 Am. Dec. 303. Since that decision a statute has been enacted which declares: "A person who wilfully, by color or aid of any false token or writing, or other false pretence, obtains the signature of any person to any written instrument, or any money or property for any alleged or pretended charitable or benevolent purpose, is punishable by imprisonment for not less than one or more than three years, or to a fine not exceeding the value of the money or property obtained, or by both. See *New York Penal Code*, § 567, Laws 1851, ch. 144, p. 268; Rev. Stat. 948, § 58.

Excuse for not Working.—A pretence to a parish officer as an excuse for not working, that the party has not clothes when he really has, although it induces the officer to give him clothes, was not obtaining goods by false pretences within 30 Geo. II. c. 24, § 1. *Rex v. Wakeling*, R. & R. C. C. 504.

1. Pretended Order for Goods.—An indictment that A obtained twenty yards of carpet by falsely pretending that a certain person who lived in a large house down the street, and had a daughter married some time back, had been at him about some carpet, and had asked him to procure a piece of carpet, whereas no such person had been at him about any carpet, nor had any such person asked him to procure any piece of carpet. The evidence was, that B obtained twenty yards of carpet by stating to the prosecutor, who was a shopkeeper in a village, that he wanted some carpeting for a family living in a large house in the village, who had a daughter lately married; that B afterwards sold the carpeting so obtained to two different persons; and a lady was called, who lived in the village, whose daughter was married about a year previously, and who stated that she had not sent B to the prosecutor's shop for the carpet. *Held*, that there was a sufficient false pretence alleged and proved, and that it was sufficiently negatived in the evidence. *Reg. v. Burnside*,

Bell C. C. 282; s. c., 8 Cox C. C. 370; 30 L. J. M. C. 42; 6 Jur. N. S. 1310; 3 L. T. 311; 9 W. R. 37.

Pretences as to Wealth and Social Standing.—An indictment charged that the prisoner falsely pretended that he had got a carriage and pair, and expected it down to T. that day or the next, and that he had a large property abroad. The evidence was that he was at E. assuming to be a man of position and wealth, but was in a destitute condition, and could not pay his hotel and other bills; and that three days afterwards he came to T. and induced the prosecutor to part with goods on the representation that he had just come from abroad, and had shipped a large quantity of wine to R. from England, and expected his carriage and pair to come down, and that he had taken a large house at T., and was going to furnish it. *Held*, that the false pretences charged were sufficient in point of law, and also that the evidence was sufficient to sustain a conviction. *Reg. v. Howarth*, 11 Cox C. C. 588; s. c., 23 L. T. 503.

Representations as to Residence and Business.—The prisoner was convicted on an indictment charging that he did falsely pretend that he then lived at and was the landlord of a beer-house, and thereby obtained goods. The evidence was that the prisoner said he was the nephew of a man in the prosecutor's employ, which was true; and that he lived at the beer-house, but he did not say he was the landlord of that house. Prosecutor, in parting with his goods, was influenced both by the fact of his being the nephew of the servant, and the statement that he lived at the beer-house; he believed him to be the landlord of the beer-house. *Held*, that it was immaterial that the prosecutor was partly influenced by the fact that the prisoner was the nephew of his servant. *Held also*, that the allegation that the prisoner lived at and was the landlord of the beer-house was divisible, and that the part "that he lived at the beer-house" being false, he was rightly convicted. *Reg. v. Lince*, 28 L. T. 570.

Representations as to Wealth and Credit of Third Person.—A. was indicted for obtaining goods by false pretences. He

sentations made by a purchaser do not necessarily reveal a fraudulent intent, but if they were used with the design of inducing the sale and delivery of the goods, the intent will be sufficiently established.¹

The indictment cannot be sustained if the evidence only shows an intention to part with the possession of the goods, and not with the right of property.² The fact that the vendor has induced the vendee to complete the purchase by the use of misrepresentations which amount to false pretences on his part, will be no justification for the use of false pretences by the vendee in order to obtain the goods.³

The mere fact that the person who bought the goods had no expectation of ever being able to pay for them is not sufficient to warrant the charge.⁴

2. Pretences as to Solvency.—False representations made by a purchaser concerning facts which relate to his ability to pay for the goods, are sufficient to bring him within the operation of the statute.⁵ Like all other false pretences, false representations made

obtained the goods from the prosecutor by pretending that he wanted them for S., whom he represented as living at N., and being a person to whom he would trust £1000, and who went out twice a year to New Orleans to take goods to his sons. The jury found that all these representations were false, and that the prosecutor, believing that A. was connected with S., and employed by him to obtain the goods, contracted with A., and not with supposed S., and delivered the goods to A. for himself, and not for S. *Held*, that A. was rightly convicted. *Reg. v. Archer*, Dears. C. C. 449; s. c., 6 Cox C. C. 515; 3 C. L. R. 623; 1 Jur. N. S. 479.

Residence of Customer.—When a manufacturer of sewing-machines was induced to deliver a machine to defendant, relying on his representation, which was false, that he resided in a particular locality, *held*, that this was an indictable false pretence, though the manufacturer might have ascertained the truth by inquiry. *Woodbury v. State*, 69 Ala. 242; s. c., 44 Am. Rep. 515.

Substitution by Prisoner of Proper Accounts for Other Purposes.—An indictment alleged that the prisoner obtained a coat by falsely pretending that a bill of parcels of a coat, value 14s. 6d., of which 4s. 6d. had been paid on account, and that 10s. only was due, was a bill of parcels of another coat of the 22s. The evidence was that the prisoner's wife had selected the 14s. 6d. coat for him, subject to its fitting him, and had paid 4s. 6d. on account. On trying on the coat it was found to be too small, and the prisoner was then

measured for one to cost 22s. When that was made it was tried on by the prosecutor, who was not privy to the former part of the transaction. The prisoner, when the coat was given to him, handed the bill of parcels for 14s. 6d. and 10s., saying, "There is 10s. to pay." The bill was receipted, and the prisoner took the 22s. coat away with him. The prosecutor stated that believing the bill of parcels to refer to the 22s. coat, he parted with that coat on payment of 10s., otherwise he should not have done so. *Held*, that there was evidence to support a conviction. *Reg. v. Steels*, 11 Cox C. C. 5; s. c., 17 L. T. 666; 16 W. R. 341.

1. *State v. Neimeier*, 66 Iowa, 634; s. c., 24 N. W. Rep. 247.

2. A harvester sold under an agreement by which the title is to remain in the vendor until the price has been wholly paid the vendor cannot be indicted for obtaining it by false pretences. *State v. Anderson*, 47 Iowa, 142.

3. *Com. v. Morrill*, 62-Mass. (8 Cush.) 571.

4. *Tefft v. Windsor*, 17 Mich. 486.

5. *State v. Neimeier*, 66 Iowa, 634; *Smith v. State*, 5 Miss. 513; s. c., 3 Am. Cr. Rep. 92; *Rothchild v. State*, 13 Lea (Tenn.), 294.

False Statements After Delivery.—Where after delivery of goods the vendor suspects that the purchaser may not be solvent, and expresses his intention to reclaim them, whereupon the purchaser makes false representations respecting his ability to pay, and the vendor in consequence thereof abandons his intention,

by a buyer as the inducement to the seller to give him credit must be relied upon by the seller, or the indictment cannot be sustained.¹

3. Pretences as to Nature of Business.—At common law a representation by a buyer, that he was a grocer in good credit in a certain town, was held not to amount to the offence of cheating.² But under the statute representations made by buyers as to the trade or business which they carry on, are deemed to be sufficient to support an indictment for false pretences.³ It has even been held on

the purchaser is not guilty under the statute, the sale being complete before the false representations were made. *People v. Haynes*, 14 Wend. (N.Y.) 546; s. c., 28 Am. Dec. 530.

Ownership of Property.—When one obtains credit by falsely pretending that he is the owner of property which he does not own, the fraud consists not in misrepresenting his intention to pay, but in misrepresenting his inability to pay. His intentions are not important. *State v. Hill*, 72 Me. 238; s. c., 3 Cr. L. Mag. 264.

Amount of Capital.—Where the defendant falsely represented that he had a capital of a certain amount, by means of which he obtained goods on credit, *held*, that he was guilty of obtaining goods on false pretences, within the meaning of the Pennsylvania act of July 12, 1852. *Com. v. Poulson*, 4 Pa. L. J. Rep. 20.

Credit of Purchaser.—An indictment alleged that H., R., F., and B., intending to defraud W. of certain horses, falsely, fraudulently, etc., represented to him, for the purpose of inducing him to part with them, that F. desired to purchase them, and that F. had moneys and credit in bank and was able to pay for them, and other statements of fact; that such statements were false, and known to be so by them; and that, by means of such false pretences and representations, H., R., and B. obtained the horses from W. *Held*, that it was sufficient as against H., R., and B., as an indictment for obtaining property on false pretences, although it did not set out a sale and delivery of the horses to F.; and that by no construction could the indictment be held to charge a larceny. *Haines v. Territory* (Wyo. Ter.), 13 Pac. Rep. 8.

Misrepresentations as to Ownership of Property.—An indictment lies for obtaining goods by false pretences where a party represents himself to be the owner of property which does not belong to him and thereby obtains credit. *People v. Kendall*, 25 Wend. (N.Y.) 399; s. c., 37 Am. Dec. 240.

Solvency of Bank.—In *Com. v. Wallace*, 114 Pa. St. 405; s. c., 60 Am. Rep.

353, 5 Cent. Rep. 530, the defendant was indicted for falsely pretending and representing that the savings-bank of which he was the president was perfectly solvent. It was held that the offence charged was sufficient to support the indictment. The court say: "It may be more difficult to establish to the satisfaction of a jury that a false representation of solvency, without more, was made with fraudulent intent, or that it induced the prosecutor to part with his property, than it would be were such representation accompanied by a detailed false statement of the property and liabilities of the person represented as solvent. This being so, it is not for the court to say that a positive statement of the fact of solvency is only the expression of an opinion."

Amount of Property subject to Execution.—*Compare State v. De Hart*, 6 Baxt. (Tenn.) 222, in which case it was held that a sale of goods induced by the buyer's false representations that he had in his office a certain quantity of property liable to his debts, as a means of obtaining credit, did not warrant an indictment for false pretences under the *Tennessee* statute, on the ground that common prudence required the prosecutor to resort to other information.

1. Reliance on Statement.—An information for obtaining goods under false pretences was held not to be sustained where the pretence charged was that the respondent owned a house and lot in a certain locality and was building an addition to the house, and wished to buy the articles for use in the building; while the proofs did not show how the pretence operated as a fraud, or what good the fact would have done the complaining witness, or that respondent had been given to understand that the question asked him about his building was put for the purpose of learning whether it was safe to trust him. *People v. McAllister*, 49 Mich. 12.

2. Com. v. Warren, 6 Mass. 72.

3. Conspiracy to Cheat by Pretending to be Merchants.—In an old case it was held to be an indictable offence to effect a

high authority that a false representation simply to the effect that the person making it is a "storekeeper" is sufficient to sustain an indictment.¹

cheat by means of one pretending to be a merchant and the other a broker, and, as such, bartering pretended wines for hats. It must be kept in view that in this case the facts practically show a criminal conspiracy, which therefore brought it within the common law rule. *Rex v. McCarthy*, 2 East P. C. 823.

Pretence of Conducting Butcher's Shop.—On the trial of a defendant under an indictment which charged him with pretending that he was conducting a butcher's shop, and thereby obtained cattle on credit, it was held that the testimony that defendant said he must have some cattle to butcher would not sufficiently sustain the charge. *State v. Neimeier*, 66 Iowa, 634.

Statement in Letter Ordering Goods —C. was convicted of obtaining potatoes from the prosecutor by falsely pretending that he then was in a large way of business, that he was in a position to do a good trade in potatoes, and that he was able to pay for large quantities of potatoes as and when the same might be delivered to him. The evidence that C. had so pretended was the following letter written by him to the prosecutor:

Sir,—Please send me one truck of regents and one truck of rocks as samples at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours, etc.

"P. S.—I will say if you use me well I shall be a good customer. An answer will oblige, saying when they are put on."

Held, affirming the conviction, that the words of the letter were fairly and reasonably capable of a construction supporting the pretences charged, and that it was a question for the jury whether the writer intended the prosecutor to put the construction upon them. *Reg. v. Cooper*, L. R. 2 Q. B. Div. 510; s. c., 3 Am. Cr. Rep. 458.

Several Inducements —A man was convicted on an indictment charging that he did falsely pretend that he then lived at and was landlord of a beerhouse, and thereby obtained goods. The evidence was that he said he was the nephew of a man in the prosecutor's employ, which was true; but he did not say that he was landlord of that house. The prosecutor, in parting with his goods, was influenced both by the fact of his being the nephew of

his servant, and the statement that he lived at the beerhouse. *Held*, that it was immaterial that the prosecutor was partly influenced by the fact that the prisoner was the nephew of his servant; *held*, also, that the allegation that he lived at and was the landlord of the beerhouse was divisible, and that the part "that he lived at the beerhouse" being false, he was rightly convicted. *Reg. v. Lince*, 28 L. T. 570.

Transfer of Business.—The defendant had for a considerable time purchased goods from the prosecutor on credit upon the faith of a grocery and bakery which he owned. He secretly conveyed the business to his wife and step-daughter. Shortly thereafter his wife and father-in-law purchased goods from the prosecutor and had them charged to the defendant, although the defendant was not present. The prosecutor did not know of the transfer, and gave defendant the credit on the faith of continued ownership. *Held*, that an indictment for false swindling need not lie. *Blum v. State*, 20 Tex. App. 578; s. c., 54 Am. Rep. 530.

Misrepresentations as to Stock Company.

—The prisoner, by falsely pretending to G. that he was agent to a steam laundry company, of which some of the leading men in B. were at the head, and that he was desired by the company, which he subsequently admitted was only himself, to procure a van, induced G. to make the van; but, before it was sent to the laundry premises, countermanded it. G. nevertheless delivered the van, which the prisoner returned to G., telling him that he ought not to have sent it after the countermand. G. said he should not know what to do with it, and that the prisoner must keep it, upon which he replied that, if he did, G. must put in some boards for the baskets of linen, which G. assented, and the prisoner then drove away with the van. Upon an indictment for obtaining the van by false pretences, *held*, that there was no evidence to go to the jury. *Reg. v. Martin*, 1 L. R. C. C. 56; s. c., 36 L. J. M. C. 54; 15 W. R. 358; 10 Cox C. C. 383.

1. *Higler v. People*, 44 Mich. 299; s. c., 38 Am. Rep. 267.

When Pretence Within Statute—*Michigan Decision.*—In the above case, Cooley, J., who delivered the opinion of the court, said "that the pretence, to be within the statute, must be one calculated to deceive a man of ordinary prudence; and

VII. BY SELLERS OF GOODS.—1. Pretences as to Quality and Soundness.—A simple misrepresentation of the quality of goods is not a false pretence, provided the goods are in species that which they are represented to be.¹ But if the representation be of a

that, if it be a false representation of facts, these facts must be such as were calculated to influence a person of common caution to part with that which was obtained. Is the false representation, that one is a storekeeper, a pretence of this sort? It may be true, and yet the man be utterly without responsibility and without character; and in that case the fact of the business would offer no security that a loan made in reliance upon it would be repaid. The terms are indefinite; it may mean a wholesale merchant, or a petty dealer in toys and candies; it may imply a principal, or an agent or servant; it may be applied to one notoriously without capital, and who lives by his wits rather than by legitimate trades;—in short, disconnected from all else, it can never indicate that the person who bears the designation is one who can safely be trusted with a loan. All this is true; and if the reliance is accommodating another person with a loan were pecuniary means or responsibility, it might be very conclusive. But notoriously, the fact is otherwise. Men are trusted in large amounts every day who have no pecuniary responsibility, and are known to have none. Sometimes the reliance for repayment will be a supposed business ability; sometimes on business that would be injured by the existence of overdue debts; but most often, perhaps, a reputation for integrity. And if in any case the existence of any particular fact would be likely to beget confidence, there is no reason why a false assertion of its existence should not be a criminal pretence as much as would be a false assertion of pecuniary responsibility provided it is equally relied upon, and equally effectual to accomplish the fraud designed. Pecuniary responsibility is no more a necessary attendant upon a commission in the army than upon the keeping of a store; but the false assertion that one holds such a commission has been held a false pretence. *Thomas v. People*, 34 N. Y. 351; *Reg. v. Hamilton*, 1 Cox C. C. 244; s. c., 9 Q. B. 271. So the pretence that one is buying horses as a gentleman's servant may be a criminal false pretence, though the fact of service by itself would not be likely to inspire confidence, except in connection with the further fact, expressed or understood, that the master was to pay the purchase price. *Rex v. Dale*, 7 Car. & P. 352. Now,

it is unquestionable that the fact that one is a storekeeper, is one which would be likely to give a degree of confidence and credit. There is an implication, if not of solvency, at least of the possession of considerable money, in the very idea that one is keeping a store. With no knowledge of his responsibility, one would sooner trust him for small sums than if he had no business, or if his business were unknown. A storekeeper is not expected to refuse payment of small debts, whether payment can or cannot be enforced. It is inconsistent with business prosperity that he should do so, and, *prima facie*, he will have in his hands the means whereby such debts may be paid; and if such a person, when away from home, had occasion to borrow a few dollars for expenses, a lender would trust, not to his responsibility, but to his honor, for repayment, and would probably ask no questions further after learning what was his business. But the question of the inability of pretence is one rather of fact than of law. If it was false, and had a tendency to deceive, and did actually deceive and accomplish the intended fraud, the case is within the statute."

1. *Com. v. Jackson*, 132 Mass. 16, 626; *People v. Jacobs*, 35 Mich. 36; *State v. Holmes*, 82 N. Car. 607; *Reg. v. Bryan, Dears. & B. C. C.* 265; s. c., 7 Cox C. C. 313; 26 L. J. M. C. 88.

Quality of Cotton.—A representation that cotton is of a grade "good middling" is not indictable, although the prosecutor had been induced to buy it thereby. *State v. Young*, 76 N. Car. 258.

Testing Article.—If a false assertion is made in regard to an article, and money is thereby fraudulently obtained, the falsehood is a false pretence within the statute against obtaining money by false pretences, if, in order to ascertain whether the representation is false, it is necessary to apply tests or experiments to the article. And it is none the less so that the party imposed on might, by common prudence, have avoided the imposition. *Re Greenough*, 31 Vt. 279.

Wrought Gold.—Knowingly exposing to sale, and selling, wrought gold under the sterling alloy, as and for gold of the true standard weight, which is indictable in a goldsmith, is a private imposition only in a common person. *Rex v. Bower*, Cowp. 323.

matter of fact, and not upon a subject which is a mere matter of opinion, an indictment will lie therefor;¹ and if the seller, by a trick imposed upon the buyer, as by pretending by means of a trick that a sample is taken from the goods which are intended to be the subject of the transaction, when in point of fact they are not, he is guilty of the offence of false pretences.² In the same manner, if he sells the goods on the representation that they are all right, when in point of fact the body of the bulk is not the same species as is on the surface, he is guilty of the offence.³

Hall Mark on Watch.—A false representation that a stamp on a watch was the Hall mark of the Goldsmith's Company, and that the number 18, part thereof, indicated that the watch was made of 18-karat gold, is an indictable offence, and is not the less so because accompanied by a representation that the watch was a gold one, and some gold was proved to have been contained in its composition. *Reg. v. Suter*, 10 Cox C. C. 577; s. c., 17 L. T. 177; 16 W. R. 141.

Specific Fact Stated which is Untrue.—The prisoner induced the prosecutor to purchase a chain from him by fraudulently representing that it was 15-karat gold, when in fact it was only of a quality a little better than 6-karat, knowing at the time that he was falsely representing the quality of the chain as 15-karat gold. *Held*, that the statement that the chain was 15-karat gold, not being merely exaggerated praise or relating to a mere matter of opinion, but a statement as to a specific fact within his knowledge, was a sufficient false pretence to sustain an indictment for obtaining money under false pretences. *Reg. v. Ardley*, 1 L. R. C. C. 301; s. c., 40 L. J. M. C. 85; 24 L. T. 193; 19 W. R. 478; 12 Cox C. C. 23.

Sale of Medicines.—B. was indicted for having falsely pretended that he was Mr. H., who had cured Mrs. C. at the Oxford Infirmary, and thereby obtained five shillings, with intent to defraud G. P. B. made the pretence, and thereby induced the prosecutor to buy, at the expense of five shillings, a bottle containing something which he said would cure the eye of the prosecutor's child. It was proved that B. was not Mr. H. *Held*, that this was a false pretence. *Reg. v. Bloomfield*, Car. & M. 537; s. c., 6 Jur. 224.

Sale of Spurious Tea by Hawker.—On an indictment for obtaining money by false pretences, it was proved that the prisoner, a travelling hawker, represented to prosecutor's wife that he was a tea-dealer from Leicester, and induced her to buy certain packages, which he stated contained good tea, but three fourths of

the contents of which was not tea at all, but a mixture of substances unfit to drink, and deleterious to health. The jury found that the prisoner knew the real nature of the contents of the packages,—that it was not tea, but a mixture of articles unfit for drink,—and that he designedly falsely pretended that it was good tea, with intent to defraud; and the prisoner was convicted. *Held*, that the conviction was right. *Reg. v. Foster*, 2 Q. B. Div. 301; s. c., 46 L. J. M. C. 128; 36 L. T. 34; 13 Cox C. C. 393; 3 Am. Cr. Rep. 444.

Sale at Auction.—L. and W. induced the prosecutor to buy certain plated goods at an auction, at which L. was acting as auctioneer, for £7, on the representation that they were the best silver plate, lined with gold, worth £20. The foundation of the goods was britannia metal, instead of nickel as in the best goods, covered with a transparent film of silver, and they were worth about only 30s. *Held*, that there was no false pretence, and that an agreement between two persons to dispose of these goods in the way they were disposed of was not a conspiracy. *Reg. v. Levine*, 10 Cox C. C. 374.

1. *State v. McConky*, 49 Iowa, 499.

2. **Wilful Misrepresentation—Tasters of Cheese.**—A wilful misrepresentation of a definite fact, with intent to defraud, cognizable by the senses, where the seller, by manœuvring, contrives to pass off tasters of cheese as if extracted from the cheese offered for sale, where it was not, is a false pretence. *Reg. v. Goss*, Bell C. C. 208; s. c., 8 Cox C. C. 264; 29 L. J. M. C. 86; 6 Jur. N. S. 178; 1 L. T. 337; 8 W. R. 193.

3. **Sale of Bales of Turpentine—Representation as to Quality.**—A seller who induced the sale of four bales of turpentine by representing that "They are all right; just as good at the bottom as at the top," when in point of fact the chief contents were chips, it was held that the seller was guilty of the offence of cheating by false pretences under the North Carolina statute. *State v. Jones*, 70 N. C. 75.

Similarly, in sales of animals a mere allegation of a matter of opinion will not sustain the indictment.¹ But if the seller assert that a horse is sound when in point of fact he is not, the false statement is a false pretence within the statute.² The fact that the seller has given a warranty of the article sold constitutes no defence.³

2. Pretences as to Weight and Quantity.—At common law the delivery of a smaller quantity than contracted for as the quantity sold was not indictable;⁴ but a false affirmation as to the weight of the

Putting Sand in Cotton.—On the trial of an indictment for putting sand in a bale of cotton, with intent to defraud the purchaser, it was proved that the sand was put into the cotton while the cotton was in seed, before it was ginned. The court charged the jury that it mattered not "when the sand or dirt was put into the cotton, provided it was done by the defendant, and so done for the purpose and with the intent to defraud, and in a manner calculated to accomplish such purpose at the time." *Held*, that the charge was a correct statement of the law, but that in assuming the fact that the sand or dirt was put into the cotton, it was error warranting a reversal. *Jones v. State*, 22 Tex. App. 680.

1. *Com. v. Jackson*, 132 Mass. 16; s. c., 13 Rep. 626; *State v. Holmes*, 82 N. C. 607.

2. *State v. Stanley*, 64 Me. 167.

Representation as to Soundness of Animal.—An indictment charged that defendant falsely pretended to a third person that a drove of sheep which he offered to sell him were free from disease and foot-ail, and that a certain lameness apparent in some of them was owing to an accidental injury, sets out a sufficient false pretence within the meaning of the statute. *People v. Crissie*, 4 Den. (N. Y.) 525.

A representation that a horse is sound and kind, made with the knowledge that the horse is unsound and worthless, is indictable under the statute. *Com. v. Jackson*, 132 Mass. 16; s. c., 13 Rep. 626; *Watson v. People*, 87 N. Y. 561; s. c., 41 Am. Rep. 397; 26 Hun (N. Y.), 76.

An indictment charged that "defendant did unlawfully falsely pretend . . . that a certain mare which he . . . was proposing to trade . . . was sound in limb and body, and always had been sound in limb and body, whereas the said mare was broken down in her loins." *Held*, that the averment was sufficient to support the indictment. *State v. Sherrill*, 95 N. C. 663.

Blindness of Horse.—In *Tatum v. State*, 58 Ga. 409, the court held that a misrepresentation that a blind horse is sound, the horse's eyes being apparently good, is

within the provision of the Georgia Code. *Compare State v. Hefner*, 84 N. C. 751, where the court held that a statement that the eyes of a horse are sound is merely the expression of an opinion, while an assertion that "there never has been anything the matter with the eyes of the horse" is a representation of fact which if false is within the statute and indictable.

Selling Blind Horse as a Sound One.—In *State v. Delyon*, 1 Bay (S. C.), 53, it was held that it is not swindling within the *South Carolina* statute of 1791 to sell a blind horse as a sound one.

Knowledge Necessary.—An indictment charged that the defendant knowingly and falsely pretended that a horse was sound, and that he himself was a farmer at O., negating both pretences in the usual way. The defendant was convicted, but a case reserved, in which, after stating that the various allegations in the indictment were proved, and that the defence was that this was a case of giving a false warranty, and therefore not indictable, the question was put, whether the conviction could be sustained. The court having directed an amendment, the facts proved were set out more specifically; but it was not stated as a fact that the defendant knew the horse to be unsound, though evidence was stated from which that inference might be drawn; nor was it stated what direction had been given to the jury. *Held*, that as the case was framed, the conviction must be quashed; as the court, not knowing what direction had been given, could not answer the question put in the affirmative; and as it was consistent with the case that the jury might have been told that even if the defendant did not know that the horse was unsound, he might be convicted upon the other false pretence alone. *Reg. v. Keighley, Dears. & B. C. C. 145*; s. c., 7 Cox C. C. 217.

3. *Jackson v. People*, 18 Ill. App. 508; *State v. Dorr*, 33 Me. 494; *Watson v. People*, 87 N. Y. 561; s. c., 41 Am. Rep. 397; 26 Hun (N. Y.), 76.

4. *Rex v. Dunnage*, 2 Burr. 1130; *Rex v. Wheatley*, 1 W. Bl. 273; s. c., 2 Burr. 1129.

article, or any device or trick by which the purchaser is induced to accept a smaller quantity than that purchased, is within the purview of the statutes.¹ It has, however, been held that where the pur-

1. *Reg. v. Ridgway*, 3 F. & F. 838; *Reg. v. Lee, L. & C.* 418; s. c., 9 Cox C. C. 460; 32 L. J. M. C. 129.

Representation as to Quantity.—A prisoner was convicted on an indictment for obtaining money by false pretences. The prosecutor bought of the prisoner and paid him for a quantity of coal upon a false representation by him that there were 14 cwt., whereas in fact there were only 8 cwt., but so packed in the cart in which they were as to have the appearance of a larger quantity. *Held*, that the false representation as to the quantity of coal was an indictable false pretence, and that the conviction was right. *Reg. v. Ragg*, Bell C. C. 215; s. c., 8 Cox C. C. 262; 29 L. J. M. C. 86; 6 Jur. N. S. 178; 1 L. T. 337; 8 W. R. 193.

False Statement of Weight.—The defendant agreed with the prosecutrix to sell and deliver to her a load of coals, at a certain price per cwt. He accordingly delivered a quantity of coals, to his knowledge weighing 14 cwt. He, however, falsely and fraudulently represented that the quantity he had delivered weighed 18 cwt., and thereby obtained the price of 18 cwt. *Held*, that he was properly convicted of the offence of obtaining money by false pretences. *Reg. v. Sherwood, Dears. & B. C. C.* 251; s. c., 26 L. J. M. C. 217; 3 Jur. N. S. 547. See *infra*, this work, at FALSE WEIGHTS AND MEASURES.

Weight-tickets Fraudulently Obtained.—Upon indictment for obtaining money by falsely pretending that certain loads of soot weighed certain tons, whereas they did not, the evidence was that the prisoners weighed at a public weighing machine some cart-loads of what was apparently soot, but amongst which were bags of old bricks, and having obtained tickets of the weights, subsequently removed the bags containing bricks, and on selling the soot the prosecutor represented to him that the weight ascribed in the tickets was the weight of what they sold. *Held*, that this false representation of the weight was within the statute. *Reg. v. Lee, L. & C.* 418; s. c., 9 Cox C. C. 460; 32 L. J. M. C. 129; 10 L. T. 348; 12 W. R. 750.

Weight of Loaves of Bread.—The defendant had contracted with the guardians of a poor-law union to deliver loaves of a specified weight to any poor persons bringing a ticket from the relieving officer. The tickets were to be returned by the defend-

ant at the end of each week, with a statement of the number of tickets sent back; whereupon he would be credited for the amount, and the money would be paid at the time stipulated in the contract. The defendant delivered to certain poor people who brought tickets loaves of less than the specified weight, returned the tickets with a note of the number sent, and obtained credit of the loaves so delivered, but before the time for payment had arrived the fraud was discovered. *Held*, that the delivery of a less quantity of bread than that contracted for was a mere private fraud, no false weights or tokens being used, and therefore not an indictable offence; that the defendant was properly convicted of attempting to obtain money, for although he had only obtained credit in account, and could not, therefore, have been convicted of the offence of actually obtaining money by false pretences, yet he had done all that was depending on himself towards the payment of the money, and was therefore guilty of the attempt; and that this was a case within 7 & 8 Geo. IV. c. 29, sec. 53, because it was an attempt to obtain money by a false and fraudulent representation of an antecedent fact: it was not a mere sale of goods by a false pretence of their weight. *Reg. v. Eagleton, Dears. C. C.* 515; s. c., 6 Cox C. C. 559; 24 L. J. M. C. 158; 1 Jur. N. S. 940.

False Statements as to Weights Used.—An indictment charged that H. R., having in his possession a certain weight of 28 lbs., did falsely pretend to C. that a quantity of coals which he delivered to C. weighed 16 cwt. (meaning 1792 lbs. weight), and were worth one pound, and that the weight was 56 lbs.; by means of which he obtained a sovereign from C., with intent to defraud him of part thereof, to wit, ten shillings: whereas the coals did not weigh 1792 lbs., and were not worth one pound; and whereas the weight was not 56 lbs.; and whereas the coals were of the weight of 896 lbs. only, and were not worth more than ten shillings; and whereas the weight was of 28 lbs. only. It was objected that all the pretences except that respecting the weight were false affirmations, and that as to the weight there was no allegation to connect the sale of the coals with the use of the weight. The defendant was convicted, and the conviction was held to be wrong. *Rex v. Reed*, 7 Car. & P. 848.

chase of the article is made for a lump sum, if the seller merely makes the false representation as to weight in order to induce the purchaser to conclude the bargain, the offence of obtaining money by false pretences is not committed.¹

3. False Marks and Brands.—If the seller attaches to his goods the brand or name of another maker, he is not guilty of forgery, but in the event of a sale may be indicted for obtaining money by false pretences.² The use of a mark on an article of food to denote its weight is in the nature of a fraud upon the public, and indictable at common law.³

VIII. IN REAL ESTATE TRANSACTIONS.—**1. In Sales.**—Sales of real estate are governed by the same rules as are sales of other property.⁴ Hence if the statements are merely as to the value of lots or as to the advantages to be derived from their location, they are to be deemed as matters of opinion, and therefore are not within the statute.⁵ If, however, the seller of lands represents that they are unincumbered, such representation if false is criminal.⁶ And it is

1. *Reg. v. Ridgway*, 3 F. & F. 838.

2. False Signature on Picture.—If a person knowingly sells as an original a copy of a picture, with the painter's name imitated upon it, and by means of the imitated name knowingly and fraudulently induces another to buy and pay for the picture as a genuine work of the artist, he may be indicted for a cheat at common law, by means of a false token, but he cannot be indicted for forging or uttering the forged name of the painter; for the crime of forgery must be committed with some document in writing, and does not extend to the fraudulent imitation of a name put on a picture merely as a mark to identify it as a painter's work. *Reg. v. Closs, Dears. & B. C. C. 460*; s. c., 7 Cox C. C. 494; 27 L. J. M. C. 54; 3 Jur. N. S. 1309.

Imitation of Wrappers of Parcels.—B. was in the habit of selling baking powders, wrapped in printed papers, entitled "B.'s Baking Powders," and having his printed signature at the end. The prisoner got printed a quantity of wrappers, in imitation of those of B., only leaving out B.'s signature, and sold spurious powders wrapped up in these labels as B.'s powders. *Held*, that the prisoner was not guilty of forging the wrappers, or uttering forged wrappers, though he might be indictable for the fraud, on a charge of obtaining money by false pretences. *Reg. v. Smith, Dears. & B. C. C. 566*; s. c., 8 Cox C. C. 32; 27 L. J. M. C. 225; 4 Jur. N. S. 1003.

3. False Marks on Barrels of Bread.—**Liability of Baker.**—It is an indictable offence in a baker if he puts false marks denoting the weight of bread on the barrels that contain it, whereby the public is in-

jured. *Respublica v. Powell*, 1 U. S. (1 Dall.) 47; bk. 1, L. ed. 31.

4. At Common Law.—The offence of cheating, when the subject-matter is land and the title to it, is not indictable at common law. *Com. v. Woodruff*, 4 Pa. L. J. 207.

False Tokens.—The *North Carolina* act of 1811, c. 814 (Rev. Stat. c. 34), in regard to the use of false tokens, does not apply to conveyances of land. *State v. Burrows*, 11 Ired. (N. C.) L. 477.

5. People v. Jacobs, 35 Mich. 35; s. c., 2 Am. Cr. Rep. 102.

Opinion as to Value.—In the above case it was held that expressions of opinion as to the value of lots and that they were "nicely located" was not within the statute. The court say: "Now, the alleged pretence that the lots were 'nicely located' was a distinct pretence in the information. But it was not such a representation as could be made the subject of criminal prosecution as a false pretence. It could not convey or be understood as conveying any definite idea at all. There is no standard for trying the accuracy of such a statement. What is a nice location to one may be otherwise to another, and even to the mind of one using it the expression is vague and indeterminate. No one can be supposed to accept such a representation as an assertion of the existence of some fact or circumstance sufficient to cause him to change his situation in reliance on it, and the law cannot measure or weigh people's fancies."

6. Unincumbered Title.—*State v. Munday*, 78 N. C. 460; s. c., 4 Am. Cr. Rep. 324. In this case the opinion contains the following language: "A said to B, 'Here

no justification that the party defrauded had the means of detecting the falsehood by the examination of the record as the dictates of common prudence would require.¹ An indictment will lie for the offence if the defendant has pointed out to a purchaser valuable property as that sold to him, when in fact the property conveyed is worthless;² or for obtaining payment of the purchase price from an illiterate purchaser by a false reading of the deed of conveyance, which induces the purchaser to suppose that he is obtaining valuable property in a different locality from that conveyed, when in point of fact the property conveyed is valueless.³

is a tract of land which belongs to me, and to which I have a perfect title without incumbrance; I will sell it to you and make you a perfect title for \$300., B says, 'I will give it,' and he does give it. It turns out that A had no title, or an incumbered one, and that he knew it at the time, and intended to cheat and defraud B out of his money. And B was defrauded. Is this a false pretence indictable in A? The defendant says it is not, because false pretences is akin to larceny, and that land is not the subject of larceny, and that neither land nor any transaction conveying it is the subject of false pretence. And for this, *State v. Burrows*, 11 Ired. (N. C.) L. 477, is cited. In that case the defendant had by a false pretence induced the prosecutor to convey to him twenty acres of land, and the charge was 'that to cheat and defraud the prosecutor of twenty acres of land.' It was held that to obtain land by false pretences was a fraud, but that it was not indictable under the statute, which embraced only such personalities as were the subjects of larceny. How does this affect this case? Here is no charge of obtaining land by a false pretence, but of obtaining money by false pretence, and surely money is the subject of larceny. It is suggested that title to land is often an abstract question, and that one who is not a lawyer, and indeed one who is, may be innocently mistaken about it, and therefore may be punished for an innocent act. Not at all. A mistake is not indictable. A false pretence is not indictable. It must be a false pretence with intent to cheat and defraud, and which does cheat and defraud." See also *State v. Dorr*, 33 Me. 498; *Com. v. Lincoln*, 93 Mass. (11 Allen) 233.

1. Failure to Examine Records—Negligence.—*Thomas v. People*, 113 Ill. 531; s. c., 5 Am. Cr. Rep. 127; 47 Am. Rep. 458. In that case two persons conspired together to obtain a stock of groceries from a third person, representing that one of them owned certain city lots, and the prosecuting witness agreed to exchange the gro-

ceries for them. The defendant represented the title to be good and the property to be clear of incumbrance. The defendant neither owned the lots nor was able to procure a deed conveying the legal title. The court say: "The only question raised upon the facts demanding attention is, whether the negligence of the prosecutrix in not having the records examined in respect of the title can be urged as a defence. We think it does not lie in the mouths of these defendants to say that because, by their artifice, they inspired an unmerited confidence, they are guiltless. The offence is the combination to obtain property by false pretences; and the very object might be, and often is, to so influence the party as to prevent the accuracy of the pretence being tested—whether one owns property, in fact. The truth in regard to it might undoubtedly be disclosed by the record, but it might equally be disclosed by the declaration of the party; and the most dangerous artifice, and that against which it is most important that the law should protect simple-minded and credulous people, is that whereby they are induced to forego all investigation, and trust implicitly to the trickster." *Compare Com. v. Grady*, 13 Bush (Ky.), 285; s. c., 2 Am. Cr. Rep. 105.

2. *State v. McConkey*, 49 Iowa, 449. In such case it is not necessary to allege in the indictment that the vendor did not own the property pointed out.

3. *Webster v. People*, 92 N. Y. 422; s. c., 17 N. Y. Week. Dig. 197.

Sufficiency of Indictment.—In *Webster v. People*, *supra*, the indictment did not in terms allege that the deed was sealed. It was so stated, however, in the testing clause of the deed as set forth in the indictment, and the court held this sufficient, and also that the question whether the land was free from all incumbrances was of no consequence if the intentional misreading of the deed induced the prosecutor to part with his money.

Inducement to Sell Land.—An indictment for obtaining a conveyance of lands

2. In Mortgages.—It is a false pretence, within the statute, to falsely represent that the mortgage granted to secure a loan is the first lien on the mortgaged premises,¹ and it is no defence in such case that the party defrauded relied upon the statement made, without examining the public records.² Representations falsely made to the effect that there are buildings upon the land which enhance its value, are within the statute.³ But if the real estate mortgaged is amply sufficient to secure the loan, the mortgagee cannot be deemed to have been defrauded by a representation that it is very much more valuable than it really is; and an indictment will not lie.⁴ A false pretence that the mortgagor was procuring a certain loan with which to pay certain notes secured by an existing mortgage, and that he had come to the holder of the mortgage for the purpose and with the intent of paying the notes, coupled with a promise to pay one of the notes upon the execution of the release of the mortgage and upon possession of the notes and mortgages being given, has been held to be within the statute.⁵

IX. BY THE USE OF FICTITIOUS AND WORTHLESS WRITINGS.—1. In General.—Under a statute which punishes the obtaining of money or goods by means of "false writings," it has been held that, to bring the offence within the purview of the act, the writing

by false statements as to the title, location, soil, and value of another tract which the defendant claimed to own, without showing any contract of exchange, or in any other manner showing how the representations could be operative to induce the conveyance to the defendant, is bad. *Cooke v. State*, 83 Ind. 402; s. c., 4 Cr. L. Mag. 614.

Sale of Land—Failure to Perfect Title—Intent to Defraud.—F. having a verbal agreement for a certain lot sold it to R., telling him that he owned it, and received the money for it. After selling to R., F. made a written contract for the lot and paid a portion of the price, but he never paid the full price for the lot, nor ever acquired title to it. F. was prosecuted for obtaining R.'s money by false pretences, the false pretence being the statement that he owned the lot. *Held*, that if F. at the time he made the sale to R. and obtained his money honestly intended and expected to make title to the lot R., he did not have the intent to defraud required by the statute, and should not be convicted. *Fay v. Com.*, 28 Gratt. (Va.) 912; s. c., 3 Am. Cr. Rep. 85.

1. *People v. Sully*, 5 Park. Cr. C. (N. Y.) 142.

Obtaining Money on Mortgage—Allegations in Indictment.—In an indictment for obtaining money on a mortgage by false pretences, "a delivery" as well as "signing" of the instrument must be averred and

proved. "Obtaining" the signature was held equivalent to delivery. *Fenton v. People*, 4 Hill (N. Y.), 126.

2. The Doctrine of Constructive Notice of an existing mortgage because of its record, does not apply to indictments for obtaining credit by falsely pretending to be the owner of valuable real estate upon which there is no existing mortgages. *State v. Hill*, 72 Me. 238.

3. Falsely Representing that Houses have been Built on Land.—A, by falsely representing that a house and some shops had been built upon certain land, obtained from the prosecutor an advance of money. A deposited the lease of land, signed an agreement to execute a mortgage, and executed a bond as security for the money. *Held*, that he was rightly convicted of obtaining money by false pretences. *Reg. v. Burgon, Dears & B. C. C. 11*; s. c., 7 Cox C. C. 131; 25 L. J. M. C. 105; 2 Jur. N. S. 596.

Representation as to Improvements.—The prisoner represented to the prosecutor that a lot of land, on which he wished to borrow money, had a brick house upon it, and thus procured a loan, when in fact the land was vacant. *Held*, that he was properly convicted. *Reg. v. Huppel*, 21 Up. Can. Q. B. 281.

4. *Keller v. State*, 51 Ind. 111; s. c., 1 Am. Cr. Rep. 211.

5. *State v. Cowdin*, 28 Kan. 269.

or instrument must purport to be the act of some person, and be so framed as to have more weight and influence in effecting the fraud than the mere assertion of the party defrauding; and consequently obtaining money by means of an unsigned bond, is not within the operation of the statute.¹

2. Bank Bills.—It is a false pretence, within the meaning of the statute, to pass, as genuine and of full value, imitation bank bills, or bills which are known as "flash notes;" that is, imitations of bank bills, printed by merchants and others for the purpose of advertising.² And a person passing a bill is punishable, although it,

1. Unsigned Bond.—*People v. Gates*, 13 Wend. (N. Y.) 311. In this case the court say: "Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretence, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or 'valuable thing,' shall be punished. When inquiring what the legislature intended by the expression 'false token or writing,' it is probably not presuming too much to suppose that they had in view the statute of 23 Hen. VIII. c. 1, and intended to embrace not only counterfeit letters made in other men's names, but any false instrument purporting on its face to be a genuine instrument of any description. It has been adjudged that the word 'token' was not satisfied by an affirmation or promise, but must be something real, visible, and substantial; so I apprehend the words 'false writing' must mean some letter or instrument purporting to be the act of some person, and so framed as to have more weight and influence in effecting the fraud than the mere assertion of the party defrauding. The words 'false token or writing' or 'any other false pretence' are all contained in the same section. Suppose the count had charged that the defendant had presented this same blank bond to Dr. Ludlow, without saying anything or making any other pretence, and that, being deceived thereby, Dr. Ludlow had given the defendant \$4000, could such a count come within the rule that the indictment must set forth the facts and circumstances with as much certainty as the nature of the case will admit? In such case there could be no false pretence, for there would be no pretence at all; nor, in my opinion, would there be any false writing, nor any writing at all. 'Writing,' as used in the statute, must mean some instrument, or, at least, letter—something in writing, purporting to be the act of another, or certainly of some person; but the paper presented in this case does

not answer any such description; it was no writing at all, because it did not purport to be the act of any person. 'Writing,' as used in the statute, cannot mean anything written upon paper, not purporting to be of any force or efficacy; but some instrument in writing, or written paper, purporting to have been signed by some person; and such writing must be false. If this is a correct exposition of the statute, the first count in the indictment is bad, for the writing is not such a one as the statute intended; and if it were, still there was no falsity about it; it was exactly what it purported to be—a blank bond prepared for the signature of Dr. Ludlow." Compare *Watson v. State*, 16 Lea (Tenn.), 604, where it was held that a conviction under an indictment charging a conspiracy to obtain money under false pretences, would be good although a bond, the principal means used, was not signed, or purported to be signed, by any one, and could not have deceived any reasonable man upon close inspection.

False Representations Used to Induce a Loan of Money Upon the Security of Railroad Bonds, to the effect that the bonds were of the market value of \$600; that any bank in San Francisco would lend that amount on them; and that the railroad was in running order, and paying expenses,—are indictable. *People v. Jordan*, 66 Cal. 10; s. c., 56 Am. Rep. 72.

2. Passing off a "Flash Note" as a Bank of England note, on a person unable to read, and obtaining from him in exchange for it five pigs of the value of £3 17s. 6d., and £1 2s. 6d. change, is a false pretence. *Reg. v. Coulson, T. & M.* 332; s. c., 1 Den. C. C. 592; 4 Cox C. C. 227; 19 L. J. M. C. 182; 14 Jur. 557.

Note of Non-existent Bank.—Obtaining goods, etc., by means of a note purporting to be a bank note of the Ohio Exporting and Importing Co., there being no such bank or company, is a cheat punishable at common law if the defendant knew that the note was false. The scienter must be averred in the indictment. *Com. v. Speer*,

upon its face, bore marks which proved the falsehood of the assertion, and although the person defrauded is able to read, and, by the exercise of ordinary care, might have prevented the fraud.¹ Under an indictment for obtaining money by falsely pretending that the note of a bank was good for the sum mentioned in it, it has been held that it is sufficient to prove that the bank had stopped payment, and that cash could not be obtained for the note on presentment at the place where it was payable.² In England

2 Va. Cas. 65; *State v. Patillo*, 4 Hawks (N. C.), 348.

Passing Bogus Bank Bill.—The passing of a blank bank bill, which was much worn, knowing it not to be a genuine bill, was held to be swindling within the meaning of the South Carolina Act of 1791 relating to cheating and swindling. *State v. Grooms*, 5 Stro. (S. C.) 158.

Note of Insolvent Bank.—If a person pass a note of a country bank for five pounds payable on demand as a good note, and as of the value of five pounds, knowing that the bank is insolvent, and has stopped payment, and cannot pay the note in full, he may be indicted for obtaining money by false pretences. *Reg. v. Evans*, Bell C. C. 187; s. c., 8 Cox C. C. 257; 29 L. J. M. C. 20; 5 Jur. N. S. 1361; 1 L. T. 108.

False Representations as to Genuineness of Note.—The prisoner was convicted of attempting to obtain a sewing-machine by false pretences. The indictment alleged that the prisoner did falsely pretend that a paper partly in print and partly in writing of £5, produced by the bearer, was the good, genuine, and available order for the payment of the sum of £5, etc.; by means of which false pretence, the prisoner did unlawfully attempt to obtain a sewing-machine. The evidence was, that the prisoner bargained for the purchase of the sewing-machine for 35s., and said that a friend had told her to get one and had sent her the money to pay for it, and at the same time gave a worthless bank note for £5, payable to the bearer, of the Devonshire Bank, which had stopped payment many years ago. The prisoner knew at the time that the bank had stopped payment and the note was of no value. *Held*, that the indictment, though inartificially framed, sufficiently alleged that the prisoner falsely represented the note to be a good and genuine note of an existing bank, and of the value of £5, and that the evidence supported the conviction. *Reg. v. Jarman*, 14 Cox C. C. 48.

1. **Misrepresentation of Denomination of Bank Bill.**—The defendant fraudulently offered a one-pound Irish bank note

as a note for five pounds, and obtained change as for a five-pound note. The person from whom the change was obtained, could read, and the note itself, upon the face of it, clearly afforded the means of detecting the fraud. *Held*, that this was obtaining money by means of false pretences. *Reg. v. Jessop, Dears. & B.* C. C. 442; s. c., 7 Cox C. C. 399; 27 L. J. M. C. 70; 4 Jur. N. S. 123.

2. **Representing Valueless Bill to be Good—Insolvency of Bank.**—On an indictment for obtaining money by falsely pretending that the promissory note of a bank, that has stopped payment by reason of bankruptcy, was a good and valuable security for the payment of the amount mentioned in it, and was of that value, it is not necessary to prove the proceedings in bankruptcy. It is sufficient to prove the time when the bank stopped payment, and that cash could not be obtained for the note on its being presented at the place where it was made payable. *Reg. v. Smith*, 6 Cox C. C. 314.

Proof that Notes are Valueless.—The prisoner, knowing that some old-country bank notes had been taken by his uncle forty years before, and that the bank had stopped payment, gave them to a man to pass, telling him to say, if asked about them, that he had taken them from a man he did not know. The man passed the notes, and the prisoner obtained value for them. It appeared that the bankers were made bankrupt. *Held*, that he was guilty of obtaining money by false pretences, and that the bankruptcy proceedings need not be proved. *Reg. v. Dowey*, 11 Cox C. C. 115; s. c., 37 L. J. M. C. 52; 17 L. T. 481; 16 W. R. 344.

Instruction as to Value.—But where the evidence shows that the bank has paid a dividend, the direction to the jury that there is evidence that the note is not of any value, will be wrong. *Reg. v. Evans*, Bell C. C. 187; s. c., 8 Cox C. C. 257; 29 L. J. M. C. 20; 5 Jur. N. S. 1361; 1 L. T. 108.

Evidence that Notes may be of Some Value.—Indictment for false pretences in passing a note of a bank, that had stopped payment, as a good note. The

it has been held that if a person obtain goods by transmitting the halves of bank notes, he may be indicted for false pretences.¹

3. Notes and Bills.—At common law a promissory note payable by an individual was not a public token, and it was not an indictable offence to represent such notes as genuine and valuable, and thereby defraud third persons.² But false pretences used in negotiating notes are now deemed to bring the person making them within the operation of the statute. And it is held that the mere fact of uttering a counterfeit note as a genuine one is tantamount to a representation that it was so.³ Similarly it has been held that if a person tenders to another a promissory note of a third person in exchange for goods, though he says nothing, yet he should be taken to affirm that the note had not, to his knowledge, been paid,

prisoner knew that the bank had stopped payment; but it appeared that two only of the partners of the bank had become bankrupt, and that the third had not. *Held*, that the prisoner must be acquitted. *Rex v. Spencer*, 3 Car. & P. 420.

1. Obtaining Goods by Use of Half Bank Notes.—A was indicted for obtaining goods from several persons, by false pretences, to whom she had forwarded half bank notes, requesting goods to the value of the entire notes to be sent to her. She had not the corresponding half-notes in her custody. *Held*, that she was rightly convicted for obtaining goods by false pretences. *Reg. v. Murphy*, 13 Cox C. C. 298.

2. State v. Patillo, 4 Hawks (N. C.), 348

3. Rex v. Freeth, Russ. & Ry. C. C. 127.

Passing Worthless Note.—In this case the defendant was indicted for falsely uttering and tendering a false, forged, and counterfeit paper as and for a true paper, and with falsely and knowingly pretending that the said false paper was a true paper. The paper was a promissory note signed by a manufacturer in the neighborhood, and circulated by him in payment of his numerous day-laborers. The note was for less than the sum of 20s., and was therefore within the operation of the statute 15 Geo. III. c. 51, s. 1, which declares promissory notes, etc., for any sum less than 20s. absolutely void and of no effect. The defendant's counsel objected that the case was not within the provisions of the act 30 Geo. II. c. 24, the general expressions of that statute being confined to cases of false suggestions of acts; to cases where the party falsely represents himself to be in a situation which he is not, as the servant of another, or as having his order or authority, or produces a false account of disbursements, on the face of which the

party would be entitled to be reimbursed, and to those cases where credit is acquired, and the moneys, etc., are obtained by the false pretences. And it was urged that in this case the credit was given to the note, and to no representation or pretence of the prisoner himself; that the fraud consisted in the fabrication of the instrument, not in any representation made by the prisoner. But the learned judge who tried the prisoner thought that the uttering it as a genuine note was tantamount to a representation that it was so. An objection was also taken as to this being a cheat at common law, upon the ground that as a note of this sort was void, and prohibited by law, it was no offence to forge it, or to obtain money upon it when forged, as the party taking it ought to be upon his guard. The case was, however, left to the jury, with a direction that the evidence, if true, sustained both or one of the latter counts of the indictment, and the jury found the prisoner guilty on both these counts; and on a case reserved the majority of the judges thought that the conviction was right, and that it was a false pretence, although the note upon the face of it would have been good for nothing in point of law if it had not been false. Lawrence, J., was of a different opinion, and thought that the shop-keeper was not cheated if he parted with his goods for a piece of paper, which he must be presumed in law to know was worth nothing if true. *Rex v. Freeth*, Russ. & Ry. C. C. 127.

A statement by defendant, that he has credit with the firm on which he drew a draft, and that it would be honored, when he knew that he had no credit there and that the draft would not be honored, comes under the California law of defrauding by false pretences. *People v. Wasservogle* (Cal.), 19 Pac. Rep. 270.

fully or partly, or to such an extent as almost to destroy its value.¹ A false representation that a note is executed by a certain person, when in fact it was made by another having the same name, is also within the statute.² Under the act 7 & 8 Geo. IV. c. 29, s. 53, obtaining credit in account from a banker by drawing a bill on a person on whom the party has no right to draw, and which has no chance of being paid, was not criminal, although the banker paid money in consequence thereof to an extent that he would not otherwise have done.³ But where the prisoner purchased goods and gave in payment a bill drawn on and executed by himself, payable one month after date, which he stated would be paid the next day, it was held that notwithstanding the fact that although the bill on its face was not due until after that day, he was guilty of the of-

1. Selling Promissory Note Partly Paid.

—In *Reg. v. Davis*, 18 Up. Can. Q. B. 180, the court held that it was properly left to the jury upon the evidence, to say whether a note for \$100 which defendant gave to the prosecutor for the full amount had not been paid, except the value of half a barrel of flour.

Compare *Middleton v. State*, Dud. (S. C.) 275, in which case it was held that if a person sells a promissory note, knowing it to have been paid, but representing it as still due according to its face, the offence is not indictable, and the party defrauded can only obtain redress by a civil action.

2. Misrepresentation as to Person Executing Note.

—In *People v. Cooke*, 5 N. Y. Cr. Rep. 115, defendant obtained from another a sum of money by representing that a promissory note, which he tendered, and which was accepted in return for the money, was executed by a certain person, when in fact it was made by another of the same name. The court held that the indictment need not allege that the real maker of the note was less responsible than the pretended maker, but that evidence of the fact was admissible as tending to establish the false pretences.

3. Obtaining Credit on Bank Account.

—The prisoner had kept an account with certain bankers for more than three years. They had told him that they could not allow him to overdraw beyond £200, but on the 29th of November, 1828, his account was £400 in debt, of which he had had notice, and was told he must get them some money. On that day he met Mr. Roe, one of the partners, and told him he had been obliged to give a check to Mr. Jacobs for £70; Mr. Roe said: "We certainly shall not pay it unless you give us some money first." He

said: "Sir, I can give you a good bill on Mr. Foster." Mr. Roe said: "Very well." About two hours afterwards the prisoner sent a letter to the bank containing a bill of exchange in his own handwriting, of which the following is a copy:

Newport, S. W., Nov. 29th, 1838.

Two months after date pay to my order £200 value received in flour.

Thomas B. Wavell.

Mr. John Foster, Mark Lane,
London.

(Indorsed) Thomas B. Wavell.

After this, checks drawn by the prisoner were brought in and paid there on that day, and amongst others that in favor of Jacobs for £70. Mr. Jacobs banked with the prosecutors, and they placed the amount to his credit, which Roe swore he should not have done unless he had met the prisoner and received the bill. Several other checks were afterwards paid or placed to the credit of parties on whose behalf they were sent in. The bill was not accepted, and searches were made in vain for a person of the description of John Foster, and the bill was not paid. The prisoner endeavored to prove that at the time he drew the bill he had reason to expect that it would have been accepted, but the jury disbelieved the defence, and upon a case reserved it was objected that no chattel, money, or valuable security was obtained by the prisoner by means of the false pretences; he only obtained such credit with the bankers as to induce them to honor his checks; and the judges held that the prisoner could not be said to have obtained any specific sum on the bill: all that was obtained by him was credit in account; somebody else received the money; and therefore the conviction was wrong. *Reg. v. Wavell*, R. & M. C. C. 224.

fence of false pretences.¹ If a promissory note has been signed by the defendant himself, he may plead in justification that he had authority from the apparent maker to so sign it; a note so signed being binding upon the party giving such authority.² It would appear that if a criminal information charge the defendant with attempting to obtain from a third party money or property by means of a false and fraudulent draft, drawn in favor of another, and indorsed by the drawee, the evidence is not insufficient to prove defendant guilty, although it may fail to show that the drawee and indorser was insolvent.³

4. Checks.—To pass a check which is worthless upon the seller of goods, by means of a false representation that the drawer has funds in a bank with which to meet it, and that it will be paid upon presentment, is a false pretence within the statute.⁴ In

1. Payment by Draft.—Misrepresentations as to Arrangements for Payment.—The prisoner purchased goods and gave in payment for them a bill drawn and accepted by himself on the day of the purchase, payable one month after date at the London and Westminster Bank. When he gave the bill, he stated that it would be paid the next day at a bank in Taunton, and that he had made arrangements that it should; but the manager proved that the prisoner had not made arrangements for the payment of the bill, and had not been at the bank, and was not known there. Watson, B., said, "If the representation made by the prisoner was false, and the prosecutrix parted with her goods on the faith of its being true, the prisoner is guilty of obtaining money by false pretences." *Rex v. Hughes, F. & F. 355.*

Sale of Note Obtained by False Pretences.—The sale of a note, the signature to which was known by the buyer to have been obtained by false pretences, was a crime under section 2204, Rev. Stat. Ind. 1881, though the pretences were verbal misrepresentation, and not of a nature which would have made the act of obtaining the signature a criminal act. *State v. Adams, 92 Ind. 116.*

2. State v. Lurch, 12 Oreg. 95; s. c., 5 Am. Cr. Rep. 234.

Authority to use Name.—But in such case testimony of a witness, offered by the defendant, to show that the witness had heard the apparent maker say that the defendant had authority to use his name upon the note, that it was signed by his authority, and that he was bound and liable for the amount of it, is properly excluded, such declarations or statements being only hearsay, and therefore inadmissible. *Com. v. Goddard, 84 Mass. (2 Allen) 148.*

3. State v. Decker, 36 Kan. 717.

Compare Rex v. Flint, Russ. & Ry. C. C. 460, where it was held on an indictment for delivering in payment for a horse certain promissory notes which the prisoner knew to be worthless, and which purported to be the notes of a country bank which had failed, that evidence that the notes were paid and of no value was necessary.

4. Maley v. State, 31 Ind. 92; Smith v. People, 47 N. Y. 303; Foote v. People, 17 Hun (N. Y.), 218; Com. v. Collins, 8 Phila. (Pa.), 609; Rex v. Jackson, 3 Campb. 370; Rex v. Parker, 2 Moo. C. C. 1; s. c., 7 Car. & P. 825; Rex v. Freeth, Russ. & Ry. 127.

Falsely Representing that Drawer of Check has Money in Bank.—The prisoner was indicted for obtaining goods by (amongst others) the false pretence that certain checks were good and valid orders for the payment of their amount. It was proved that the prisoner ordered goods of the prosecutors, and said he wished to pay ready money for them. He gave checks on a bank for the price, and took away the goods. The prisoner had shortly before opened an account at the bank, but had drawn out the amount deposited, except a few shillings. Various checks of his had been refused payment, and he would not have been permitted to overdraw. He did not intend, when he gave the checks to the prosecutor, to meet them, but intended to defraud. *Held,* that there was sufficient evidence of the false pretence that the checks were good and valid orders for the payment of their amount. *Reg. v. Hazelton, 2 C. C. Res. 134.*

False Representations by Purchaser to Induce Sale.—The purchaser of chattels, gave to the seller, his check on a bank in

passing the check, the drawer does not impliedly represent that he has funds with the banker, with which it will be paid, for the reason that overdrafts are too frequent to be classed with false pretences; but he is deemed, by the act of passing, to represent that

another State, dated on the day of the sale, and payable twenty-one days thereafter. He said he was rather short, and was frightened that he would not have enough to pay the check. It transpired that he had no money at the bank on which the check was drawn, and kept no account there. A conviction for obtaining goods by false pretences was sustained, one judge out of three dissenting. *Foot v. People*, 17 Hun (N. Y.), 218; s. c., 1 Cr. L. Mag. 126.

Giving Check with no Money in Bank—Representations.—Prosecutor agreed to sell a mare warranted sound, to the prisoner for £20 10s. The prisoner came and took the mare away on a Thursday, giving a check for the price, which, at his request, the prosecutor agreed not to cash till Saturday. He, however, paid the check to his bankers on the same Thursday; they returned it to him on the Saturday indorsed "no account." The prisoner had no effects at the bank on the Saturday, or on any day for a long time previously. For the prisoner, B., a witness, proved that he had requested prisoner to buy a horse for him (B.), and that prisoner had told B. that he thought he knew of a mare that would suit, and asked B. for a check, which B. did not give, as he had not his checkbook with him; that the prisoner, on the Monday after the Saturday, told B. he had bought a horse for him for £20 10s., and that B. sent a check to him on the following day for the amount. On the Wednesday the mare was sent back to the prosecutor, with a veterinary certificate that she was not sound, a summons against the prisoner having been taken by the prosecutor and left at the prisoner's house on the previous Monday. The prisoner's counsel contended that he ought to be acquitted, first, because the prosecutor, having broken the contract, the charge of false pretences could not be maintained; secondly, because there was no false pretence of an existing fact, as the prisoner alleged he had no funds at the bank at the time he drew the check; and, thirdly, because, upon B.'s evidence, the prisoner had reasonable cause to believe that the check would be paid on the Saturday. The court overruled the objections, and directed the jury that, if they believed that the prisoner knew that he had no funds at the bank at the time he gave the

check, and that the prosecutor had parted with the mare upon the belief that the check was a good and valid one, they must find the prisoner guilty. *Held*, that the direction was wrong, and that the case ought not to have been left to them, and that the conviction ought to be quashed. *Rég. v. Walne*, 11 Cox C. C. 647; s. c., 23 L. T. 748.

Postdated Check.—L. and M. called upon G., and agreed with her upon the price of certain goods. While M. went out, as he said, to get the money, L. told G. that M. was a man of business, having two stores, etc. M. returned with the check for the amount, purporting to be drawn by S., and dated the next day, explaining that it was "too late to go to the bank to-day." Both L. and M. said the check was good, and that S. had a business. G. took the check, and L. and M. took away the goods. On the trial of L. for obtaining the goods by false pretences, the check was admitted to be worthless, S. being a fictitious person. *Held*, that the postdate of the check did not render the transaction a simple undertaking; that the money to meet it would be in the bank at its maturity; and that the facts justified a conviction. *Lesser v. People*, 73 N. Y. 78.

At Common Law the giving of a check on a banker with whom the drawer had no cash, was not indictable, the check not being deemed a false token. See *Rex v. Lara*, 2 Leach C. C. 652; s. c., 2 East P. C. 819; 6 T. R. 565, where it was held that a person who, under a mere false pretence of purchasing lottery tickets, bargains with the holder of them, and obtains the delivery of them by giving a draft on a banker with whom he had no cash, for the amount of them, is not indictable for a fraud at common law; for, in order to constitute this offence, the property must be obtained either by conspiracy, or by means of a false token, as well as a false pretence, and not, as in this case, by a mere false assertion, or a bare, naked lie.

In California, however, it has been held that a check is a false token within the meaning of the penal code if the maker knew, when he gave it in payment, that he had neither funds to meet it nor credit at the bank upon which it was drawn. *People v. Donaldson*, 70 Cal. 116.

he has authority to draw it, and that it will be paid.¹ The fact that the check is postdated will not affect the defendant's criminal responsibility if the other elements of the offence are present.²

1. Representation by Implication.—In *Com. v. Drew*, 36 Mass. (19 Pick.) 179, 186, the court said: "The representation is inferred from the act, and the pretence may be made by implication, as well as by verbal declaration. In the case at bar, the defendant presented his own checks on a bank with which he had an account. What did this imply? Not necessarily that he had funds there. Overdrafts are too frequent to be classed with false pretences. A check, like an order on an individual, is a mere request to pay. And the most that can be inferred from passing it is, that it will be paid when presented, or, in other words, that the drawer has in the bank of the drawee either funds or credit. If the drawer passes the check to a third person, the language of the act is, that it is good and will be duly honored. And in such case, if he knew that he had neither funds nor credit, it would probably be held to be a false pretence."

Fraudulently Overdrawing Account.—In *Reg. v. Hazleton*, L. R. 2 C. C. Res. 134; s. c., 11 Moak's Eng. Rep. 350, the prisoner was indicted for obtaining goods by passing certain checks in payment. It appeared that the prisoner ordered the goods, said he wished to pay ready money for them, gave the checks for the price and took them away. He had shortly before opened an account at a bank, but had drawn out the whole amount deposited, except a few shillings. Various checks had previously been refused payment, and the prisoner would not have been permitted to overdraw. The jury found that he did not intend, when he gave the checks, to meet them, but intended to defraud. It was held that there was evidence of the false pretences that the checks were good and valuable orders for the payment of that amount. Kelly, C.B., remarks: "Several representations are laid in the indictment, and are proposed to us as in the case as arising from the conduct of the prisoner in the present case. It is suggested that a person, acting as the prisoner did, represents that he then has money, to the amount of the check which he tenders, in the bank upon which it is drawn. If this had been the only representation suggested, there would have been great difficulty in upholding the conviction. The giving of a check does not necessarily imply any such repre-

sensation. Not only may a banking account be kept under a guarantee upon the express terms that it may be overdrawn, but, without any such arrangement, a person of position may often overdraw an account in perfect good faith and with the tacit sanction of his bankers. Then it is suggested that the conduct of the prisoner amounted to a representation that he had authority to draw upon the bank for the sum for which he drew. I think that the representation does arise. I do not see how it can but be implied. But as to the third representation, there can be no doubt—namely, that the check is a good and valid order for the payment of its amount. The case which has been cited, *Rex v. Parker*, 7 Car. & P. 829; s. c., 2 Mood. C. C. 1, is express upon the point; and, that the goods were obtained upon the faith of the representation, admits no question. It remains to consider whether the representation made was untrue. If a man's account were overdrawn, and he had reason to suppose that his check would still be honored, this might be consistent with his having authority to draw and with his check being a good and valid order. But, in the present case, it is quite clear that the prisoner knew that his account at the bank was virtually closed, and that he knew his check would not be paid. He had, therefore, no authority to draw. And his check was not a good and valid order; that is to say, one which might be cashed."

2. Representation as to Postdated Check.

—A was charged with falsely pretending that a postdated check, drawn by himself, was a good and genuine order for £25, and of the value of £25, by means of which he obtained a gold watch and chain. It was found by the jury that, before the completion of the sale and the delivery of the watch by the prosecutor to the prisoner, the prisoner represented to the prosecutor that he had an account with the bankers on whom the check was drawn, and that he had a right to draw the check, though he postponed the date for his own convenience—all which was false; and that he represented that the check would be paid on or after the day of the date, but that he had no reasonable ground to believe that it would not be paid, or that he could provide funds to pay it. The prisoner was convicted, and the judges held the

and he is guilty, although the check may have been drawn in a fictitious name.¹ If the delivery of the goods was intended by the parties to be substantially simultaneous with payment, the fact that the check was not delivered to the buyer for a short time after the goods had been delivered, does not relieve the defendant from liability to punishment.²

conviction right. *Rex. v. Parker*, 7 Car. & P. 825; s. c., 2 Moo. C. C. 1.

1. **Checks Signed in Fictitious Name.**—In *Com. v. Drew*, 36 Mass. (19 Pick.) 179, the defendant had from time to time deposited money in, and drawn checks upon, a bank, under a fictitious name. Finally, for the purpose of defrauding the bank, he drew a check when he had no money to his credit, presented it himself, and obtained payment. He was indicted under the Massachusetts act of 1815, c. 136, for obtaining money by false pretences. It was held that the assumption of a fictitious name was a false pretence within the meaning of the statute, but that, as it appeared that it had no influence in inducing the bank to pay the money, proof of it would not support the indictment.

R. M., in payment for a pony and cart purchased by him from the prosecutor, drew a check in the name of *W. M.*, in the presence of the prosecutor, upon a bank at which he, the prisoner, had no account, and gave it to the prosecutor as his own check, drawn in his own name. At the time he drew the check the prisoner knew that it would be as, in fact it was, dishonored. The prosecutor received the check in the belief that it was drawn in the prisoner's own name. *Seem*, that *R. M.*, was guilty of obtaining the pony and cart by false pretences. *Reg. v. Martin*, 5 Q. B. Div. 34; s. c., 49 L. J. M. C. 11; 41 L. T. 504; 28 W. R. 232; 44 J. P. 74; 14 Cox C. C. 375.

2. **Payment in Check when Property is to be Weighed and Paid for in Cash.**—In *Com. v. Devlin*, 141 Mass. 423, the defendant purchased from the prosecuting witness a number of sheep, the price of which was to be payable in cash. An hour after the sheep had been weighed off, and recorded to the defendant in the weigher's book, in pursuance of the agreement of purchase, the parties met for the setting of the price. The defendant then tendered the check in question, which the prosecuting witness accepted. The court held that although technically a delivery of the goods had taken place previously to the passing of the check, a false representation made expressly at the time of

payment was sufficient to render the defendant punishable under the statute. The court say: "The evidence was, that the representations were made about an hour after the sheep had been weighed off and recorded to the defendant in the weigher's book, pursuant to an agreement of purchase by the defendant. The only dispute of fact at the trial, material to the instruction, seems to have been whether what had taken place amounted to a delivery. We must take it that there was evidence that the delivery had been made. The strength of the defendant's case is, that, even if by the terms of the bargain a sale is to be made for cash, a delivery before payment *prima facie* waives the condition of concurrent payment and passes the property; *Haskins v. Warren*, 115 Mass. 514; and that, if there was anything to prevent this operation of the delivery in the present case, the burden was on the government to prove it, whereas the instruction might have been thought to throw the burden on the defendant. We think, however, that the instruction, when applied to the evidence, sufficiently guarded the defendant's rights. In *Haskins v. Warren*, the delivery took place several days after payment was demanded. The principle of the case does not apply to a delivery intended to be substantially simultaneous with payment, but which happens to precede it by a few minutes. For instance, if, upon a cash sale, goods should be handed across a counter before the money was put down, that would not be a waiver of the condition or a giving of credit. *Bussey v. Barnett*, 9 Mees. & W. 312. If the buyer ran off with the goods without paying for them, he would not have even a voidable title; and if, by a false representation made the moment after putting his hands upon the goods, he induced the seller to take a check instead of cash, he could be convicted for obtaining the goods upon false pretences. The case at bar is governed by the same principle as the one we have supposed. The delivery of the sheep was a more cumbrous operation than handling goods over a counter; but, even if it was completed before the representations were made, we think that, on all the evidence,

X. OBTAINING SIGNATURE BY FALSE PRETENCES.—1. To Deeds and other Writings.—Under the statutes relative to the obtaining of signatures to writings, it has been held that the instrument must be one which might be the subject of forgery;¹ and, further, that the instrument must not only have been signed, but must also have been delivered.² In this offence, however, it would appear that it is not essential that any actual loss or injury should be shown to have been sustained;³ although in every case the obtaining must have been with the intent to defraud,⁴ and the offence is only complete if the false pretences used induced the signing of the writing.⁵ Where the signing of the writing has resulted in the defendant obtaining money, it has been held that the defendant might be indicted for obtaining the money by false pretences.⁶

fairly construed, it must be taken to have been made on the understanding that the payment was to be substantially simultaneous. We do not gather that this was fairly open to controversy or, controverted. If the price was fixed by weight, as was testified, it could not be fixed exactly until after the weighing off, which is relied on as constituting the delivery. The parties met in about an hour for payment, and reckoned up the price, and then it was that the representations were made. The instruction excepted, to evidently was given upon this view of the case, and upon this view, which the jury also have taken, was correct; for, even if the jury found that there was a completed delivery, still its operation was conditional upon immediate payment, and everything was in *feri* until, by reason of what we must take to have been false pretences, the seller was induced to accept a check instead of money, and to complete the sale on that changed footing. Up to that moment the title did not pass; and whether the technical doctrine be that the purchaser's custody of the sheep *ad interim* did not constitute possession in a legal sense until payment, or that to obtain the title by false pretences was within the statute, even if the defendant had the possession before, we are satisfied that, one way or the other, the facts which must have been found, under the instructions, constituted the statutory offence. It is hardly necessary to add, that, in our view, the false pretences which induced the seller to accept the checks as the price of his sheep also induced him to part with the title to the sheep for the checks."

1. *People v. Mott*, 34 Mich. 80.

2. *State v. McGinniss* (Iowa), 33 N. W. Rep. 338; *State v. Clark*, 69 Iowa 169. *Baker v. State*, 4 Tex. App. 332.

3. *People v. Sully*, 5 Park. Cr. Cas. (N. Y.) 143.

4. *Therasson v. People*, 10 Hun (N. Y.), 55.

Question for the Jury.—The question of intent "to cheat and defraud" is for the jury. *Brown v. People*, 16 Hun (N. Y.), 535.

5. *Cook v. State*, 83 Ind. 403.

Representation as to Material Fact.—An indictment under Mass. Gen. Stat., ch. 161, § 54, alleged that the defendant, to induce M. to sign a lease to C., falsely represented that C. was a liquor-dealer doing business as such in B.; that C. was worth \$10,000; and that a defendant pointed out to M. was C. *Held*, that the first allegation was a representation of the material fact; that the second was not; and *semble* that the third was not. *Com. v. Stevenson*, 127 Mass. 446; s. c., 1 Cr. L. Mag. 806.

6. By the Revised Statutes of New York, obtaining by a false pretence the signature of a person to a written instrument is classed with the obtaining of money by false pretences. *People v. Stone*, 9 Wend. (N. Y.) 190. One represented himself to a recruit to be a captain of his regiment, pretended that he had received the bounty of the latter, and induced the latter to give him an assignment of it, and by means of the assignment he first obtained the bounty. *Held*, that this amounted to obtaining money from the recruit upon false pretences. *People v. Cook*, 5 Park. Cr. Cas. (N. Y.) 251.

Representation by Lawyer as to Safety, of Investment.—A lawyer who, by means of false representations to his client, about the safety of an investment on mortgage, procured her signature to a satisfaction piece, cashed the mortgage, and kept the money. *Held*, properly convicted of obtaining money under false pretences.

2. To Notes and Bills.—It is within the provisions of the statute to obtain the signature of any person to a note or a bill by means of false pretences;¹ and if the signature has been obtained with intent to defraud, the offence is complete, without showing that any actual loss has been sustained by the maker.² Under the statute which provides in express terms for the punishment of any person who obtains a signature to a written instrument by false pretences, an indictment will lie for so obtaining the indorsement of a negotiable promissory note; but if it appears that the note was made by the defendant to the prosecutor's order, there must be an averment that the indorsement was for defendant's accommodation, the presumption otherwise being that the note was indorsed over for value received by the payee.³ It seems to be generally held that an indictment for obtaining a signature to a note will lie, under

Therasson v. People, 20 Hun (N. Y.), 55; s. c., 1 Cr. L. Mag. 806.

An indictment may be based upon a false claim of indebtedness against a municipal corporation; and if it appear that the claim was presented under circumstances and in such a manner as was calculated to deceive the municipal officer whose duty it was to act thereon, and that his signature was thus procured, a conviction will be sustained. *People, ex rel. Phelps v. Oyer and Terminer*, 83 N. Y. 436; s. c., 3 Cr. L. Mag. 124.

1. *State v. Thatcher*, 35 N. J. L. (6.Vr.) 445; *Baker v. State*, 14 Tex. App. 332.

False Reading of Note.—Signature by Illiterate Man.—If one induces an illiterate man, by false representations and false reading, to sign a note for a different amount from that agreed on, he is indictable for the cheat. *Hill v. State*, 1 Yerg. (Tenn.) 76; s. c., 24 Am. Dec. 441.

Representations as to Destruction of Former Note.—The false representation that a former note for the same sum was destroyed, and evidence was offered that defendant was plaintiff's partner, and that plaintiff was bound by agreement to indorse for defendant to a much greater amount than the two notes, and had refused to fulfil the agreement, and that the money on said note was used for the benefit of the joint business. *Held*, (1) that such evidence is admissible and proper, as tending to disprove presumption of intent to defraud; (2) that such intent must be proved by facts so strong that in the absence of all other proof they would warrant the jury in finding an intent to defraud, unless such intent is fairly to be inferred from the circumstances attending the act itself. *People v. Getchell*, 6 Mich. 496.

Representing Note to be used as Joke.—Obtaining Signature by.—Rev. Stat. Mo.

1879, § 3126, provides that technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import. Defendant was charged in an indictment with having obtained signatures of certain parties to a promissory note, stating it was to be used as a joke, but that defendant did use it to obtain money. The indictment charged this obtaining the signatures as a false pretence and fraudulent representation. *Held*, that the defendant was guilty of gross breach of confidence, but not of a criminal false pretence in the meaning of the statute. *State v. De Lay (Mo.)*, 5 S. W. Rep. 607; s. c., 10 Cr. L. Mag. 323.

Representations of One Applying for an Accommodation Note, that his indebtedness was but \$2000, when he knew it to be \$12,000, and that his property was unincumbered by debts, when it was under executions and judgments to the amount of \$6,000, *held*, representations of material facts, and indictable. *State v. Pryor*, 30 Ind. 350.

Representations to Induce Signature to Note.—Where the false pretence, by which a signature to a note was obtained was that the prisoner had money in the hands of an absent person, *held*, that it was not material to prove the amount which he mentioned to be the identical sum stated in the indictment; that it was enough that the sum mentioned by him was sufficient to meet the payment of the note which the party was induced to sign. *People v. Herrick*, 13 Wend. (N. Y.) 87.

2. *State v. Pryor*, 30 Ind. 350.

3. *People v. Chapman*, 4 Park. Cr. Cas. (N. Y.) 56.

a statute which provides for the punishment of any person who obtains "any money, property, or valuable thing whatever," by false pretences.¹ If the signature to a note is obtained by a promise on the part of the defendant to apply the proceeds in payment of another note payable to the prosecuting witness, then about to become due, such promise is not a false pretence for which an indictment will lie.² The fact that the person signing the note knew that it was to be used for a dishonest purpose,³ or gave it with the intention of compounding a felony,⁴ has been held to constitute no justification.

XI. OBTAINING MONEY BY.—1. Pledge of Jewelry and Plate.—In obtaining loans of money upon the pledge of jewelry and plate, representations to amount to false pretences within the statute must go, not merely to the quality of the articles, but to some other essential properties.⁵ If, however, the lender makes an ex-

1. Securing Signature. Obtaining "Money, Goods," etc., in Statute.—Obtaining an indorsement to a promissory note by false pretences and with a fraudulent intent, and which the party obtaining it has used for his own benefit, is within the spirit of the statute making it a punishable offence to obtain "money, goods, or chattels, or other effects," by false pretences. *People v. Stone*, 9 Wend. (N. Y.) 190.

Same—What Constitutes the Offence.—Where one, by the means of false pretences, induces another to buy from him property, and on payment thereof obtains from him a check upon funds owned by the drawer in bank, a criminal prosecution may be properly brought under the first clause of the Revised Statutes, § 7076, providing for obtaining anything of value and need not be laid under the second clause providing for obtaining signatures. *Tarbox v. State*, 38 Ohio St. 581; s. c., 4 Cr. L. Mag. 766.

Defrauding Forms—Obtaining Signature to Note by Trickery.—Defendant got a person to sign a paper which turned out to be a promissory note, by reading to him a contract by which he was to receive medicines to sell on commission, which contract the person supposed he was signing. Upon indictment under Mo. Rev. St. § 1561, providing that any person who, with intent, etc., obtains from any other person, any money, property, or valuable thing whatever, by means of a trick or deception, etc., shall be punished by imprisonment in the penitentiary. *Held*, that the crime was punishable under that law, and that the State was not obliged to prosecute under § 1335, providing specifically for the case of obtaining the signature of a person to a written instrument by false pretences, which latter law imposed the

same punishment as for larceny, which in this case would be a light punishment, as the larceny of a note at common law is considered as the larceny of only so much paper. *State v. Porter*, 75 Mo. 171.

1. *Com. v. Moore*, 99 Pa. St. 570; s. c., 15 Cent. L. J. 211; 13 Pitts. L. J. 57.

2. *People v. Henssler*, 48 Mich. 49; s. c., 11 N. W. Rep. 804.

3. *Perkins v. State*, 67 Ind. 270. In this case a person obtained a promissory note by falsely claiming to be an officer having a warrant for the arrest of the maker on a criminal charge.

4. Representations as to Quality.—On the trial of an indictment for false pretences, it was proved that the prisoner offered a chain in pledge to a pawnbroker, and required money to be advanced upon it, representing that it was gold. On being tested, it turned out to be a compound of brass, silver, and gold, but the gold was very minute in quantity. *Held*, not a false pretence. *Reg. v. Lee*, 8 Cox C. C., 233.

For the purpose of procuring advances of money by way of pledge, a party produced spoons to the prosecutors, who were pawnbrokers, and falsely and fraudulently stated that "they were of the best quality; that they were equal to Elkington's A.; that the foundation was of the best material; and they had as much silver on them as Elkington's A." *Held*, that the representation being merely as to the quality of the articles, were not false pretences within the statute, as the articles delivered to the pawnbrokers were the same in species as he had professed them to be, though of inferior quality to what he had stated. *Reg. v. Bryan, Dears. & B. C. C.* 265; s. c., 7 Cox C. C. 313; 26 L. J. M. C. 84; 3 Jur. N. S. 620.

amination of the articles and advances the money, not upon the faith of the representations, but in reliance upon his own examination and test, the statutory offence has not been committed.¹

2. Defrauding Intending Employees.—A simple representation that the person making it has a situation in view, by which he induces a person seeking employment to part with his money, is sufficient to sustain an indictment under the statute;² and it has even been held that a false assertion of confidence that one can secure a place for another, accompanied by a promise to do so, and by other devices, is sufficient to bring the person making the representations within the operation of the statute.³ False representations to the effect that the person making them is engaged in business and desirous of employing assistants, but requires a deposit as security for the employee's honesty, or that the pretended employer requires money to purchase the railroad tickets for the purpose of sending his employee to his destination, amounts to false pretences within the meaning of the statute.⁴

1. False Representations as to Quality—Party Relying on own Judgment.—A falsely pretended to a pawnbroker that a chain was silver. The pawnbroker lent A ten shillings on the chain, without placing any reliance upon the statement of A, but relying on his own examination and test. The chain was made of a composition worth about one farthing an ounce. *Held*, that he was properly convicted of attempting to obtain money by false pretences, the statement being a false pretence within the statute. *Reg. v. Roebuck, Dears. & B. C. C. 24; s. c., 7 Cox C. C. 126; 25 L. J. M. C. 101; 2 Jur. N. S. 597.*

Lord Campbell, C.J., said: "*Reg. v. Ball, Car. & M. 249*, appears to be an authority expressly in point, and I entirely approve of the principle on which that decision may rest. Under such circumstances, the party who has succeeded in defrauding the pawnbroker, the money being advanced upon the faith of the false representation, comes clearly within the 7 and 8 Geo. IV., c. 29, § 53; for, by fraudulently representing as an existing fact that which he knew to be not an existing fact, he obtained the money from the pawnbroker, 'with intent to defraud him of the same.' Having the *animus furandi* he actually steals the money under pretence of a contract of borrowing on pledge; and the statute deprives him of the technical defence that there was not a larcenious asportation. I think it makes no difference that the chain which has in it no silver, is of 'a composition worth about a farthing an ounce.' It was in no respect the thing bargained for, and it was of no value to the prosecutor. This cannot properly be distinguished from the cases on 'flash

notes,' for the paper on which these notes are written or printed is of some value, although infinitesimally small."

False Representations as to Quality—Failure to Procure Loan.—A man went into a pawnbroker's shop in the middle of the day, and laid down eleven thimbles on the counter, saying, "I want five shillings on them." The pawnbroker's assistant asked the man if they were silver, and he said they were. The assistant tested them and found they were not silver, and in consequence did not give the man any money, but sent for a policeman, and gave him into his custody. *Held*, that the conduct of the man who presented the thimbles amounted to an attempt to commit the statutable misdemeanor of obtaining money under false pretences, and by consequence that, if the money had been obtained, the statutable offence would have been complete. *Reg. v. Ball, Car. & M. 249.*

2. A Keeper of an Intelligence Office, who agreed to procure a place for an applicant in consideration of \$2 paid in advance, but without intention to procure such a place, and, by falsely alleging that he had a situation in view, induced the applicant to pay the money, *held*, to be guilty of obtaining money by false pretences within Mass. Stat. 1815, ch. 136 (Rev. Stat. ch. 136, § 32). *Com. v. Parker, Thach. C. C. (Mass.) 24.*

3. People v. Winslow, 39 Mich. 505.

4. Employment Agents.—In *State v. Gross, 62 Wis. 41*, the defendant falsely pretending that he was a contractor, having contracts for the execution of work in another part of the State, he represented to the prosecutor that he de-

3. Defrauding Employers.—It amounts to a false pretence within the meaning of the statute, if an employee clandestinely removes work, which has been done by a fellow-servant, and places it beside his own, for the purpose of delivering it to the foreman as his own and getting pay therefor;¹ or to remove checks or tokens placed by a fellow-servant upon his work, and substitute checks and tokens of his own therefor, with the same fraudulent intent.² Similarly, if the employer furnish cloths or uni-

sired to employ him and others to work for him during the following winter, and proposed to employ the prosecutor to work upon the contracts; the prosecutor agreed to do so, and the defendant thereupon pretended that he had not sufficient money to pay the prosecutor's fare, and thereupon obtained from him an advance of a sufficient sum to purchase the necessary railroad tickets. The court held that the pretences were sufficient to bring the defendant within the operation of the Wisconsin statute.

Auctioneer and House Agent Requiring Deposit.—A prisoner obtaining a sum of money from the prosecutor by pretending that he carried on an extensive business as an auctioneer and a house agent, and that he wanted a clerk, and that the money was to be deposited as security for the prosecutor's honesty as such clerk, the jury found that the prisoner was not carrying on any such business at all. *Held*, that this was an indictable false pretence. *Reg. v. Crab*, 11 Cox C. C. 85; s. c., 18 L. T. 370; 16 W. R. 732.

Deposit by Prosecutor as Security.—On an indictment for obtaining money by false pretences, it appeared that the prisoner, on engaging an assistant, from whom he received a deposit, represented to him that he was doing a good business, and that he had sold a good business for a certain large sum, whereas the business was worthless, and he had been bankrupt. *Held*, that the indictment could not be sustained upon either of the representations. *Reg. v. Williamson*, 11 Cox C. C. 328; s. c., 21 L. T. 444.

Advancing Money—Pretended Shopkeeper.—A defendant was tried upon an indictment for obtaining money by false pretences, in which it was alleged that she had represented that she kept a shop, and that the prosecutrix might go and live with her till she got a situation. It was proved that the defendant did not keep a shop, and the prosecutrix stated that she lent the defendant the money because the latter had said that she kept the shop, and that she, the prosecutrix, should have the money when she got home with her. The jury returned a

special verdict finding the defendant guilty of fraudulently obtaining the money, and prosecutrix parting with it under the belief that the defendant kept a shop and the prosecutrix should have the money when she got home with her. *Held*, that the defendant was properly convicted of obtaining money by false pretences. *Reg. v. Fry, Dears. & B. C. C.* 449; s. c., 7 Cox C. C. 394; 27 L. J. M. C. 68; 4 Jur. N. S. 266.

1. Obtaining Pay for Labor of Fellow-workman, as Own.—A, employed in a tannery, clandestinely removed certain skins of leather from the warehouse to another part of the tannery, for the purpose of delivering them to the foreman and getting paid for them, as if they had been his own work. *Held*, that this did not amount to larceny, but to an attempt to commit the misdemeanor of obtaining money by false pretences. *Reg. v. Holloway*, 1 Den. C. C. 370; s. c., T. & M. 40; 3 New Sess. Cas. 410; 2 Car. & K. 942; 18 L. J. M. C. 60; 13 Jur. 86.

2. Hewers and Putters in a Colliery had tokens differently marked, which they placed on the tubs of coal drawn up the pit, and which were then taken off and put into a box, and their wages calculated according to the number of tokens sent up by them. The putter fetched the empty tub to the hewer, and took it when full to the station, to be drawn up to the bank; before the tub was filled he placed his token on it, to denote the sum he was entitled to for his labor in putting and removing the tub to the station, and the hewer put his token also, to denote the amount he was entitled to for hewing the coal and filling the tub. A hewer removed the putter's token after the tub was brought to him, and substituted one of his own, and then put an additional token of his own for hewing and filling the tub. The tub was then drawn up, and the two tokens thrown into the box. The contents of the box were then taken away by the tokenman, and the accounts of the different workmen made up according to the number of tokens found with their initials on. In that way the hewer obtained money for hewing and filling

forms to his servants, it is an offence, within the meaning of the statute, for one employee when leaving his employment to take possession of the clothes or uniforms of a fellow-servant, and, by returning them as his own obtains the payment of wages which otherwise would have been retained under a rule which requires employees to restore their uniforms before leaving the employment.¹ It is also a false pretence within the meaning of the statute, if a defendant has sent a boy to the pay-table to obtain the wages of another person and bring them to the defendant;² but the fact that the defendant gave an order on his employer for wages afterwards to become due to him, and collected the wages himself without revealing the fact that he had given the order, does not

two tubs of coal, instead of only one. *Held*, that this amounted to an indictable false pretence. *Reg. v. Hunter*, 10 Cox C. C. 642; s. c., 17 L. T. 521; 16 W. R. 342.

1. Railroad Employee—Delivering up Uniform of Fellow-laborer.—The prisoner, on entering the service of a railway company, signed a book of rules, a copy of which was given to him. One of the rules was: "No servant of the company shall be entitled to claim payment of any wages due him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving the service, he knowingly and fraudulently delivered, as part of his uniform, to an officer of the company, a great-coat belonging to a fellow-servant, and so obtained the wages due him. *Held*, that he was properly convicted of obtaining the money by false pretences. *Reg. v. Bull*, 13 Cox C. C. 608; s. c., 36 L. T. 376.

In this case Lord Cockburn, C.J., delivered the opinion of the court, saying: "It is not necessary in this case to call on the counsel for the prosecution. It appears that the prisoner was in the service of the London, Brighton & South Coast R. Co., and that it was one of the rules of that company, which were signed by the prisoner, that no servant of the company should be entitled to claim payment of any wages due to him, on leaving the company's service, until he should have delivered up his uniform clothing. The prisoner signed the rules, was aware of this rule, and in fact delivered up his copy of the rules on leaving the service. He gave notice to leave, and went to the station-master and gave up part of his uniform. The station-master then asked him for his great-coat. He went away, and some time afterwards brought one, and so obtained his wages. It turned out that the great-coat belonged to another servant of the com-

pany, as the prisoner well knew. I take it that this was not an act of theft, but that he took it for the purpose of obtaining his wages. Now, we must take it that it was part of his contract with the company that he was not to be entitled to the wages due to him, on leaving the service, until he had returned to the company all the articles of uniform that he received from the company. It is clear that the prisoner perpetrated a fraud on the officer of the company, and so got from him the money due to him; in other words, he obtained the money by the false pretence that the great-coat he produced to the company's officer was the one he had received from him."

2. False Pretence by Innocent Agent.—

B. was one of many persons employed, whose wages were paid weekly at a pay-table. On one occasion, when B.'s wages were due, the prisoner said to a little boy, "I will give you a penny if you will go and get B.'s money." The boy consented, went to the pay-table, and said to the treasurer, "I come for B.'s money," and B.'s wages were given to him. He took the money to the prisoner, who was waiting outside, and who gave the boy the promised penny. *Held*, that the prisoner could not be convicted on the charge of obtaining the money from the treasurer by falsely pretending to the treasurer that he, the prisoner, had authority from B. to receive his money, or of obtaining it from the treasurer and the boy by falsely pretending to the boy that he had such authority, or of obtaining it from the boy by the like pretence to the boy; but that he might have been convicted on a count charging him with obtaining it from the treasurer by falsely pretending to the treasurer that the boy had the authority from B. to receive the amount. *Reg. v. Butcher*, Bell C. C. 6; s. c., 8 Cox C. C. 77; 28 L. J. M. C. 14; 4 Jur. N. S. 1155; 32 L. T. O. S. 110; 7 W. R. 38.

constitute a false pretence within the meaning of the statute, and the person defrauded can only obtain remedy by a civil action.¹

4. Pretences Coupled with Promise of Marriage.—A mere false promise of marriage, upon the faith of which a defendant obtains money or property, will not sustain an indictment for false pretences.² But if the promise of marriage has connected with it, or arising out of it, a false statement of a matter of fact, as, that the defendant is a single man, the indictment will lie.³

1. *Moulden v. State*, 5 Lea (Tenn.) 577.

2. Obtaining Money under Promise of Marriage.—A count stated that the prisoner unlawfully pretended to H. G. H. that he intended to marry her on the 8th of February, and that he had purchased a suit of clothes for the wedding, for which he wanted the sum of £4, to pay for the same; whereas, the prisoner did not intend to marry H. G. H., nor did he ever purchase a suit of clothes for the said wedding. The prisoner had paid his addresses to H. G. H., and the bans had been published with his sanction. After the first publication, the prisoner met H. G. H. at a draper's shop, by appointment, in order that he might there buy a suit of clothes for the wedding. He accordingly bought a suit of clothes for £4, and asked her for £4 for that purpose. The jury found the prisoner guilty; but Rolfe, B., doubted whether the pretence stated was one on which a conviction could take place; and, upon a case reserved, the judges held the conviction wrong. *Reg. v. Johnston*, 2 Moo. C. C. 254.

3. Same—Falsely Representing One's Self as a Single Person.—On an indictment for obtaining money by false pretences, it appeared that the prisoner, who had a wife living, had presented himself to the prosecutrix as a single man, and, pretending that he was about to marry her, induced her to hand over to him £8 out of her wages, representing that he would go to Liverpool, and with the money furnish a house for them to live in, and that, having done so, he would return and marry her. Having obtained the money, he went away and never returned. The prosecutrix stated that she had been induced to part with her money on the representations of the prisoner that he was a single man, that he would furnish the house with the money, and would then marry her. There was no doubt that these representations were false; but it was contended that as the prosecutrix had parted with her money on the joint operation of the three representations, and as only the first had reference to a present existing fact, while the others related to things

to be done in future, the indictment could not be maintained. But, on a case reserved, it was held that, though a false promise cannot be the subject of an indictment for obtaining money by false pretences, yet here there was the pretence that the prisoner was a single man, which was false, and was essential, for without it he would not have obtained the money. Then this false fact, by which the money was obtained, would support the indictment, although it was united with two false promises, which alone would not have supported the conviction. *Reg. v. Jennison*, 9 Cox C. C. 158; s. c., L. & C. 157; 31 L. J. M. C. 146; 8 Jur. N. S. 442; 6 L. T. 256; 10 W. R. 488.

Extorting Money under Threat of Instituting Action for Breach of Promise.—

Where a count stated, that the defendant pretended to A. Crellin, a single woman, that he was an unmarried man, and having thereby obtained a promise of marriage from A. Crellin, that she refused to marry the defendant, and that he falsely pretended, at the time of such refusal, that he was an unmarried man, and entitled to bring an action against her for the breach of promise of marriage, by means of which he obtained from her £100; whereas in truth he was not an unmarried man, and not entitled to maintain an action for the breach of promise of marriage against her. The prisoner was a married man, and A. Crellin stated that she, being a single woman and possessed of considerable property, the prisoner had paid his addresses to her, and that she had consented to marry him, she being then ignorant that he was a married man, and afterwards changed her mind, and intimated as much to the defendant; and that he thereupon threatened her with an action at law for breach of promise of marriage, and he added, that, by means of such proceedings, he could take half of her fortune from her; and that she, believing that he could and would carry his threat into effect, and in order to induce him from so doing, paid him a sum of money, under a written stipulation, that, in consideration of such payment,

5. Partnership Transactions.—If a person is induced, by false pretences, to enter into a contract of copartnership and to advance money as the capital of the partnership, he has not parted with his money within the meaning of the statute, because, being a partner, he is still interested in it.¹ But if a contract of a copartnership has been executed upon the faith of the fraudulent representation, an indictment will lie under the statute for obtaining the signature thereto.² If the false pretences are used to induce a person to

he would forego proceedings at law against the prosecutrix for breach of promise of marriage; that, but for the prisoner's threat of bringing an action, she would not have paid the money; and that she was induced by such threat to pay the money; and that, had she known that he was a married man, she would not have paid the money. The case was left to the jury to say whether the money was in fact obtained by the false pretence that the defendant was single, and they found the prisoner guilty; and Lord Denman, C.J., and Maule, J., were both clearly of opinion that there was evidence to go to the jury that the money was obtained by the false pretence that the prisoner was a single man, and in a condition to intermarry with the prosecutrix; and Maule, J., was further of opinion that there was also evidence of the money having been obtained by the false pretence of the defendant that he was entitled to maintain an action for breach of promise of marriage, and that such latter false promise was a sufficient false pretence within the statute. *Reg. v. Copeland*, Car. & M. 516.

1. Inducing Person to Become Partner and Put in Money.—Where the prosecutor, by certain false representations made to him by the prisoner, as to his business, customers, and profits, was induced to enter into partnership with the prisoner and to advance £500 as part of the capital of the concern, and the sessions directed the jury that, if they believed the account given by the prosecutor, they would find the prisoner guilty, and the question was reserved whether the conviction could be supported, the court held that the only point of law reserved was whether, in every possible and conceivable view of the evidence by the jury, they were bound to return a verdict of guilty; and the court held that they were not, for many other questions ought to have been submitted to the jury. *Reg. v. Watson*, D. & B. 348; s. c., 7 Cox C. C. 364; 27 L. J. N. S. 18; 4 Jur. N. S. 14. Cockburn, C.J., said: "I am far from saying that where a party is induced by false pretences to enter into

a partnership and to advance money, the allegations being altogether false and fraudulent, or honorable merely, he might not have ground for maintaining an indictment for obtaining money by false pretences, or from saying that he might not rescind a contract obtained by fraud. But I am clearly of opinion that if he does enter into the contract of partnership and does not rescind it, and advances money as part of the capital of the concern, he has not parted with his money within the meaning of the statute; because, being a partner, he is interested in that money. Erle, J., thought, on the evidence, there had been a real partnership assented to by the prosecutor for some time, and was not aware of any case in which it was held that money advanced to a concern by a partner can be treated as money obtained by another partner by false pretences; but he agreed that there might be a case of partnership obtained by fraud, and money advanced, where the whole thing was a pretence, and the party always intended to obtain and appropriate the money, where an indictment for false pretences might lie."

2. Copartnership—Procuring Signature by False Representations.—In *Com. v. Hutchison*, 114 Mass. 325, the defendant was indicted for obtaining the prosecuting witness's signature to a partnership agreement, by false pretences. The defendant made false statement as to his pecuniary responsibility in order to induce the prosecuting witness to advance money for a pretended joint purchase of hay; the prosecutor, relying upon the representations, agreed to advance the money, but, before doing so, desired the defendant to execute the partnership agreement. The agreement was accordingly executed by both the parties. The court held that the evidence was sufficient to warrant the jury in finding that the execution of agreement had become necessary for the obtaining of the money. The defendant accordingly adopted its execution as a part of his plan. It further held that, as the agreement was complete without delivery, the defendant might properly be convicted.

purchase an interest in a worthless business, there would appear to be nothing to prevent the indictment being maintained. In such case the purchase-price does not become part of the capital, so that it cannot be argued that the purchaser still retains an interest in it.¹ It would appear that if a partner induces his co-partner to allow him to withdraw from the business a sum of money as due to him, under a partnership agreement, on account of sales which never had been made, the matter is strictly one of partnership accounting, and the false representations used will not support an indictment.

6. In Contracts of Carriage.—It is a false pretence within the meaning of the statute if a carrier to whom goods have been entrusted for transportation obtains the freight upon the same by falsely pretending to have delivered them, and that he had lost the consignee's receipt.³ In an English case a carrier who dealt with a manufacturer obtained goods, and after he had possession of them stated that they were wanted for a third person. It was held that as a false pretence was not made until after he had obtained possession, it could not form any inducement to the owner to part with his property, and that therefore the indictment could not be sustained.⁴

1. Sale of Interest in Partnership.—In *Com. v. Blood*, 141 Mass. 571, the defendant was charged with obtaining money by false pretences in the sale of an interest in a partnership formed for medical purposes. The pretences used were that the business was of great value, profit, extent, and responsibility; that the defendant owned a secret formula by which a remedy for a certain disease was compounded with one of the partners, a skillful physician; that a certain remedy and appliance was a complete battery; and pretending, by the defendant, that said appliances had been sold in larger quantities and at greater profits; that the defendant's interest in the business was of a certain value, and that one of the partners had paid a certain sum for his interest. The court held that the pretences were within the statute, and that the defendant was properly convicted.

2. Partnership Accounting—False Representation as to Orders Obtained.—In *Reg. v. Evans*, 9 Cox C. C. 238; s. c., L. & C. 252; 32 L. J. M. C. 38; 9 Jur. N. S. 183; 7 L. T. 507, the prisoner entered into a partnership with the prosecutor. It was agreed by the partners that the prisoner should travel about the country soliciting orders, and that he should be paid a commission on all orders received by him. It was agreed that the commission should be payable out of the capital funds of the partnership before dividing any of the profits. By falsely representing that he had obtained a certain order, the prisoner ob-

tained a commission therefore. The court held that this was a mere matter of account between the partners, and that the act of the prisoner was not criminal, but was only a misrepresentation, which would be overhauled when the accounts were gone into. Pollock, C. J., who delivered the judgment of the court, said: "I may add that, in my opinion, the statute against obtaining money by false pretences was never intended to meddle with the real business of commerce. It was not to control commercial proceedings, unless where there was really and truly a piece of swindling, nor to apply to frauds committed in the course of a commercial transaction. In my opinion, and I am giving this as my opinion only, and not that of the court, it would be very mischievous to make every knavish transaction the subject of an indictment."

Mr. Graves, the learned editor of the fourth English edition of Russell on Crimes, questions the correctness of this decision. He says that it may be supported on the ground that the prisoner obtained money in which he had a joint interest, but the grounds upon which the decision rested are open to the greatest doubt; that it might just as well be said that a clerk who obtains money by presenting a false account, was not guilty of the offence because there might be an accounting afterwards.

3. *Rex v. Airey*, 2 East P. C. 831; s. c., 2 East, 30.

4. *Reg. v. Brooks*, 1 F. & F. 502.

7. **In the Collection of Debts.**—False representations made in the course of the collection of moneys, to the effect that moneys are all due, or that a greater amount is payable than really is, have been held sufficient to sustain an indictment,¹ and where the debt is payable not in one sum, but in regular stated instalments, every fresh application for payment will be treated as a reaffirmation that the debt is due.² A contractor for a municipal corporation, who, by means of a bill, obtains the certificate of the commissioners, and its audit by the comptroller, and a warrant from the mayor, upon which he draws payment,—is a false pretence within the statute, if these steps have been taken for the purpose of obtaining money for goods which have not been delivered.³ If a person falsely represent that he is canvassing for subscribers to a directory, and thereby obtain money from a subscriber, he may be convicted of the offence.⁴ An indictment will lie against a money-lender,

1. **A Postman Falsely Pretended that the Sum of 2s. was Payable on a Post-letter** intrusted to him for delivery, whereas one shilling only was payable. *Held*, that the offence was complete when he made the offence, and the absence of any evidence that he did not pay over the whole sum received was immaterial to his guilt or innocence. *Reg. v. Byrne*, 10 Cox C. C. 369.

What Constitutes the Offence.—The agent of an insurance office received a premium, giving to the insured an informal receipt. He appropriated the money, returning the official receipt to the company, who treated the policy as lapsed. The next year the agent called again for the premium. The days of grace having expired, he told the insured that payment would be effectual, he understanding that the agent would apply to the company to allow the policy to go on. The company were in the habit of doing this. The payment was made. *Held*, sufficient evidence to support a conviction. *Reg. v. Powell*, 51 L. T. 713; s. c., 6 Cr. L. Mag. 429.

Benefit Society—False Representation as to Death.—An indictment stating that by the rules of a benefit society every free member was entitled to five pounds on the death of his wife, and that the defendant falsely pretended that a paper which he produced was genuine and contained a true account of his wife's death and burial, and that he further falsely pretended that he was entitled to five pounds from the society by virtue of their rules, in consequence of the death of his wife, by means of which last-mentioned false pretence he obtained money, is good. *Reg. v. Dent*, 1 Car. & K. 249.

2. **Pauper—Falsely Drawing Monthly Relief.**—Originally E. had been rightfully

placed on the list of paupers, but she had subsequently removed from the county, and had ceased to be entitled to relief. The defendant, however, continued to draw E.'s monthly stipend after her removal. *Held*, on indictment for obtaining such orders by false pretences that every fresh application was in fact and effect a reaffirmation of E.'s continuing rights as a pauper. *State v. Wilkerson* (N. C.), 3 S. E. Rep. 683; s. c., 10 Cr. L. Mag. 323.

3. **False Bill for Articles Delivered.**—One who was counsel to the commissioners to erect a court-house, directed D., who expected to furnish the iron materials therefor, to make out a bill as of iron delivered in certain months, which in fact had not been delivered, and procured the certificate of the commissioners to the bill, its audit by the comptroller, and a warrant from the mayor, whereupon he drew the money as attorney of D. *Held*, that he was liable for obtaining money under false pretences. *People v. Genet*, 19 Hun (N. Y.), 91.

4. **Bogus Solicitor for Directory.**—The prisoner obtained money by representing that he was collecting information for a new county directory that W. & Co. were getting up, and that by paying one shilling prosecutor could have his name inserted in large type therein. W. & Co. were not getting up a directory, and had not employed the prisoner. *Held*, that he was rightly convicted of obtaining money on false pretences. *Reg. v. Speed*, 46 L. T. 174; s. c., 3 Cr. L. Mag. 584.

Obtaining Money on Postal Order.—One D., being postmaster at Berlin, transmitted to defendant at T. several post-office orders payable there, which defendant presented and got cashed; but it afterwards appeared that the money thus ob-

and his attorney if they conspire together, by the use of judicial process and false representations, to obtain from a debtor a greater sum than what is due.¹

8. Moneys Obtained as Loans.—If a person obtain money as a loan by false pretences, the money obtained becomes the property of the borrower, and the defence is therefore false pretences, and not larceny, because the property has passed with the lender's consent.² Accordingly, any false pretence of an existing fact, by

tained had never been received by D. for defendant, and that frauds to a large extent had been thus committed. Defendant was held properly convicted of having obtained these sums with intent to defraud. And, *semble*, that defendant might also have been properly convicted under another count of the indictment, charging him with having obtained the money by false pretences. *Reg. v. Desauer*, 21 Up. Can. Q. B. 231.

1. A Money-lender, having a claim for a small sum against a borrower for money lent, and high interest, caused an attorney to issue process for a sum double the amount, making up the difference by items charged on various pretences, and, after receiving payment from a third party of the sum lent, so that only a sum of five pounds remained due for interest, still prosecuted the suit for the whole amount indorsed on the process, and then tried to get from the debtor a charge on property of far greater value, and represented to the third party that the whole sum claimed was really due. The money lender and the attorney, being indicted for attempting to obtain money from the third party by means of false pretences, it was held that there was a case for the jury; and that if the jury believed the two combined together to enforce, by legal process, payment of sums they knew not to be due, in order to obtain payment, they were liable to be convicted, as they accordingly were. *Reg. v. Taylor* (No. 1), 15 Cox C. C. 265.

2. Fraudulent Loan—Use for Different Purposes.—The prisoner had accepted a bill drawn upon him by the prosecutor, for £2638, which he owed the latter. When the bill became due, the prosecutor asked the prisoner if he was prepared to pay it, and the prisoner said he had enough all but £300, and that he expected to get the loan of that from a friend. The prosecutor, who was not any longer the holder of the bill, expressed his willingness to advance the £300 himself, and ultimately did so; but the prisoner, instead of taking up the bill, applied the £300 to his own purposes, and suffered the bill to be dishonored, and the prose-

cutor eventually had to pay it. Evidence was also given that at the time the prisoner obtained the money, he was not in possession of funds sufficient to make up the difference between the £2638 and the £300, but was in insolvent circumstances. For the prisoner it was contended that the representation was not a false pretence within the statute, being a mere misstatement, or, at the worst, a naked lie, and *R. v. Codrington*, *infra*, was cited; and, secondly, that the act did not extend to cases where the prosecutor had only lent, not parted with, the property of the goods or money. *Patteson, J.*, said: "The words of this act are very general, and I do not think I can withdraw the case from the jury. If they are satisfied that the prisoner fraudulently obtained the £300 from the prosecutor by a deliberate falsehood averring that he had all the funds required to take up the bill except £300, when in fact he knew that he had not, and meaning all the time to apply the £300 to his own purposes, and not to take up the bill, it appears to me that the jury ought to convict the prisoner. In *R. v. Codrington* it does not appear that the prisoner did distinctly allege that he had a good title to the estate which he was selling. As to the money being advanced by the prosecutor only as a loan, the terms of the act of parliament embrace every mode of obtaining money by false pretences, by loan as well as by transfer." The prisoner was acquitted. *R. v. Crossley*, 2 Moo. & R. 17; s. c., 2 Lew. C. C. 164.

By the Civil Law, the loan of money did not acquit with *mutuum*, or loan for consumption, if interests stipulated or implied be held as profit and not as mere restitution, nor with *locatio rei*, or the contract of hire, which do not properly apply to fungibles. But, setting aside the stability of the Roman law, the loan of money seems to have been practically referable to *mutuum*. *Van Leeuwen*, 337; 1 *Stair's Inst.* 11, § 5; 3 *Ersk. Inst.* 1, § 18; *Bell Prin.* § 200. By the common law of *mutuum* any substitute was not recognized. "As to equivalents, we should here note, the civil and

which a person obtains the loan of money, is within the statute;¹ and the fact that he intended to repay it, does not relieve his offence of its criminality.² Thus, indictments have been sustained where money was procured on loan by a false pretence that the borrower owed a certain debt and required it to make payment thereof;³ and also where the defendant represented that he had money in the hands of his granddaughter, or that money is being brought to him by a relative, which will be applied in payment;⁴ similarly, where security is given for the loan, a false representation that the security has a certain market value, at which it is selling,⁵ or that the property pledged as security is unencumbered,⁶ will be sufficient to support the indictment. It has

common jurisprudence are at variance, the Roman law specifying one class as *mutuum* where it rests absolutely or as a matter of option upon the bailee to deliver again, not the specific thing furnished him, but another of the same nature; whereas, the recognized doctrine of England and the United States is, that the instant the property in the identical thing so delivered passes completely over to the new possessor, or a sale takes effect, or, in other words, the recipient's fixed obligation to render an equivalent is simply that of an owner having a further duty to perform." It will thus be seen that in the contract of *mutuum*, or loan for consumption, there was no bailment, but the property passed absolutely to the borrower.

1. Pretending to Have Been Intrusted by One to Take His Horses from Ireland to London, and to have been detained by contrary winds till all his money was expended, was within 30 Geo. II., c. 24, § 1. *Rex v. Villeneuve*, 2 East P. C. 830.

Where A falsely represents and pretends to B that he is about to loan a certain sum of money to C, and thereby obtains from B one half of said sum for such purpose upon promise of repayment, A is guilty of obtaining money under false pretences. *State v. Nichols*, 1 Houst. Cr. Cas. (Del.) 114.

2. *Buntain v. State*, 15 Tex. App. 490.

3. *State v. Cowdin*, 28 Kan. 269.

4. Where the defendant represented that he had a sum of money in the hands of his guardian, in another State, and that he would procure the money from his mother necessary to repay the amount lent him by the prosecutor, held, that the defendant was properly indicted under the act for obtaining money under false pretences. *Com. v. Hickey*, 1 Pa. L. J. Rep. 436.

What is an indictable false pretence.—The representation of a party who bor-

rowed money, that his brother was to arrive with money, coupled with a promise to use it in payment of the sum borrowed, amounts to a pretence that he had the money, and may be alleged in the indictment, and proved on the trial. *State v. Fooks*, 65 Iowa, 196; s. c., 19 Rep. 42; 6 Cr. L. Mag. 292.

5. *People v. Jordan*, 66 Cal. 10; s. c., 56 Am. Rep. 73; 18 Rep. 713.

6. Representations that Property is Unincumbered.—The prosecutor lent money to the prisoner at interest, on the security of a bill of sale on furniture, a promissory note of the prisoner and another person, and a declaration made by the prisoner that the furniture was unincumbered. The declaration was untrue at the time it was handed to the prosecutor, the prisoner having a few hours before given a bill of sale for the furniture to another person, but not to its full value. Held, that there was evidence in support of a charge of obtaining money by false pretences. *Reg. v. Meakin*, 11 Cox' C. C. 270; s. c., 20 L. T. 544; 17 W. R. 683.

Same — Massachusetts Doctrine. — In *Com. v. Lincoln*, 93 Mass. (11 Allen) 233, the defendant obtained money upon the false pretence that certain chattels, upon which he gave a mortgage, were unincumbered. The defendant objected that the money was obtained not by means of the false pretences, but in reliance upon the chattel mortgage. The court, however, held that the indictment must be sustained, and that the obtaining was not to be referred to the mortgage, but to the representation. The court say: "The fact that this was a conditional sale of the wagon can make no difference. The offence charged is, that the defendant obtained the money by false representations as to his ownership of the wagon; and, whether the same was obtained by an absolute or conditional sale, is imma-

even been held that a representation by the president of a bank, that the bank's assets were largely in excess of its liabilities, and that the bank was perfectly solvent, is an offence within the statute.¹ But, as in all other cases of false pretences, it must be kept in view that the statement upon which the loan is obtained must be of an existing fact, and not a mere promise relating to the future.² But although the false promise alone will not sustain an indictment, the indictment will lie, when the promise is coupled with a false representation as to property owned by the person making it.³

9. Presentation of False Accounts, etc.—It is a false pretence within the meaning of the statute, if an employee intrusted by his employer with the keeping of accounts of moneys due for goods or wages presents an account which falsely represents a larger amount to be due than actually is,⁴ and the mere presentation of

terial in reference to the nature of the offence."

The Fact that a Forged Certificate was Offered and Received as Security for a Loan of money is evidence whereon a jury may properly find that the lender was thereby induced to part with his money, although, in answer to a question whether he did not rather trust the accused than any security, he testifies that he "had every confidence in him." *Com. v. Coe*, 115 Mass. 481.

1. *Com. v. Wallace*, 114 Pa. St. 405; s. c., 60 Am. Rep. 353.

Representation as to Bank's Assets.—In *Com. v. Wallace*, *supra*, the court say: "The indictment charges that the defendant did pretend "that the assets of said People's Savings Bank were largely in excess of its debts and liabilities, and that said bank was perfectly solvent and able to pay all its debts and liabilities, "Was this a pretence within the statute? Persons in the transaction of business understand that a solvent man is able to pay his debts. The phrase, respecting the large excess of assets over liabilities, and the statement that the bank was able to pay all its debts, emphasized the representation that it was solvent. It may be that when a man buys goods on credit, or borrows money, by such act he represents himself to the creditor as solvent, but it is not so understood by persons in business. If the debtor says nothing as to his solvency or property, the creditor does not understand that he represents anything. A note or other obligation for the payment of money, by usage, does not mean a pretence of ability to pay; but the giving of a bank check, by usage, is a pretence that there is money in the bank subject to the check. Acts may amount to a pretence, as well as words."

2. What Constitutes the Offence.—Obtaining money upon a promise to work it out, and refusing to do the work, is not obtaining it by false pretences. *Ryan v. State*, 45 Ga. 123.

Loan to Open a Public-house.—An indictment charged one Gregory with having obtained thirty pounds from Prosecutor Woodman, on the false pretence that he, the said Gregory, then wanted the loan of thirty pounds to enable him to take a public-house at Melksham; by means of which said false pretences the said Gregory did then unlawfully and fraudulently obtain the said sum from the said Samuel Woodman, with intent to defraud. Whereas, the said Gregory was not then going to take a public-house at Melksham, . . . as he, the said Gregory, well knew; and whereas, the said Gregory did not then want a loan of thirty pounds or any money to enable him to take the said house. *Held*, not sustainable. *Reg. v. Woodman*, 14 Cox C. C. 179; s. c., 28 Moak's Eng. Rep. 561.

3. *State v. Montgomery*, 56 Iowa 195.

4. Obtaining Larger Sum of Money than Due on Account.—A workman employed by clothiers was to keep an account of the number of shearmen employed, and the amount of their earnings and wages, which he was to deliver weekly to a clerk, in writing, who paid him the amount; he delivered in a false account, charging for more work than was actually done, by which he obtained a larger sum than was actually due. *Held*, an obtaining money under false pretences, within 30 Geo. II. c. 24, because, without the false pretence, he would not have obtained the credit, and it was not like a case of money paid generally on account. *Rex v. Wittchell*, 2 East P. C. 830.

By Means of a False Wage-sheet, the prisoner obtained from his master a

a false account constitutes the offence, although the person presenting it does not appear personally before the person defrauded and make his representation verbally.¹

10. Other Instances.—Among the other instances in which indictments have been sustained are false representations by the defendant, that he was a practising physician, had restored sight to one blind, that the house of a prosecuting witness was infected with poison, and that his granddaughter was poisoned, by means of which he obtained money.² An attorney has also been convicted

check for the amount stated in the sheet, to pay the men's wages. The check was informally drawn, and payment was refused by the bank. The prisoner returned it to his master, telling him of the cause of non-payment, and the master tore it up and gave another, which the prisoner cashed, and appropriated the difference between what was really due for wages and what was falsely stated to be due in the wage-sheet. On an indictment charging the prisoner with obtaining 8s. 6d., the actual sum appropriated by the prisoner, it was objected that the above evidence did not prove the charge, for that he had by it only obtained the first check, which was a valuable piece of paper. *Held*, that the false pretence was a continuing one, that the second valuable check was obtained thereby equally with the first, and that the charge was proved. *Reg. v. Greathead*, 14 Cox C. C. 108; s. c., 28 Moak's Eng. Rep. 542.

Part of Total Sum Only Appropriated.

—A, the servant of B, rendered an account to B of £14 1s. 6d. as due from A to his workmen, and B gave A a check for the amount. All that sum was so due except 7s., which A kept, when he got the check cashed, and paid the workmen the residue. In an indictment it was charged, that by this false pretence A obtained the check from B with intent to defraud him of the same. It was objected, that the intent was only to defraud B of a part of the proceeds of the check. A was convicted, and the judges held the conviction right, and that the evidence supported the count. *Reg. v. Leonard*, 2 Car. & K. 514; s. c., 1 Den. C. C. 304; 3 Cox C. C. 284.

1. Roberts v. People, 9 Colo. 458.

False Account by Assessor.—In *Roberts v. People*, *supra*, a county assessor was indicted of obtaining money by false pretences. He presented an account which was in the following form: "County of A. to F., debtor, assumed 1883, June, 16 days, \$6, \$96." F. was the clerk of the defendant. The board of commissioners, relying upon the account, allowed the

claim. The court held that the fact that the account was not itemized, as required by statute, constituted no defence, since the commissioners had allowed similar accounts of the department clerks for four years past, and the account furnished informed them of the nature of the services claimed. It was also held that the fact that an account was allowed without his presence before the board, did not render the false pretence any less criminal.

False Account of Infirmary Director.—

The board of infirmary directors of a municipal corporation is an accounting officer in the sense in which that term is employed in § 7075 of the Ohio Revised Statutes, which provides, that whoever knowingly presents a false and fraudulent claim to the auditor "or other accounting officer" of any municipal corporation, for the purpose of procuring the allowance of the same, is guilty of a crime. *Hauck v. State (Ohio)*, 14 N. E. Rep. 92; s. c., 10 Cr. L. Mag. 323.

2. Bowen v. State, 9 Baxt. (Tenn.) 45; s. c., 40 Am. Rep. 71.

Quack Doctor—Ordinary Caution.—

In *Bowen v. State*, *supra*, the prosecuting witness was an ignorant negro, and the evidence showed that the defendant went to the prosecutor's house, in company with a confederate, and said he was "a Chicasaw doctor" going about doing good; said "Somebody seems to be sick here;" prosecutor replied, "Yes, my granddaughter;" plaintiff in error looked at her and said she was poisoned; that she had poison in her bed, etc., "but you do not believe it; you are hard to believe. I will show you how a person can poison another without coming near him." He took a hat and put it on a table, walked back to the back part of the room and told the prosecutor to raise the hat and see how many pieces of paper were under it; prosecutor raised the hat and there were none; plaintiff in error told him to put the hat down again; he did so, and was told to look, which he did, and found four pieces of paper. The defendant continued his representations and legerde-

for obtaining money upon the false pretence that he had in a former case obtained the release of a prisoner on the payment of a fine smaller than that imposed by the court.¹ A conviction of a married woman, living apart from her husband and receiving the allowance on the deed of separation, for obtaining property by falsely representing that her husband would give a check for the goods as soon as they were delivered, has also been held good.² On the other hand, a false representation by a hotel-keeper, that a friend of the prosecutor was staying with him, by which means he induced the prosecutor to agree to board at his hotel and to pay for his board in advance, has been held not to be within the

main until he had obtained \$74 from the prosecutor. The court held that he was properly convicted of false pretences. Discussing the objection taken by the defendant, that the false pretences complained of were not such as would deceive a person of ordinary prudence, the court say: "It is insisted that the false pretences complained of were not such as would be credited by a person of ordinary caution. We are aware that such language is used in some of the cases passed upon by this court. This restriction upon the operation of the statute is not, in our opinion, authorized by its language.

"The object and purpose of the law is, to protect all persons alike, without regard to the single capacity to exercise ordinary caution, a condition of mind very difficult of definition, and certainly of very different meaning under the various circumstances that may surround the person supposed to exercise it. Thus, a child intrusted with a watch, money, or other valuable, to be borne to an artificer, merchant, or friend, might be induced by the most flimsy and self-apparent falsehood, to part with it; still, if these representations were of a character to secure the credit of the child and deprive it of the possession of the goods, however absurd such representations might seem to the more mature and experienced, yet it would be such false pretences by one person to another as deprived that other of his personal property, as contemplated by the letter and spirit of the law.

"A man of the country, unacquainted with the vices incident to a city, may be and often is cheated out of his effects by tricks and means that would not for a moment deceive him who was accustomed to the society in which such things so frequently occur, although he may have less strength of mind than the former."

1. An Attorney, who had appeared for a person who was fined £2 on a summary conviction, called on the person's wife and

told her that he had been, with another person who was fined £2 for a like offence, to Mr. B. and Mr. L., and that he had prevailed upon Mr. B. and Mr. L. to take £1 instead of £2, and that if she would give him £1 he would go and do the same for her. She gave the attorney a sovereign, and afterwards paid him for his trouble. It was proved that the attorney never applied to either Mr. B. or Mr. L. respecting either of the fines, and that both were afterwards paid in full. *Held*, that he was guilty of obtaining money by false pretences. *Rex v. Asterley*, 7 C. & P. 191.

2. **Married Woman Living Apart from Husband—Representing that Husband will Pay for Goods.**—An indictment charged that the prisoner was living separately from her husband, and receiving an income from him for her separate maintenance under a deed of separation, which stipulated that he should not be liable for her debts; and that she falsely pretended to U., a servant of W., that she was living under the protection of her husband, and was authorized to apply to W. for goods on the credit of her husband, and that he was willing to pay for them; and that she wanted them to furnish a house he occupied. It was proved that on the 4th of August she called at W.'s shop, and on being served by U., selected certain goods, and, being asked for a deposit, said it was a cash transaction—that her husband would have a check as soon as the goods were delivered. The deed was proved, and it was also proved that the annuity covenanted to be paid by the husband was duly paid; that the house which she gave as her address, and which was found shut up after the goods had been sent to it, had been taken by her while in company with a man with whom she had been living from the middle of July till the end of August. *Held*, that there was abundant evidence to support a conviction. *Reg. v. Davis*, 11 Cox C. C. 181; s. c., 19 L. T. 325; 17 W. R. 127.

statute.¹ It was also held, that the fact that a broker who was conducting stock transactions gratuitously for a personal friend, who of his own accord sent him money from time to time to keep margins on stock, but, becoming embarrassed, sold the stock without the prosecutor's consent, and afterwards received remittances from him, which he misappropriated to his own use, was not guilty of false pretences.²

XII. OBTAINING GOODS BY.—It amounts to false pretences within the statute, if a person pretends that he is sent for goods by the owner or by a third person, and thereby obtains them.³ Where a person orders goods and it is open to question whether the goods were ordered on his own behalf or on the behalf of an employer, that question ought to be left to the jury.⁴ The mere fact, that a

1 Misrepresentation as to Collateral Fact.—An indictment charged in substance, that the prosecutor went from Kentucky to Hot Springs with the fixed purpose of lodging and boarding while there at the same hotel where one Dr. Welsh, an acquaintance of his, boarded, whose society while visiting the Springs he greatly desired; that he went to the defendant's hotel for breakfast, and was there informed by the defendant that he well knew Dr. Welsh—that the doctor had been boarding at his hotel for some time, but had left two days before for Eureka Springs; that by means of said representations he was induced to take board and lodging for one month at defendant's hotel, and to pay him \$30 in advance therefor; that said representations were wilfully false and fraudulent; that said Welsh had not at any time boarded at defendant's hotel—had not left the city, but was still there, and boarding at another hotel. *Held*, that the indictment charged no criminal offence. *Morgan v. State*, 42 Ark. 131; s. c., 6 Cr. L. Mag. 292; s. c., 48 Am. Rep. 55.

2. Stock Transactions—Money for Margins.—A, of his own accord, sent to B money from time to time to keep good margins on stock transactions which B was conducting for A at A's request and without compensation. Becoming embarrassed after a time, B sold the stock without A's knowledge or consent, and afterwards accepted remittances sent by A in ignorance of the fact that his stock had been sold. These remittances B misappropriated to his own use. *Held*, that he was not guilty of obtaining A's money on false pretences. *People v. Baker*, 96 N. Y. 340.

Sufficiency of False Pretence.—A first count charged, that the defendant unlawfully did falsely pretend to J. L. that he, the defendant, was sent by W. P. for an

order to go to J. B. for a pair of shoes, of the goods and chattels of J. B., with intent to defraud J. L. of the price of the shoes, to wit, nine shillings of the moneys of J. L. The second count charged that he falsely pretended to J. L. that W. P. had said that J. L. was to give him, the defendant, an order to go to J. B. for a pair of shoes, by means of which false pretence he did obtain from J. B., in the name of J. L., a pair of shoes of the goods of J. B., with intent to defraud J. L. of the same. *Held*, that both of these counts were bad in arrest of judgment, as neither of them charged sufficient false pretence. *Reg. v. Tully*, 9 Car. & P. 227. *Sed quare*, see *Reg. v. Brown*, 2 Cox C. C. 348.

3. Com. v. Burdick, 2 Pa. St. 163; s. c., 46 Am. Dec. 183.

Representation as to Purchase of Farm.—One who obtains property by falsely representing that he has just purchased a certain farm, is guilty of obtaining property by false pretences. *State v. Fooks*, 65 Iowa, 492.

Food was Supplied to a Lodger, believing a statement he had made as to clothes left at another lodging. *Held*, the direction that the jury were to be satisfied that the pretence was false, that the prosecutrix acted on it, and that it was made with intent to defraud, was substantially accurate. *Reg. v. Burton*, 54 L. T. 765; s. c. 8 Cr. L. Mag. 358.

4. Question on whose Behalf Goods Ordered, one for Jury.—Where a prisoner, being employed at a hospital, wrote to the prosecutor, as manager, for a small quantity of linen, not saying it was for the hospital, and in point of fact he was not the manager, and the goods were really ordered for himself, but not sent,—on an indictment for an attempt to obtain them, the question left to jury was, whether he ordered the goods as for and

person cancels his insolvency, and thereby obtains possession of property in the usual course of business, does not necessarily render him liable to punishment for obtaining property under false pretences.¹

XIII. RECEIVING GOODS OBTAINED BY FALSE PRETENCES.—By statute in most of the States, it is an offence to receive goods knowing that they have been obtained by false pretences.² Under these statutes the jury must acquit, except they are satisfied that the defendant knew that the goods had been obtained by false pretences;³ but it is not necessary that the receiver should have known what the false pretences were.⁴ The indictment must, in order to charge the offence, set out the false pretences used.⁵ And it would appear, that if the goods were obtained by false pretences not amounting to a criminal offence, the receiver is entitled to an acquittal.⁶

XIV. JURISDICTION OF THE OFFENCE.—False representations amounting to false pretences within the meaning of the statute, do not constitute the crime, except the property has been actually obtained. Consequently it is generally held, that the crime is complete where the goods or money is obtained; and that therefore, if the pretences are made within one jurisdiction, and the property or money is obtained in another, the person making the representations must be indicted within the latter jurisdiction.⁷ If by means

on behalf of the hospital or in his own name, there being no evidence of an intention to pay cash, but evidence of its absence. *Reg. v. Franklin*, 4 F. & F. 94.

Order Given by Person Having Authority to Order for Another.—A surveyor of highways, having authority to order gravel for the road, ordering gravel as usual, and applying it for his own use, is not liable to a charge of obtaining it by false pretences; nor for larceny, unless it appears that he did not mean to pay for it. *Reg. v. Richardson*, 1 F. & F. 488.

1. *People v. Moore*, 37 Hun (N. Y.), 84. In this case a banker obtained possession of a draft in the usual course of his business, without disclosing the fact of his insolvency.

2. 24 & 25 Vict. c. 96, §. 95.

3. *Reg. v. Rines*, 3 Car. & P. 327.

4. *Reg. v. Goldsmith*, 42 L. J. M. C. 94; s. c., L. R. 2 C. C. Res. 74; 12 Cox C. C. 479; per Bovill, C. J., see report in 12 Cox C. C. 481.

5. *Reg. v. Goldsmith*, 12 Cox C. C. 479; s. c., 42 L. J. M. C. 94; L. R. 2 C. C. Res. 74.

6 **False Pretences—Receiving Goods Obtained by.**—In *Reg. v. Goldsmith*, 12 Cox C. C. 479, the defendant was indicted for receiving goods obtained by false pretences. Upon a question reserved, Bramwell, B., said: "In the present case, if, on trial of the principle offender, false pre-

tences had been proved amounting only to future promises, or the like, is it to be supposed that the judge would have allowed the case to go to a jury?

Indiana Doctrine.—It must be noted, however, that this *dictum* is not in keeping with the decision of the Indiana court in *State v. Adams*, 92 Ind. 116. In that case the defendant was indicted under a statute which provides "that whoever sells . . . any promissory note, . . . knowing the signature of the maker thereof to have been obtained by any false pretence, shall be imprisoned in the State's prison. The court held that it was not necessary to charge that the false pretences were of themselves, sufficient to constitute a crime under the statute."

7. *Stewart v. Jessup*, 51 Ind. 413; s. c., 19 Am. Rep. 739; *State v. House*, 55 Iowa, 466; *State v. Schaeffer*, 89 Mo. 271; *People v. Sully*, 5 Park. Cr. Cas. (N. Y.) 142; *Skiff v. People*, 2 Park. Cr. Cas. (N. Y.) 139.

Where a Misdemeanor Consists of Different Parts, so much of the charge as amounts to a misdemeanor in law must be proved in the county in which the venue is laid. *Rex v. Buttery*, 3 B. & C. 700; s. c. 5 D. & R. 616.

Where False Pretences were Made and the Property Delivered in one County, but the note in payment was made and delivered afterwards in another, the former

of the false pretences used, the prosecutor is induced to transmit by mail, to the defendant, a draft or other writing, the postmaster is the agent of the defendant to forward the letter to him, and the offence is complete at the place where the letter is mailed.¹

If, however, the false pretences are made by a letter written and dispatched from one State, but the defendant obtains the money by means of a draft upon a bank in another State, which is collected through the agency of other banks, the money must be deemed to have been obtained within the jurisdiction of the latter State, and the courts of the State from which the letter is sent have no jurisdiction of the offence.² If, by means of false pretences made in

is the proper place of trial. *Skiff v. People*, 2 Park. Cr. Cas. (N. Y.) 139.

Jurisdiction.—An indictment for obtaining money by false pretences, made in Maryland, cannot be sustained in the District of Columbia, although the bills on which the money was obtained were discounted at the latter place. *United States v. Plympton*, 4 Cr. C. C. 309.

Same—Articles Obtained in One County, Indictment in Another.—In *Reg. v. Stanbury*, 9 Cox C. C. 94; s. c., L. & C. 128; 31 L. J. M. C. 88; 8 Jur. N. S. 84; 5 L. T. 686 10 W. R. 236, the prisoner was indicted in Essex for obtaining sheep by false pretences. The sheep were obtained in Middlesex and remained in his possession until he conveyed them into Essex. It was held, on a case reserved, that he had been indicted and tried in the wrong county.

1. Com. v. Wood, 142 Mass. 459.

Same—Begging-letter.—Where a prisoner, in a begging-letter, which contained false pretences, and was addressed to the prosecutor, who resided in Middlesex, requesting him to put a letter, containing a post-office order for money, in a post-office in Middlesex, to be forwarded to the prisoner's address in Kent, held, that the venue was rightly laid in Middlesex, as the prisoner, by directing the money-order to be sent by post, constituted the postmaster in Middlesex his agent to receive it there for him; and that consequently there was a receipt of the money-order by the prisoner within the county of Middlesex. *Reg. v. Joes*, 1 Den. C. C. 551; s. c., 4 New Sess. Cas. 353; 4 Cox C. C. 198; 19 L. J. M. C. 162; 14 Jur. 533.

Same—Return of Fees to Commissioner of Treasury.—On an indictment for obtaining money by false pretences, which was alleged to have been by sending a certain false return of fees to the commissioners of the treasury, it appearing that the return was received by them in Westminster, with a letter dated North-

ampton, and an affidavit sworn there; and that they, on the faith of it, drew up a minute, which operated as an authority to the paymaster-general to pay a certain amount to the prisoner (as compensation under 7 & 8 Vict. c. 96) at Westminster, the venue laid being Northamptonshire, held, that there was reasonable evidence that the false representation was forwarded from Northampton; that it was, if false and fraudulent, a false pretence within the statute; that in effect the money was obtained by means of the minute being a mere matter of regulation, and not a judicial proceeding; and that therefore the venue was right, and the indictment was supported. *Reg. v. Cooke*, 1 F. & F. 64.

Same—Money Obtained by Letter.—Upon an indictment tried at the sessions for the county of the borough of Carmarthen, which is a separate jurisdiction from the county of Carmarthen, it appeared that the false pretence, with which the prisoner was charged, was contained in a letter written by him at N. E., in the county of Carmarthen, and received by the prosecutor in the borough of Carmarthen. The money obtained by such false pretence was posted in a registered letter in the borough of Carmarthen, and received by the prisoner at N. E., in the county of Carmarthen; and, upon a case reserved, it was held that the sessions for the borough had jurisdiction to try the prisoner. *Reg. v. Leech*, 1 Dears. C. C. 642.

2. Offence Commenced in one State and Completed in Another.—In *State v. Shaeffer*, 89 Mo. 271; s. c., 6 Am. Crim. Rep. 260, the evidence for the State tended to prove that the defendant made representations to Blair to the effect, that he had agreed to pay to the Anthony heirs, for their interest in a tract of land near Kansas City, \$8450, having in fact purchased the same at the price of \$800. The agreement between Blair and defendant, in relation to the interest of the Anthony

heirs in the tract, was, that Blair would place the money to make that purchase to defendant's credit in such bank at Kansas City as defendant might suggest by telegraph, or that he would pay defendant's draft at sight, National Park Bank, New York. It appears, that defendant telegraphed Blair, February 12, 1884, that he had drawn on him for \$19,668.33, which sum included the \$8450 for the interest of the Anthony heirs.

The draft was indorsed by Shaeffer to the Traders' Bank of Kansas City, which sent it for collection to the United States National Bank, New York, which collected it, and placed it to the credit of the Traders' Bank of Kansas City, which, after being informed of the draft in New York, paid the amount to Shaeffer at Kansas City. The court held, that the offence was complete in New York, and that the defendant was not subject to the jurisdiction of the courts of Missouri. The court say: "Where did Blair pay this money? Where did he lose his property in the money, and his dominion over it? If he deposited it in the Park National Bank, to the credit of Shaeffer, that was a payment in New York to Shaeffer. If he had money on deposit to his own credit, and directed the bank to it on Shaeffer's check or draft, then, when so paid in New York, whether on Shaeffer's check or draft, he then parted with his money. The United States National Bank was the agent of the Traders' Bank of Kansas City, which was unquestionably the agent of Shaeffer. Neither of the banks was in any sense the agent of Blair; but whether the United States National Bank is to be considered as the agent of Shaeffer or the agent of the Traders' Bank, is wholly immaterial, since it is clear that it was not the agent of Blair or of the National Park Bank. After the National Park Bank paid the money to the United States National Bank, Blair's obligation to pay money was discharged; and if that bank had become insolvent, or failed to account for the proceeds of the check to the Traders' Bank, Shaeffer could have had no recourse upon Blair. The Traders' received the draft for collection for Shaeffer's accommodation, and paid him the amount of the draft only on assurance from its correspondent in New York, that the Park Bank had paid the draft."

"That the Traders' Bank then paid the amount of the draft to Shaeffer, was not a payment by Blair. But the substance of this transaction was the collection of the money in New York from Blair, and

a disposition in Kansas City, by Shaeffer, of that money so collected in New York. If, instead of receiving the money, Shaeffer had received property in Kansas City from the Traders' Bank instead of money, the principle would have been the same. The Traders' Bank paid Shaeffer its money, not Blair's. The United States National Bank held the money sent, not as Blair's money, but really as Shaeffer's, though nominally as the money of the Traders' Bank; and the indorsement of the draft to the Traders' Bank, by Shaeffer, operated to transfer the proceeds of the draft to the Traders' Bank when paid by the Park National Bank to the United States National Bank. A merchant in New York who draws a draft on a customer in St. Louis, which is paid by the latter to a bank in St. Louis, to which the draft is sent for collection, does not thereby pay the money in New York, but in St. Louis; and that the New York merchant indorses it for collection to a bank in New York, and receives the money in New York from that bank after the latter has notice of the payment of the draft in St. Louis to its correspondents there, does not make the payment by his customer to the bank in St. Louis a payment of the money to the New York merchant in New York."

Same—Fraudulent Receipts of Produce.

—In *People v. Adams*, 3 Den. (N. Y.) 190; s. c., 1 N. Y. 173; s. c., 45 Am. Dec. 468, the defendant resided in Ohio and had never been in the State of New York, he fraudulently made receipts acknowledging the delivery to him, as forwarder, of a quantity of produce for the use of a firm in New York, and subject to their order. In reality, he had never received the produce; he employed agents to present the receipts to the New York firm, and obtained money thereon. It was held, that the offence must be considered as having been committed in New York, where the money was obtained; that the employer was guilty as a principal; that he was liable to be indicted and tried in New York for the offence. The court say: "The defendant may have violated the law of Ohio by what he did there, but with that we have no concern. What he did in Ohio was not, nor could it be, an infraction of our law or a crime against this State. He was indicted for what was done here, and done by himself. True, the defendant was not personally within this State, but he was here in purpose and design, and acted by his authorized agents. *Qui facit per alium, facit per se*. The agents employed were innocent, and he alone

one jurisdiction, goods are delivered by a person in another jurisdiction to a carrier for shipment to the person making the representations, the carrier is the agent of the consignee, and the venue of the indictment must be laid in the jurisdiction within which the goods were delivered to him;¹ but if, by reason of the fact that

was guilty. An offence was thus committed, and there must have been a guilty offender; for it would be somewhat worse than absurd to hold that any act could be a crime if no one was criminal. Here the crime was perpetrated within this State, and over that our courts have an undoubted jurisdiction. This necessarily gives to them jurisdiction over the criminal. *Cremen trahit personam.*"

Posting Letter.—A false pretence was made by letter in Nottingham, England, and posted there to, and received by, a person in France. In consequence of the letter, that person drew a check in France payable at Nottingham, and sent it to the prisoner at Nottingham, who cashed the check in England. *Held*, that the prisoner was properly indicted and tried at Nottingham. *Reg. v. Holmes*, 12 Q. B. Div. 23; s. c., 53 L. J. M. C. 37; 49 L. T. 540; 36 Moak's Eng. Rep. 564; 4 Am. Cr. Rep. 591. Lord Coleridge, C. J., who delivered the opinion of the court, said: "The pretence was made in the county of Nottingham, for it was held in *Rex v. Burdett*, 4 Barn. & Ald. 95, and other cases, that the delivery at the post-office, of a sealed letter inclosing a libel, is a publication of the libel at the place of posting, and the money which was the result of the false pretence was obtained in Nottingham. Therefore, the two necessary ingredients of the offence both took place in the country where the prisoner was tried. What was done in the mean time, between the making of the pretence and the obtaining of the money, is immaterial, for all the necessary ingredients to constitute the offence took place at Nottingham. *Reg. v. Holmes*, 12 Q. B. Div. 23; s. c., 53 L. J. M. C. 37; 49 L. T. 540; 36 Moak's Eng. Rep. 564; 4 Am. Cr. Rep. 591.

In England, it is provided by statute, that the offence may be tried in any jurisdiction where it is begun or completed. 7 Geo. IV. c. 64, § 12. When the prisoner wrote and posted in a county a letter containing a false pretence, to the prosecutor, who received it in a borough, the prosecutor in the borough posted to the prisoner in the county a letter containing the money obtained by the false

pretence, and which the prisoner received in the county. *Held*, that under 7 Geo. IV. c. 64, § 12, the prisoner might be tried for the offence of obtaining the money by false pretence, at the borough quarter sessions; part of the offence being the making the false pretence, and the false pretence being made to the prosecutor in the borough, where the letter containing the false pretence was delivered to him by the post-office authorities, whom the prisoner made his agents for that purpose. *Reg. v. Leech*, Dears. C. C. 642; s. c., 7 Cox C. C. 100; 25 L. J. M. C. 77; 2 Jur. N. S. 428.

1. *Com. v. Goldstein*, 3 Pa. Co. Ct. 121.

What is Criminal False Pretence.—Defendant bought twenty-four mules of G., in Randolph county, for \$140 each, giving G. in payment for them \$80 in cash and a draft on M. & J., of St. Louis, for the balance, of \$3248, representing to G. that he had the money in the hands of M. & J. with which to pay the draft, when, in fact, he had in their hands but \$69.60, less \$32, the freight on the mules. Defendant ordered the car for the shipment of the mules, directed them to be shipped in G.'s name, and at his request they were so shipped, and, after the payment of the \$80 and giving the draft for the balance, defendant procured G. to sign a statement that he had bought the mules and that they were his. Defendant went to St. Louis on the train with the mules, and on the day they arrived he sold them and ran off with the money. He exhibited to the purchaser and to the consignee the statement he had procured G. to sign, showing he had bought the mules and that they were his. *Held*, that, when the defendant paid G. for the mules by giving him \$80 in cash and a draft for the balance, he became invested with the property in them and also their possession; that he was guilty of obtaining property by means of false representations, and that the venue of the offence was properly laid in Randolph county. *State v. Dennis*, 80 Mo. 589.

False Representations as to Solvency. Made by Letter—Venue County where Received.—In *Norris v. State*, 25 Ohio St. 217; s. c., 18 Am. Rep. 291, it appeared that the defendant was a resident

the contract is within the statute of frauds, the delivery to the carrier does not amount to a delivery to the purchaser, the venue must be laid, not in the jurisdiction where the goods are so delivered to the carrier, but in the jurisdiction where they were received by the defendant.¹

XV. INDICTMENT.—1. Joinder of Offences—Under the rule that joinder of the offences charged may be allowed where all arise out of the same transaction, a count for obtaining goods by false pretences may be joined to counts charging a conspiracy to obtain the goods, both the offences charged being only misdemeanors.²

of Clarke county, and, by fraudulent representations as to his solvency, contained in a letter, he induced the Akron Sewer-pipe Company, located in Summit county, to ship him by rail, to Clarke county, a lot of sewer-pipe. He was indicted in Clarke county, but the supreme court held, that the crime was committed in Summit, and remarked that "the weight of authority is clearly that the railroad company was the agent of defendant for receiving the goods at Akron, and carrying them to Springfield, and the delivery to it by the sewer-pipe company was, in legal contemplation, a delivery of the goods to the defendant at Akron."

In *Com. v. Taylor*, 105 Mass. 172, the evidence showed that the defendant represented to the owner of mowing-machines, in Worcester, that he was authorized by several persons, named by him, to give orders on their behalf for the purchase of their machines, to be sent them severally by order, at different places in Vermont. The machines were sent accordingly, but there where no such persons, and the defendant received the goods himself, as he had intended to do. The defendant contended that the evidence in the case was not sufficient in law to prove that the offence was completed in the county of Worcester; the court adopted the contrary view, and held that the goods were obtained there. The court say: "If there had been such persons as he named, and the machines had been sent to them, there might have been good reason to hold, that the goods were not delivered to him in this county. But as, in fact, these names, being fictitious, represented only himself, and as the goods were really sent to him and received by him, he was the real consignee. The well-established doctrine, that delivery to the carrier is a delivery to the consignee, must apply to this case, and thus the offence was committed in this county."

1. Venue must be Laid in the Place of

Delivery.—P. & S. resided and did business in Saline county. The travelling salesman of merchants in Douglas county sold them a bill of goods. The order of purchase was verbal. There was no written contract signed by P. & S. The evidence showed, delivery of the goods to a railroad for conveyance to P. & S., but did not show that they accepted or received the same or paid any part of the purchase-money. They were arrested, upon a warrant issued by a police court in Douglas county, under a complaint of obtaining money under "false pretences." On *habeas corpus*, held, (1) that the contract of purchase, being void under the statute of frauds, a delivery of the goods to the railroad was not delivery to P. & S.; (2), that, under the evidence, the police court of Douglas county had no jurisdiction of the alleged offence. *Ex parte Parker*, 11 Neb. 309.

2. Joinder of Misdemeanors.—In *Thomas v. People*, 113 Ill. 531, the first two counts of the indictment charged a conspiracy to obtain goods of a man by false pretences, the third count charged the obtaining of the goods by false pretences. The court held that both offences being only misdemeanors by common law and by the Illinois statute, the counts were properly joined. The court say: "A motion in arrest of judgment was made and overruled, and it is contended that this was error, because, first, if the offence of which the defendants were convicted was felony, then the third count, which was only for a misdemeanor,—that of obtaining goods by false pretences,—was improperly joined; and second, if the offence of which they were convicted was not felony, then the punishment imposed was improper. Without at all conceding, that a count for a misdemeanor can under no circumstances be joined with a count for felony, it is sufficient for the present to observe that the offence of which the defendants were convicted was not felony at common law (2 Bishop Cr. L. (4th ed.), sec. 231), and it is not made felony by our statute, and so is necessarily a misdemeanor."

Similarly, obtaining money by false pretences and larceny from a person, being offences of the same general nature belong to the same family of crimes, and are punishable in the same manner, though with different degrees of severity, and may be joined in different counts in the same indictment.¹ Thus it has been held that counts for embezzlement and for obtaining the same money by false pretences may be joined.²

or. *Lamkin v. People*, 94 Ill. 501. All the counts being for misdemeanors (and that, too, manifestly, for the same misdemeanor, stated in different ways), there was, even on theory of the counsel for plaintiff in error, no misjoinder. The offence being a misdemeanor only, why the punishment imposed was improper, we cannot divine. It was certainly competent for the legislature to provide that a misdemeanor might be punished by confinement in the penitentiary. It was so provided in the statute, and this verdict is within the meaning and intent of that statute."

1. *Johnson v. State*, 29 Ala. 62; s. c., 65 Am. Dec. 383.

2. **Joining False Pretences and Embezzlement.**—*State v. Lincoln*, 49 N. H. 464. In this case the defendant was a servant of the prosecuting witness and collecting the debt due to him, the indictment containing a count charging him with obtaining the money by falsely representing that he was the authorized collector of the prosecutors, and empowered to receive payment of the debt due to them, by means of which he obtained the amount of such debt. There was no count which charged that the respondent was the agent of the prosecutors and received payment of the debt, that he did receive it, and embezzled the money. It was held that there was no misjoinder. The court say: "We think it is quite apparent that the purpose of the prosecuting officer in this case was to charge the respondent with but one criminal transaction; but the offence was described in different ways, for the purpose of meeting the evidence as it might transpire on the trial, and to avoid the escape of a guilty party through the loop-hole of a mere technicality. There is no objection to this form of criminal pleading, under proper rules and restrictions. It is analogous to the forms of declarations in civil actions, and is admissible for the same purposes, in criminal as well as civil causes. It is never admitted, however, where it becomes apparent that injustice may result from it, or the prisoner be put to such inconvenience or embarrassment as may prevent a full and fair exhibition of his defence. But it is said that

a count for felony cannot be joined in the same indictment with a count for a misdemeanor; and that this indictment presents both a felony and a misdemeanor in its several counts. What is a felony and what a misdemeanor by our law, and in the criminal jurisprudence of many other States of the Union, is not always easy to determine. In some other States the distinction is made and defined by statute. But it is not so in New Hampshire; and it may seriously be doubted whether felony, in any proper or practical use of the term, is or can be recognized in our criminal jurisprudence. And since here, as in the United States generally, there can be no forfeiture of estate or goods, as a punishment for crime, the word "felony" has lost its characteristic and original meaning. Offences as to their designation in this respect, if the distinction becomes important, must be defined by the interpretation of the common law; and in that light the term felony is here perhaps generally used to denote any high crime, punishable by death or imprisonment in the State prison; offences of that character being such only as by the English law formerly had the penalty of forfeiture attached as an additional punishment. Such a criterion would not, however, be strictly correct, because larceny, for example, is undoubtedly regarded as a felony, though the value of the money or goods stolen may be so small as to render the offence not punishable by imprisonment in the State prison. 2 Bishop Cr. L. 875.

"And the two offences here joined are each so much of the nature of larceny, that by analogy both might be considered as felonies. Moreover, by our law, either offence may be punished by imprisonment in the State prison; and the fact that one of these offences may, but does not, by necessary force of the statute, receive a lighter punishment, would not reduce the character of the offence from felony to misdemeanor, if that character is determinable by the degree of the punishment which may be prescribed, since that degree is not dependent at all upon the value of the money or goods fraudulently appropriated. Gen. Stat. ch. 257, secs. 1, 8. If, then, the offence charged in each

2. Joinder of Counts.—For the purpose of meeting the offences which may be developed upon the trial, it is usual to join in the same indictment separate counts, to meet the state of facts which by any possibility may appear. It has been held that there is no misjoinder in an indictment for obtaining money by false pretences, when each count alleged that the pretences were made and the other counts with the pretences were made to the individual members of the firms.¹ If goods are obtained from a person by the same pretences repeated on different days, the whole pretences constitute but one transaction, and the prosecution is not bound to make an election.²

3. Joint Offenders.—If the false pretences form part of a scheme concocted by two or more, or if two or more act together in making the pretence and in obtaining the money, they are jointly guilty, and may be jointly indicted.³

4. Necessary Averments.—*a. Scienter.*—In every indictment for obtaining money or property by false pretences, it is essential to allege that the defendant made the pretences in the knowledge of their falsity.⁴ It has been held, that, if the indictment contain an

count may be charged as a felony (and though expressed as distinct offences, the purpose is apparent to present but one transaction), there is no objection, as we have seen, to the joinder of the two counts in the same indictment.

"But in the uncertainty which involves the character of the two offences here charged, we will adopt the arbitrary definition of some of the text writers, who, without explanation, make a distinction between the character of these offences, and designate the obtaining of money by false pretences as a misdemeanor, and embezzlement as a felony.

"We shall then find that the only reason which forbids the joinder of a count for felony with a count for misdemeanor, in the same indictment, contrary to the rule which permits the joinder of separate felonies, rests in the practice of the English and some of the American courts, which forbids a conviction for a misdemeanor only, on an indictment for a felony."

¹ Bishop's Cr. L. secs. 814, 823; ¹ Bishop's Crim. Proc. sec. 198, and authorities cited in note 3.

² 1. Oliver v. State, 37 Ala. 134.

² 2. Veasley v. State, 59 Ala. 20.

³ 3. Cowen v. People, 14 Ill. 348; Reg. v. Martin, 8 Ad. & El. 481; Jones v. United States, 5 Cr. C. C. 647; Reg. v. Moland, 2 Moo. C. C. 276; Young v. Rex, 3 T. R. 98; s. c., 1 Leach C. C. 505; 2 East P. C. 828; Reg. v. Connor, 13 Up. Can. C. P. 529.

Joint Offenders—Representations of One.
—In Com. v. Harley, 48 Mass. (7 Metc.) 462, the defendant accepted instructions

to the effect that the jury might convict both defendants upon false pretences made by either as part of the same transaction. The court say: "Though an indictment for perjury, and one for obtaining money, etc., by false pretences, etc., agree in the manner above mentioned, as to the necessity in each of distinctly negating the particular matters to be falsified; yet there is a distinction between these offences, which is to be here particularly noticed, viz., that though several persons cannot be joined in one indictment for perjury, because the words spoken by one defendant cannot possibly be applied to another as his act in falsely uttering those very words, perjury being in its nature a single transaction; yet in the case of a cheat, if a number of persons are all present acting a different part in the same transaction, or if all join in the relation of a thing as within their own knowledge, they thus obtain a greater degree of credit, and one alone cannot be said to have obtained the money or goods, etc., or defrauded the prosecutor; and no rule of criminal procedure is therefore violated by adjudging them guilty of the imposition jointly; and any supposed inconvenience arising from the confounding of the evidence, as to the several defendants, may be obviated; because, if it affects them differently, the judge who tries them may select the evidence which is applicable to each, and leave their cases to the jury." 1 Gabbett Cr. L. 214, 215.

⁴ 4. Johnson v. State, 75 Ind. 553; State v. Blauvelt, 38 N. J. L. (9 Vr.) 306; State v. Patillo, 4 Hawks. (N. C.) 348; Ma-

allegation that the defendant "knowingly, designedly, falsely, and feloniously pretended,"¹ etc., the scienter is sufficiently set out.² But it is not sufficient to allege that the defendant "designedly," feloniously, falsely pretended, etc.³ So, too, it is not sufficient simply to allege that the pretences were "falsely and fraudulently" made.⁴

b. Intent.—In every indictment for obtaining money by false pretences, it is necessary that there be an allegation of intent to defraud.⁵ Under the English statute, an indictment charging, that

randa v. State, 44 Tex. 442; s. c., 1 Am. Cr. Rep. 525; *Mathena v. State*, 15 Tex. App. 47; *Hirsch v. State*, 1 Tex. App. 395; *Coni. v. Speer*, 2 Va. Cas. 65; *Reg. v. Philpotts*, 1 Car. & K. 112; *Reg. v. Henderson*, 5 Moo. C. C. 192; s. c., Car. & M. 328.

Indictment—Form and Contents of.—An indictment charging that the defendant unlawfully did pretend to S. that a paper writing which he produced to S. was a good five-pound Ledbury Bank note, by means whereof he unlawfully obtained money from S., with intent to cheat and defraud him of the same, whereas, in truth and in fact, the paper writing was not a good five-pound note of the Ledbury Bank, is bad, as it does not charge that the defendant knew that it was not a good five-pound note of the Ledbury Bank, and is not aided by the allegation of the intent to defraud. *Reg. v. Philpotts*, 1 Car. & K. 112.

Sufficiency of the Indictment.—An indictment for obtaining money under false pretences, which set out such pretences, negatived their truth, and further alleged "all of which the defendant then and there knew," *held*, after verdict, not to be obnoxious to the objection that the scienter was not sufficiently averred. *State v. Jansen*, 80 Mo. 97; s. c., 7 Cr. L. Mag. 802.

Rule in Texas.—See *Arnold v. State*, 11 Tex. App. 472.

1. Did Unlawfully and Falsely Pretend.—In an indictment for obtaining money by false pretences, under 7 and 8 Geo. IV. c. 29, it was alleged that the defendant "did unlawfully, falsely pretend," etc. *Held*, that the omission of the word "knowingly" was no ground for arresting the judgment. *Reg. v. Bowen*, 4 New. Sess. Cas. 62; s. c., 3 Cox C. C. 483; 13 Q. B. 790; 19 L. J. M. C. 65; 13 Jur. 1045.

2. State v. Hurst, 11 W. Va. 54.

3. State v. Smallwood, 68 Mo. 192; *State v. Bradley*, 68 Mo. 140.

Representations "Designedly" Made.—*Compare State v. Snyder*, 66 Ind. 203, in

which it was held that a charge that the pretences were "designedly" made with intent to defraud, imputes a knowledge of the falsity of the representations.

4. Reg. v. Henderson, 2 Moo. C. C. 192; s. c., Car. & M. 328.

5. An Indictment for a Violation of U. S. Rev. Stat., sec. 5132, when founded on a charge of obtaining goods by false pretences, need not charge an intent to defraud creditors generally; nor need it negative that the accused was carrying on business when he obtained the goods. *United States v. Myers*, 19 Bank Reg. 387.

An Indictment for Swindling, under the Texas Penal Code, art. 773, must charge that the offence was committed feloniously. *State v. Small*, 31 Tex. 184.

With Intent to Defraud.—If, in an indictment for false pretences the words "with intent to defraud" are omitted, the indictment is bad and cannot be amended under 14 and 15 Vict., c. 100, § 1. *Reg. v. James*, 12 Cox C. C. 127.

"Asked and Requested" "to Pay and Deliver."—An indictment for obtaining money by false pretences alleged that the defendant made certain false pretences, and "then and there asked and requested" the person defrauded, "in consideration thereof, to pay and deliver," to the defendant, the money in question. *Held*, that the indictment sufficiently set forth the defendant's purpose in making the false pretences. *Com. v. Howe*, 132 Mass. 250; s. c., 4 Cr. L. Mag. 287.

"Knowingly, Feloniously and Designedly."—An indictment under Wag. Stat. § 47, p. 461, for obtaining the property of one H. M. under false pretences, after setting out the false pretences resorted to, and charging that they were unlawfully, wilfully, knowingly, feloniously and designedly made by defendant, averred that H. M., relying on them as being true, delivered his property to defendant, and further charged that, by means of these false pretences, defendant unlawfully, etc., obtained said property from said H. M. with intent to defraud and cheat said H

the prisoner did "feloniously pretend," is bad;¹ but it has been held in North Carolina, that an averment that the act was done with felonious intent is surplusage.² Although the acts and pretences of the defendant are properly set out, the indictment is bad except it contain a specific averment of intent, for the law will not infer an intent, even though corresponding with the obvious consequences of the defendant's acts.³

c. Specification of Pretences.—The indictment must state what the false pretences are, and must set them out in such terms that the court can determine whether they come within the statute.⁴

M. Held, that the indictment was not insufficient as failing to allege that the false pretences were made with intent to cheat and defraud, and were relied upon by *H. M. State v. Smallwood*, 68 Mo. 192; s. c., 1. Cr. L. Mag. 667.

Aider by Verdict.—An indictment charging that the defendant, contriving and intending to cheat *W.*, on a day named did falsely pretend to him that he, the defendant, then was a captain in her Majesty's fifth regiment of dragoons, by means of which false pretence he did obtain of *W.* a valuable security, to wit, an order for the payment of £500, of the value of £500, the property of *W.*, with intent to cheat *W.* of the same, whereas, in truth, he was not, at the time of making such pretence, a captain in her Majesty's regiment, and the defendant, at the time of making such false pretence, well knew that he was not a captain,—is a good indictment after conviction and judgment; for it was not necessary to allege more precisely that the defendant made the particular pretence with the intent of obtaining the security, nor how the particular pretence was calculated to effect, or had effected, the obtaining; and the truth of the pretence was well negated, it appearing sufficiently that the pretence was, that the defendant was a captain at the time of his making such pretence, which was the fact denied; and it was necessary to aver expressly, that the security was unsatisfied, at any rate since 7 Geo. IV. c. 64, § 21, the objection being taken after verdict, and the indictment following the words of the statute creating the offence. *Hamilton v. Reg.* 9 Q. B. 271; s. c., 2 Cox C. C. 11; 16 L. J. M. C. 9; 10 Jur. 1028.

1. *Rex v. Walker*, 6 Car. & P. 657.

2. "**With Felonious Intent**"—**Surplusage.**—An indictment charging that the defendant wilfully, etc., pretended to the prosecutor, that he had cut for him, for the use of another, twenty cords of wood, whereas, in truth and fact, he had not cut the same, and by means of said false pretence did obtain from prosecutor \$3 in

money, with intent, etc., is sufficient. An averment, that the act was done with felonious intent, is surplusage. *State v. Eason*, 86 N. C. 74.

3. *Stringer v. State*, 13 Tex. App. 520, overruling *Tompkins v. State*, 33 Tex. 228, and *Robinson v. State*, 33 Tex. 341.

4. *State v. Metsch* (Kan.), 15 Pac. Rep. 251; *Glacken v. Com.*, 8 Met. (Ky.) 233; *Com. v. Goddard*, 86 Mass. (4 Allen) 312; *State v. Bonnell*, 46 Mo. 395; *People v. Gates*, 13 Wend. (N. Y.) 311; *Com. v. Bracken*, 14 Phila. (Pa.) 242; *Fuller's Case*, 2 East P. C. 837, ch. 18, § 13; *Reg. v. Goldsmith*, 44 L. J. M. C. 94; s. c., L. R. 2 C. C. Res. 74; *Rex v. Mason*, 2 T. R. 581; s. c., 2 East P. C. 837; 1 Leach, 487. Compare *State v. Porter*, 75 Mo. 171; *Com. v. Barger*, 14 Phila. (Pa.) 368.

Alleging an Article to be "all Right."—An indictment for false pretences, charging that the defendant represented a horse which he traded to prosecutor "to be all right, whereas, in truth and in fact, he was not all right, but diseased to such an extent as to render him worthless," held, to be too indefinite, and a motion in arrest of judgment, after conviction, to be properly allowed. *State v. Lambeth*, 80 N. C. 393.

In an Indictment for Attempted Cheating, where the names of the persons against whom the attempt was made are unknown, that fact should be set out, and the "trick," etc., made use of should be alleged with particularity; and an indictment, under Mo. Rev. Stat. 1879, § 1561, charging that the accused, at a certain time and place, "did, with intent," etc., "to feloniously cheat and defraud unlawfully," etc., "attempt to obtain from certain persons," etc., "by means and use of a certain trick and deception, and by means and by use of certain false and fraudulent representations," etc., "a large sum of money," etc., is bad, because it does not sufficiently set forth the trick or device of which the defendant

made use. *State v. McChesney*, 90 Mo. 120.

Conspiracy to Cheat and Defraud.—An indictment charging that the defendants, with others unknown, unlawfully conspired to cheat and defraud, and in pursuance of the said conspiracy did defraud and obtain from Mary Graff twenty-five cents, commonly called a quarter of a dollar, by means of divers unlawful, false, and fraudulent devices, pretences, and representations, is demurrable, because the devices, pretences, and representations are not laid in the indictment. *Com. v. Bracken*, 14 Phila. (Pa.) 242; s. c., 37 Leg. Int. 14.

Allegation of Manner in which Goods Parted with.—An indictment in such case, that does not allege the manner in which the goods were parted with and obtained, so as to show the connection of the false pretences therewith, is bad for uncertainty. *State v. Williams*, 103 Ind. 235.

Same—"In Fair and Usual Course of Trade."—In an indictment for obtaining goods by false pretences, it was charged that the accused represented that "he wanted to buy goods on credit, in the fair and usual course of trade" etc., and that the goods were delivered on the faith of the representation. *Held*, sufficient, without a more specific statement of the transaction. *State v. Jordan*, 34 La. An. 1219; s. c., 16 Rep. 333.

Setting Out "Attempts."—An indictment stated, that A did unlawfully attempt and endeavor, fraudulently, falsely, and unlawfully to obtain, from the Agricultural Cattle Insurance Company, a large sum of money, to wit, £22 10s., with intent to cheat and defraud the company. *Held*, that the nature of the attempt was not sufficiently set forth. *Reg. v. Marsh*, 1 Den. C. C. 505; s. c., T. & M. 292; 3 New Sess. Cas. 699; 19 L. J. M. C. 12; 13 Jur. 1019.

Representation as to Amount of Land—Greater Amount Received than Paid for.—Where A had procured, by means of a forged paper, the conveyance to himself from B, of 55½ acres of land, on payment of the price of only 35½ acres, *held*, that the indictment should allege that there was an actual excess of 20 acres, and that the fraud, which was to obtain a deed of the whole 55½ acres on paying for 35½ acres, did not come under any definition of fraud under the common or statute law. *State v. Burrows*, 11 Ired. (N. C.) L. 477.

Misrepresentations as to Identity of Maker of Note.—An indictment charged the obtaining of money by the false pre-

tence, that the maker of a note was a certain A, and not another person of the same name living in the same town. *Held*, that the indictment was not defective in not charging that the one was irresponsible while the other was not; that evidence of this might be given; and that the maker of the note might testify as to the circumstances under which he made it. *People v. Cook*, 41 Hun (N. Y.), 67.

Cheating by Use of False Coin.—An indictment charging a false pretence that a false coin was good and current gold coin, and that the person to whom the pretences were made, being deceived thereby, was thereby induced to receive the same as good and current gold coin, and to deliver to the defendant, in exchange therefor, certain bank bills and silver coin described, sets forth the contract with sufficient certainty. *Com. v. Nason*, 75 Mass. (9 Gray) 125.

Pledge of Watch of Third Person.—An indictment for cheating by false pretences averred that the defendant pledged a watch belonging to a third person as security for the performance of a certain act, falsely exaggerating its value, but contained no allegation of any authority from the owner to pledge it. *Held*, bad on demurrer, as showing on its face that the watch belonged to a third person. *State v. Estes*, 46 Me. 150.

Direct and Positive Allegation in Description of Substance and Nature of Article.—The want of a direct and positive allegation in the description of the substance, nature, or manner of the offence charged in an indictment, cannot be supplied by any intendment, argument, or implication whatever. Therefore, where the substance of the allegations of an indictment were, that the defendant got money on a mortgage of land which he falsely represented to be well wooded and timbered, having upon it a valuable growth of hard and soft wood and hemlock bark, and containing one hundred acres, whereas, in fact, the land was not well-wooded and well timbered, and did not have upon it a valuable growth of wood, bark, or timber, and did not contain one hundred acres, *held*, that the indictment was bad, in that the charge was laid inferentially, and not directly and positively. *State v. Paul*, 69 Me. 215; s. c., 1 Cr. L. Mag. 408.

Sale of Mortgage—Allegation Respecting Representations as to Purchaser.—An indictment for false pretences, in selling a mortgage which alleges that the prisoner pretended that he had recently sold the real estate covered by the mortgage, and

If, however, the indictment sets out the offences so that the court can determine whether they come within the statute, it is not essential that all the details of the fraud should be stated.¹ If

that said real estate was situated in I., but which does not give the name of the purchaser or describe the property, and does not allege that such name and description are unknown, is bad on a motion to quash, as being too uncertain and indefinite. *Keller v. State*, 51 Ind. 111; s. c., 1 Am. Cr. Rep. 211.

Cheating by False Token—False Certificate of Stock.—An indictment for cheating by false pretences, setting forth a certificate of stock as the false token with which the fraud was committed, need not set forth in what manner the certificate could be used to deceive. *Com. v. Coe*, 115 Mass. 481; s. c., 2 Cr. L. Rep. 292.

Description of Farms.—Two farms, pretended to be owned by the defendant, are definitely described by giving the town and county where situated, and the names they commonly went by. *Skiff v. People*, 2 Park. Cr. Cas. (N. Y.) 130.

An Indictment for Selling by False Weights, in Tennessee, must specify the person to whom the sale was made. It is not sufficient to charge that the defendant sold to "divers persons." *State v. Woodson*, 5 Humph. (Tenn.) 55.

Falsely Obtaining Order.—A municipality having provided some wheat for the poor, the defendant obtained an order for 15 bushels, described as "three of golden drop, three of Fife, nine of milling wheat." Some days after, he went back and represented that this order had been accidentally destroyed, when another was given to him. He then struck out of the first order the words, "three of golden drop, three of Fife," and, presenting both orders, obtained in all 24 bushels. The indictment charged that defendant unlawfully, fraudulently, and knowingly, by false pretences, did obtain an order from A, one of the municipality of B, requiring the delivery of certain wheat by and from one C, and by presenting the said order to C, did fraudulently, knowingly, and by false pretences procure a certain quantity of wheat, to wit, nine bushels of wheat, from the said C, of the goods and chattels of the said municipality, with intent to defraud. *Held*, sufficient in substance, not being uncertain or double, but, in effect, charging that defendant obtained the order, and, by presenting it obtained the wheat by false pretences. *Held*, also, that the evidence set out in the case was sufficient to sus-

tain the conviction. *Reg. v. Campbell*, 18 Q. B. 413.

Falsely Obtaining Payment of Claim by County—Description of Pretences.—Counts of an indictment, charging false pretences in obtaining payment of a claim against a county, which fail to accurately describe the pretences, the order or warrant issued to the defendant, to whom it was payable, and for what amount it was drawn, and the connection between the false pretences relied upon by the board of commissioners in allowing the claim, and the act of the treasurer in paying the amount allowed, are insufficient on motion to quash. *Johnson v. State*, 75 Ind. 553; s. c., 3 Cr. L. Mag. 584.

Setting Out Words Used.—An indictment for false pretences consisting in words used by the respondent, may set them out as uttered, without explaining their meaning. *State v. Call*, 48 N. H. 126.

1. False Bill Against City.—The prisoner, G., procured one D. to make out a false and fraudulent bill against the city, and procured the same to be certified and sent to the comptroller. He also requested the auditor to certify it, the comptroller to draw a warrant therefor, and the mayor to sign it—all of which was done by them, relying on the representations of the bill. *Held*, that an indictment charging G. with having falsely pretended and represented to the mayor that the city was justly indebted to D. for the amount of the bill, and thereby inducing the mayor to sign and deliver to him the warrant, was sufficient; that it was not necessary that all the details of the fraud should be stated; that it cannot be assumed that a municipal corporation, acting only through its officers and agents, would necessarily know that a debt claimed to be due from it was without foundation. *People v. Oyer and Terminer*, 83 N. Y. 436; s. c., 12 N. Y. Week. Dig. 16.

How Money Obtained—Need Not be Set Out.—It is not necessary to state in the indictment whether the money was obtained by sale, bailment, or otherwise, and at the trial the particular mode may be proved. *Skiff v. People*, 2 Park. Cr. Cas. (N. Y.) 139.

Procuring Signature by False Representations.—An indictment which alleges that the defendant procured the signature of another to a note by "false representa-

there be several false pretences, only one of them need be set out in the indictment; or, if several be set out and one is proven, the indictment is sustained.¹ An indictment which states an offence with proper precision and familiarity will not be quashed, although it contain some immaterial allegations, or although some one of the pretences may not be properly charged.² These statements must be set out in such terms, that the court may decide whether the party relied on existing facts; otherwise the indictment is bad.³ An indictment for unlawfully receiving goods which had been obtained by false pretences must be objected to before plea, if it

tions," sufficiently charges the crime of cheating by false pretences. *State v. Joaquin*, 43 Iowa, 131.

Attempt to Procure Property with Worthless Bank Note.—The prisoner was convicted of attempting to obtain a sewing-machine by false pretences. The indictment alleged, that the prisoner did falsely pretend that a paper, partly in print and partly in writing, produced by the prisoner to the prosecutor, and purporting to be a bank note for the payment to the bearer of £5, was then a good, genuine, and available order for the payment of the sum of £5, and was then of the value of £5, etc., by means of which false pretences the prisoner did unlawfully attempt to obtain a sewing-machine. The evidence was, that the prisoner bargained for the purchase of the sewing-machine for 35s., and said that a friend had told her to get one, and had sent her the money to pay for it, and at the same time gave a worthless bank note for £5, payable to the bearer on the Devonshire Bank, which had stopped payment many years ago. The prisoner knew at the time that the bank had stopped payment, and that the note was of no value. *Held*, that the indictment, though inartificially framed, sufficiently alleged that the prisoner falsely represented the note to be a good and genuine note of an existing bank, and was of the value of £5, and that the evidence supported the conviction. *Reg. v. Jarman*, 14 Cox C. C. 111; s. c., 1 Cr. L. Mag. 408.

1. *State v. Vandermark*, 35 Ark. 396.

2. *Com v. Stevenson*, 127 Mass. 46.

3. *Reg. v. Henshaw*, L. & C. 444; s. c., 9 Cox C. C. 472; 33 L. J. M. C. 132; 10 Jur. N. S. 595; 10 L. T. 428.

Pretences as to Knowledge—Allegations.—An indictment charged A with falsely pretending to B, whose mare and gelding had strayed, that A would tell B where they were. *Held*, that the conviction must be quashed; the indictment should have stated that A pretended to know where they were. *Rex v. Douglas*, 1 Moo. C. C. 462.

Representations as to Expectancy.—In an indictment alleging that the prisoner pretended, to A's representative, that she was going to give him 20s. for B, and that A was going to allow B 16s. per week, it does not sufficiently appear that there was any false pretence of an existing fact. *Reg. v. Henshaw*, L. & C. 444; s. c., 9 Cox C. C. 472; 33 L. J. M. C. 133; 10 Jur. N. S. 595; 10 L. T. 428; 12 W.R. 751.

Representations as to Existing Fact.—An indictment alleging that the defendant falsely pretended a sum of money, parcel of a certain large sum, was due and owing to him for work which he had executed for the prosecutor, is not an allegation of a false pretence of an existing fact, as the allegation might be satisfied by evidence of a mere matter of opinion, either as regarded fact or law; and therefore the indictment is bad. *Reg. v. Oates, Dears*, C. C. 459; s. c., 6 Cox, C. C. 540; 24 L. J. M. C. 123; 1 Jur. N. S. 429.

Representations as to Money Due on Work.—In an indictment, the pretence averred in some of the counts, it was said that the prisoner falsely pretended that he, having executed work, there was a sum of money due and owing to him for and on account of the work, being parcel of a larger sum claimed by him, whereas there was not then due and owing to him such money, being parcel of a larger sum. The false pretence averred in other counts was that the prisoner falsely pretended that there was due and owing to him the whole amount of a sum of money for and on account of work executed by him, whereas, there was not then due and owing to him the whole amount of such sum of money, but only a smaller sum. *Held*, that the indictment was bad, inasmuch that a false pretence of an existing fact was not sufficiently alleged, and the averments would not be proved by evidence of a mere wrongful over-charge. *Reg. v. Oates, Dears*, C. C. 459; s. c., 3 Eng. C. L. 661; 24 L. J. M. C. 123; 1 Jur. N. S. 429.

fail to set out what the particular false pretences were; otherwise it will be cured by a verdict of guilty.¹

d. Description of Writing Used.—If the money or property is obtained by the use of a false or defective writing, although it is not essential that the tenor should be given, it must be set out with sufficient decision to indicate its nature and contents.²

1. *Reg. v. Goldsmith*, L. R. 2 C. C. Res. 64; s. c., 42 L. J. M. C. 94; 28 L. T. 881.

Cheating in "Swapping" of Horses.—A was indicted for obtaining a horse of B by the false pretence that the mare which he exchanged therefor was his own, and was unencumbered, and the indictment did not allege that the mare was of any value. *Held*, after conviction, that this was not a sufficient ground for an arrest of judgment. *State v. Dorr*, 33 Me. 498.

2. **Forged Certificate of Stock.**—An indictment for cheating by false pretences charged, that the defendant obtained money as a loan from a person by falsely pretending that a forged certificate of stock was good, valid, and genuine certificate of stock, and set forth the certificate at length. *Held*, that the fact that the certificate was made out in the name of the lender, was no reason for quashing the indictment. *Com. v. Coe*, 115 Mass. 481; s. c., 2 Am. Cr. L. Rep. 292.

Same—Specifying Manner in which Used.—In an indictment for cheating by false pretences, the false token, as a certificate of stock, may be set forth without specifying in what manner it should be used to deceive. And the property obtained may be described as "a check for the payment of money," without setting it forth at length. *Com. v. Coe*, 115 Mass. 481; s. c., 2 Am. Cr. Rep. 272.

Order for Money—Description of Writing.—If an indictment for attempting to obtain money under false pretences charges it to have been attempted by means of a paper writing purporting to be an order for money, and the instrument cannot be considered, as stated in the indictment, to be such an order, it is bad. *Rex v. Cartwright*, R. & R. C. C. 106.

Same—Indorsements.—In such case, an allegation that the certificate was of the "tenor following," is to be referred to the time when the false pretence was made; and indorsements thereon need not be set forth. *Com. v. Coe*, 115 Mass. 481; s. c., 2 Am. Cr. Rep. 292.

Personating Captain of a Vessel.—An indictment that A. unlawfully did falsely pretend to W., that he was a captain in the East India Company's service, and that a promissory note, which he "then and

there produced and delivered to W., purporting to be made for the payment of twenty-one pounds, not saying by whom it purported to be drawn, nor otherwise describing it, was a good and valuable security for twenty-one pounds; by which false pretences, he obtained," etc., whereas the defendant was not a captain in the company's service, and whereas the promissory note which he then and there produced and delivered to W. "was not a good and valuable security for twenty-one pounds, or for any other sum," *held*, that the indictment did not sufficiently describe the note, or show how it was wanting in value; and that a conviction could not be supported on the representation as to the defendant's character, because the false pretences were so connected on the record that one could not be separated from the other. *Wickham v. Reg.*, 2 P. & D. 333; s. c., 10 Ad. & El. 34.

Real Estate—Setting Out Deed to.—An indictment for false pretences in the sale of real estate, did not, in terms, allege that the deed was sealed, but set forth the deed the attesting clause of which so stated. *Held*, a sufficient averment that the deed was under seal. *Webster v. People*, 17 Week. Dig. 197; s. c., 4 Cr. L. Mag. 944.

Cheating by Chattel Mortgage—Failure to Set Out the Mortgage.—An indictment for swindling, which alleges that defendant fraudulently procured goods by means of a false and fraudulent chattel mortgage, in writing, executed by defendant on certain cattle, when, in fact, he owned no cattle, but which fails to set out the mortgage, is fatally defective. *Hardin v. State (Tex.)*, 7 S. W. Rep. 534.

Mortgage of Cotton Crop to be Raised—Description of Deed.—An indenture whereby the party of the first part agrees to deliver, to the party of the second part, his crop of cotton, planted, as a security for the payment of a sum of money, upon default in the payment of which the party may sell such crop, is sufficiently described as a deed of trust in an indictment for obtaining money by falsely pretending that said sum had been paid. *Oliver v. State*, 37 Ala. 134.

Promissory Note—Setting Out Defect.—An indictment for falsely representing an

c. Inducement to Part with Property.—The indictment must show, that the goods were obtained by means of false pretences, and that the prosecutor was induced to part with them by his reliance upon the misrepresentations.¹ But it is not essential to al-

instrument of writing, in form a promissory note, to be a draft, and thereby obtaining money for it, is not sufficient. The indictment should disclose in what particular the instrument was defective. The name of the instrument, if valid, is immaterial. *State v. Dyer*, 41 Tex. 520.

1. *Pendry v. State*, 18 Fla. 199; *State v. Conner*, 110 Ind. 469; *Johnson v. State*, 11 Ind. 481; *State v. Philbrick*, 31 Me. 101; *Clark v. People*, 2 Lans. (N. Y.) 329; *People v. Herrick*, 13 Wend. (N. Y.) 88; *Norris v. State*, 25 Ohio St. 217; s. c., 2 Am. Cr. Rep. 85; *State v. Tate*, 6 Humph. (Tenn.) 424; *Hightower v. State*, 23 Tex. App. 451; *Erwin v. State*, 11 Tex. App. 536; *Reg. v. Closs, Dears. & B. C. C.* 460; s. c., 7 Cox C. C. 494; *Reg. v. Kelleher*, 8 Ir. L. R. 11; s. c., 14 Cox C. C. 48.

Inducing Person to Contract for Property—Allegation as to Pretences.—An indictment, charging that the defendant procured a signature to a note by false pretences, used to induce the person whose signature is thus obtained to contract for the purchase of an article of property, is bad if it does not state that the person whose name was procured relied upon such pretences as true, and upon the faith thereof purchased the property, and in consideration thereof executed the note set out in the indictment. *Jones v. State*, 50 Ind. 473; to the contrary, *Norris v. State*, 25 Ohio St. 217.

What Allegations are Unnecessary.—It is not necessary, that an indictment for obtaining property by false pretences should state, in terms, that credit was given to the representations alleged to have been falsely made, when it contains the allegations that, by the representations so made, the defendant obtained the property. *State v. McConkey*, 49 Iowa, 499.

Indictment—What Should Charge in Terms.—An indictment for obtaining property by fraudulent representations, should charge, in terms, that the property was acquired by means of the fraudulent representations. It is not sufficient to allege, that the owner was swindled out of the value of the property by means of the fraudulent representations. *Epperson v. State*, 42 Tex. 79.

Same—Under Alabama Code.—An indictment under Alabama Rev. Code, § 3731, which alleges that the defendant "fraudulently exhibited a false sample of

cotton, by means whereof one W. G. was injured," is sufficient. *Cowles v. State*, 50 Ala. 454.

Same—Sufficiency of.—An indictment for obtaining goods by false pretences, which charges the accused with representing that his firm had commenced business with a certain capital; that, at the date of the representations, they had goods on hand and debts due to them equal to that amount; that the total indebtedness of the firm only amounted to a specified sum, and that it was doing a certain amount of business each year; and that a merchant, "relying on said representations and pretences, and believing the same to be true, and being deceived thereby," sold a quantity of goods on credit,—is insufficient if it is not averred that it was by means of such false representations that the merchants were induced to part with their goods. *State v. Conner* (Ind.), 11 N. E. Rep. 454; s. c., 9 Cr. L. Mag. 560.

In an Information Against a Party for Obtaining Money by False Pretences, it was alleged, that, "by reason of the false pretences," the accused obtained the money, the words of the statute being "by false pretences," *held*, the allegation was sufficient. *Cowan v. State* (Neb.), 35 N. W. Rep. 405; s. c., 10 Cr. L. Mag. 323.

Obtaining "Credit" by False Pretences.—An indictment alleging that, to obtain credit, certain false representations were made, and that by means of such representations certain goods were obtained by defendant from A. B. "on credit," *held*, not to show that the goods were delivered in pursuance of the representations. *State v. Williams*, 103 Ind. 235.

Alleged False Pretence Must be Proved.

—On a trial of an indictment, which charged the prisoner with obtaining a horse of the prosecutor by falsely representing himself to be the servant of Hardman, of Stickley, the evidence was, that the prisoner at first represented himself as a servant of Hardman, of Stickley Farm, but that afterwards, learning that the prosecutor had mistakenly supposed that he had said that he was the servant of Harding, late of Benwell Lodge, he adopted that view and virtually said that he was the servant of Harding, late of Benwell Lodge, and now of Stickley Farm. It was proved that the prosecutor parted with his horse in the belief that the prisoner

lege, in express words, that the party defrauded relied upon the false representations; this is necessarily implied from the allegation, that he was induced by the false representations to part with the goods or money, or to do the thing complained of.¹ In some cases it is held that the indictment must contain terms which connect the false pretences with the obtaining of the goods.²

f. Negating False Pretences Charged.—In every indictment it is absolutely essential, that there should be an averment that the pretences charged, or some of them, are false.³ The averment of

was the servant of Harding. *Held*, that the conviction could not be supported, as the real pretence that operated on the prosecutor's mind was not alleged in the indictment. *Reg. v. Bulmer, L. & C. 476*; s. c., 9 Cox C. C. 492; 33 L. J. M. C. 171; 10 Jur. N. S. 684; 10 L. T. 580; 12 W. R. 887.

Money Obtained as a Loan.—An allegation, in an indictment for cheating by false pretences, that the defendant "obtained money as a loan, with the intent to cheat and defraud," is sufficient. *Com. v. Coe, 115 Mass. 481*; s. c., 2 Am. Cr. L. Rep. 292.

Indictment—Omitting "Thereby"—Sufficiency.—An indictment, charging obtaining property by false pretences, omitted the word "thereby" in attempting to charge, that, induced by the false representations, the party defrauded parted with his property. *Held*, that, the meaning being clear, the indictment should be deemed sufficient. *State v. Neimeier, 66 Iowa, 634*.

Obtaining Money by Tricks and Deception.—An indictment charging, that defendant, "by use of certain tricks and deception, and by means . . . of certain false and fraudulent . . . pretences," attempted to obtain a sum of money "from certain persons, firms, and corporations then and there composing a voluntary association called the 'Brewers' Association of St. Louis,' a more particular description of which is to the jurors unknown," *held*, sufficiently definite, both as to the means and the persons. *State v. McChesney, 16 Mo. App. 259*.

1. *State v. Penley, 27 Conn. 587*; *People v. Jacobs, 35 Mich. 36*; *Baker v. State, 14 Tex. App. 332*. See also *Enders v. People, 20 Mich. 233*.

Reliance on False Pretences.—It is necessary, that it should appear, from an indictment for obtaining money by false pretences, that the prosecutor was induced to part with his money by relying on the alleged false pretences; but it is not necessary that this should be alleged in these specific words. The statement, that the prisoner, by means of false pretences, ob-

tained the money, is a sufficient allegation of the fact. *State v. Hurst, 11 W. Va. 54 s. c., 3 Am. Cr. Rep. 100*.

Same—Allegations.—It is sufficient, as showing that the firm believed the representations to be true, to charge that they "relied on such false representations." *State v. Williams, 103 Ind. 235*; s. c., 6 Am. Cr. Rep. 253.

2. *Jones v. State, 50 Ind. 473*; s. c., 1 Am. Cr. Rep. 218; *State v. Orvis, 13 Ind. 556*.

Same—Representations as to Accounts.—Where the gist of the charge was, that the accused falsely represented that a certain account was good and collectable, and that he could and would assign it to the prosecutor, but the indictment did not allege that he did assign it, or that the prosecutor paid for it, relying on the false representations. *Held*, that it was fatally defective. *State v. Saunders, 63 Mo. 482*.

Bogus Draft—Allegation of Delivery Necessary.—Inasmuch as an indictment for swindling by means of a bogus draft failed to allege, that the draft was delivered to or accepted by the injured party as the consideration upon which the money was advanced, the motion to quash should have prevailed. *Lutton v. State, 14 Tex. App. 518*; s. c., 5 Cr. L. Mag. 914.

An indictment for obtaining goods by means of a false token or writing which fails to allege that the token or writing was delivered by the defendant and received by the prosecuting witness in exchange or payment for the goods, is bad, and the motion to quash it ought to be sustained. *Wagoner v. State, 90 Ind. 504*; s. c., 5 Cr. L. Mag. 746.

Same—Setting out Contract—Necessity for.—An indictment for false pretences, which does not set out the contract into which the prosecutor was induced to enter by means of the false pretences, is bad on a motion to quash, because it does not show why or how the prosecutor was induced by means of the false pretences to part with his property. *Jones v. State, 50 Ind. 473*; s. c., 1 Am. Cr. Rep. 218.

3. *Pattee v. State, 109 Ind. 545*; *Keller v. State, 51 Ind. 111*; *State v. Webb,*

falsity must be distinct and specific as in an assignment of perjury.¹ But if the false pretences have been compounded with statements which are true, those statements which of themselves are false are sufficient to sustain a conviction; and it is accordingly held that if any one of the pretences used be properly negated

26 Iowa, 262; State v. De Lay (Mo.), 5 S. W. Rep. 607; State v. Bradley, 68 Mo. 140; State v. Pickett, 78 N. C. 458; Redmond v. State, 35 Ohio St. 81; Amos v. State, 10 Humph. (Tenn.) 117; Tyler v. State, 2 Humph. (Tenn.) 37; State v. Levi, 41 Tex. 530; Rex v. Airey, 2 East, 30; R. v. Perrott, 2 Maule & S. 379.

1. State v. Metsch, 37 Kan. 222; s. c., 15 Pac. Rep. 251; State v. Peacock, 31 Mo. 413; People v. Haynes, 11 Wend. (N. Y.) 557. Compare Skiff v. People, 2 Park. Cr. Cas. (N. Y.) 139; Amos v. State, 10 Humph. (Tenn.) 117; Tyler v. State, 2 Humph. (Tenn.) 37; Com. v. Rosenberg (Pa.), 3 Law L. Rev. 75.

Invalid Note—Allegation of Rendering so.—An indictment charged swindling by means of an invalid and spurious note, which defendant represented to be valid and genuine, knowing the contrary. The indictment set out the note apparently valid on its face *in haec verba*, but did not allege the facts which rendered it worthless. *Held*, that it was fatally defective. Wills v. State (Tex.), 6 S. W. Rep. 316; s. c., 10 Cr. L. Mag. 471.

Solvency of Bank—Negating.—Where the indictment charges the false pretences to be that a certain bank was solvent and able to pay its debts, an allegation, in the indictment, that the bank was not solvent and able to pay its debts is a sufficient negative of the pretended facts. Com. v. Wallace, 114 Pa. St. 405; s. c., 60 Am. Rep. 353.

Obtaining Property Subject of Larceny.—An indictment, under Ky. Gen. Stat. ch. 29, art. 13, § 2, punishing any person who, by any false pretence or statement, with intention to commit a fraud, obtains from another money or property which may be the subject of larceny, alleged that the accused fraudulently represented to R. that C. had told him to come to R.'s store and get certain property specifically described in the indictment, and that C. would pay for it; and the said R., relying on the representations of the accused, let him have the goods; that all the statements were false, and known to be false when made. *Held*, that the averment, that all said statements were false, was sufficiently definite to enable the accused to know the nature of the charge against him. Com. v. Whit-

ney, 3 S. W. Rep. 533; s. c., 9 Cr. L. Mag. 560.

Personating Another Person—Negating Averments.—Where K. was indicted in the following form: that he did falsely pretend that he, the said K., was one G., who had moneys deposited in the Cork Savings Bank, and who had a book of the said bank with a statement of his account in it, which book he, the said K., presented to the cashier of the bank at the time he represented himself to be the said G., by means of which said false pretence the said K. obtained moneys, etc., whereas, in truth, K. was not the person so named in the said savings bank book, nor had he any then, or at any other time, authority from the said G. to present the said book at the savings bank for the purpose of drawing out money, neither had he, the said K., any authority from G. to draw money from the said bank,—it was held, that the subsequent portion of this indictment did not negative the previous averments; and in consequence the indictment was quashed. Reg. v. Kelleher, 2 Ir. L. R. 11.

False Pretence in Mortgage—Setting Out Other Incumbrances.—In an indictment for false pretences in the sale of a mortgage, where the pretence is, that the property covered by the mortgage is not subject to any prior liens, an allegation that the property was subject to prior liens, but which does not set them out or describe them, is insufficient. Keller v. State, 51 Ind. 111; s. c., 1 Am. Cr. Rep. 211.

Sale of Mortgage—Representations as to Value of Premises—Allegations as to Value.—In an indictment for false pretences in the sale of a \$500 mortgage, where the pretence was that the real estate covered by the mortgage was worth \$3500, an allegation that the real estate was not worth \$3500 is insufficient. The indictment should show that the property was not of sufficient value amply to secure the sum of \$500. Keller v. State, 51 Ind. 111; s. c., 1 Am. Cr. Rep. 211.

In Texas, under what is known as the "Common-Sense Indictment Act," of 1880. See Eppstein v. State, 11 Tex. App. 480; Arnold v. State, 11 Tex. App. 472.

in the indictment, and falsity is established by sufficient evidence, the conviction is good.¹

g. Description of Property, etc., Obtained.—(1) *Property*.—It is held as a general rule that the property obtained must be described with some particularity, as in an indictment for larceny.² The fact that the indictment does not set forth all the property obtained by means of false pretences does not render it invalid.³ Except the punishment depend upon the value of the property obtained, no allegation as to value is required.⁴ But when the punishment varies in severity, according to the amount or value of the property obtained, an allegation as to the value ought to be made.⁵

(2) *Money*.—The rule that the property obtained must be described with some particularity, as in the case of larceny, applies not only where the defendant has obtained goods, but also where he has obtained money.⁶ It has been held sufficient if the indictment set forth that the prosecutor delivered, and the defendant received from him, a specified sum of the money and property of the prosecutor.⁷

1. *State v. Smith*, 8 Blackf. (Ind.) 489; *Com. v. Morrill*, 62 Mass. (8 Cush.) 571; *People v. Haynes*, 11 Wend. (N. Y.) 565; *People v. Stone*, 9 Wend. (N. Y.) 182; *Rex v. Hill, R. & R.* 190.

2. *Jamison v. State*, 37 Ark. 445; *Treadaway v. State*, 37 Ark. 443; *Ladd v. State*, 17 Fla. 215; *Com. v. Howe*, 132 Mass. 250; *State v. Reese*, 83 N. C. 637; *State v. Kube*, 20 Wis. 217.

Description of Property—"Lot of Dry-goods."—A description of the property as "a certain lot of dry-goods" is sufficient (*Redmond v. State*, 35 Ohio St. 81); as is an indictment charging that the defendant obtained "board" of the goods and chattels of the prosecutor (*Reg. v. McQuarrie*, 22 Up. Can. Q. B. 600), and a charge that the defendant obtained "goods and moneys" of the prosecutor to the value of \$50. *State v. Reese*, 83 N. C. 637.

Same—Description in Disjunctive.—The indictment will be bad for uncertainty if it describe the property in the disjunctive; as, "24 and 25 steers or head of cattle." *Com. v. France*, 2 Brewst. (Pa.) 568.

Buying Chance in Raffle—Fraud.—An indictment charged, that the defendant obtained from the prosecutor a chance in a raffle for an organ, and also alleged that the chance was obtained after the defendant knew that the prosecutor's chance had obtained the prize. It was held, that the indictment was too uncertain, as it did not appear where the charge was for swindling out of the chance in the raffle or out of the value of

the organ. *Rosales v. State*, 22 Tex. App. 673; s. c., 3 S. W. Rep. 344.

3. *People v. Parish*, 4 Den. (N. Y.) 15. In this case the defendant obtained from the prosecutors, by means of false pretences, conveyances of certain lands; the consideration for the conveyances was in the shape of certain bonds and mortgages; the indictment charged the obtaining of the conveyance to the lands, but did not charge that the defendant had also obtained from the prosecutors promissory notes for balances which he claimed were due to him. The court held that the omission did not constitute a variance; that it was enough that the defendant obtained some valuable thing by the fraud, which thing was properly described in the indictment; and that proof that he obtained something more did not make a variance.

4. *People v. Stetson*, 4 Barb. (N. Y.) 151; *State v. Gillespie*, 80 N. C. 396.

5. *State v. Ladd*, 32 N. H. 132.

6. *Jamison v. State*, 37 Ark. 445; *Treadaway v. State*, 37 Ark. 443.

7. See *Com. v. Lincoln*, 93 Mass. (11 Allen) 233. Compare *Smith v. State*, 33 Ind. 159, in which it was held, that an indictment which charged that the defendant obtained "\$25 in money of the personal goods and chattels" of the prosecutor, was defective, in that it did not describe the property with sufficient particularity.

Goods and Money.—In *State v. Reese*, 83 N. C. 537, the court held that a general charge that the defendant obtained "goods and money" of the prose-

(3) *Writing and Signatures.*—If the property obtained is in the form of a writing, the indictment need not set out the document at length. It is sufficient if the tenor or substance of the instrument be shown.¹ The description of the writing must be such that everything constituting the defence appears on the face of the indictment.²

cutor to the value of \$50 was too vague and indefinite, and laid down the rule, that the money should be described at least by the amount; as, so many dollars and cents.

Value of Money need not be Alleged.—An indictment for obtaining a certain sum of money by false pretences is not bad for not alleging the value of such sum. *Oliver v. State*, 37 Ala. 134.

Description of Money Obtained.—In an indictment for obtaining money by false pretences, the money obtained was described as follows: "Divers United States notes and divers national bank notes, to the jurors unknown, amounting to \$158." *Held*, that this was a sufficient description, and that it was not necessary to state the number of the notes, nor to allege that the number of them was unknown to the jury. *State v. Hurst*, 11 W. Va. 54; s. c., 3 Am. Cr. Rep. 100.

Obtaining Bank Note.—Under the Virginia statute of 1879, ch. 45, re-enacting, in substance, the provision of the statute Henry VIII., but confining the offence to the fraudulent obtaining of "money, goods, or chattels," an indictment was held to be bad which charged the defendant with obtaining, by means of a counterfeit letter, "one hundred dollars in a note of the bank of Virginia," on the ground, it would seem, that a bank note was not money, in the sense in which it was used in the statute. *Com. v. Swinney*, 1 Va. Cas. 146, 151.

But an indictment was held good which alleged the obtaining, from the Bank of Virginia, by similar means, of "fifty dollars in money current in the commonwealth of Virginia," although it was contended that, as the preamble of the statute recited a pre-existing evil, etc., as the cause of the enactment, it could not extend to a bank which did not exist in Virginia until many years after the date of the statute. *Com. v. Swinney*, 1 Va. Cas. 150, 151, note. See also *State v. Patillo*, 4 Hawks (N. C.), 348.

1. In *Com. v. Coe*, 115 Mass. 481; s. c., 2 Am. Cr. Rep. 292, the defendant was indicted for obtaining, by false pretences, "a check and order for the payment of money." The court held the description sufficient.

Obtaining Order on County Treasurer—Description of Order.—In *State v. Wilkerson* (N. C.), 3 S. E. Rep. 683, defendant was indicted for obtaining an order by the county commissioners upon the county treasurer. The indictment alleged, that "an order was obtained from the commissioners for the sum of \$6." It was held that the description was sufficient.

Fraudulently Procuring Signature—Form of Indictment.—In *Baker v. State*, 14 Tex. App. 332, the defendant was indicted for fraudulently obtaining signatures to an instrument. The indictment set out the instrument "in words and figures following." The instrument, as set out, included the signatures of the defendant. The signatures obtained were not set out as part of the instrument, but the indictment alleged, that the defendant, after signing the instrument himself, procured the prosecutors, by false representations, to sign and affix their names thereto, stating fully the circumstances. The court held that the indictment was properly drawn. *Compare Wallace v. State* (Tenn.), 3 Leg. Rep. (N. S.) 276, in which the defendant was indicted, under the Tennessee Code, for obtaining, by false pretences, the signature of a person to a written instrument, the false making of which would be fraudulent. The court held that it was indispensable that the instrument should be set out with literal accuracy if within the control of the State, or, if not, that the indictment should state the reason for the omission.

Describing Instrument by Name.—An indictment for obtaining a signature to a written instrument by false pretences, merely describing the instrument by name, has been held bad on demurrer. The substance or tenor of the instrument should be shown. *Langford v. State*, 45 Ala. 26.

Swindling Out of Draft—Setting Forth Indorsement.—An indictment for swindling one out of a draft need not set forth an indorsement on the draft, in order that the draft may be admissible in evidence. The indorsement is but an extrinsic and irrelevant writing. *May v. State*, 15 Tex. App. 430.

2. Signature to Note "as Maker."—*Ellars v. State*, 25 Ohio St. 385, the de-

h. Ownership of Property, etc.—It is essential to the validity of an indictment for false pretences that it should contain an allegation whose money or property was obtained.¹ If the name of the

defendant was indicted under the Ohio act of February 21, 1873, which makes it a defence to procure, by false pretences, the signature of a person to a promissory note "as the maker thereof." It was held, that the words "as the maker" constitute a material part of the description of the defence, and must be averred in the indictment.

Indorsement of Promissory Note.—If the defendant, by means of false pretences, obtain an indorsement to a promissory note, the valuable thing obtained is the indorsement, and not the note or the money, and it should be so alleged in the indictment. *State v. Blauvelt*, 38 N. J. L. (9 Vr.) 306.

Same—Averment as to Making of Indorsement.—In *People v. Chapman*, 4 Park. Cr. Cas. (N. Y.) 56, the defendant was indicted for obtaining a note by false pretences. The note was set out in full in the indictment, and it appeared that it had been made by the defendant to the prosecutor's order. The court held that there must be an averment that the indorsement was made for the defendant's accommodation; the presumption otherwise being that the note was indorsed for value received by the payee.

1. *Ladd v. State*, 17 Fla. 215; *Thomson v. People*, 24 Ill. 60; *Halley v. State*, 43 Ind. 509; *Leobold v. State*, 33 Ind. 484; *State v. Levi*, 41 Tex. 563; *Burd v. State*, 39 Tex. 509; *State v. Lathrop*, 13 Vt. 279; *Reg. v. Norton*, 8 Car. & P. 196; *Reg. v. Parker*, 2 G. & D. 709; s. c., 3 Q. B. 292; *Sill v. Reg.*, *Dears. C. C.* 132; s. c., 1 Fl. & Bl. 553; *Reg. v. Martin*, 3 N. & P. 472; s. c., 8 Ad. & F. 481.

Allegation as to Ownership.—An indictment for false pretences, alleging that the prisoner obtained "from A a check for the sum of £8 14s. 6d. of the moneys of B," is a sufficient allegation that the check was the property of B. *Reg. v. Godfrey*, *Dears. & B. C. C.* 426; s. c., 7 Cox C. C. 392; 27 L. J. M. C. 151; 4 Jur. N. S. 146.

Same—The Money of a Benefit Society, whose rules were not enrolled, was kept in a box, of which B., one of the stewards, and two others had keys. The prisoner, on the false pretence that his wife was dead, which pretence he made to the clerk of the society in the hearing of E., obtained from the hands of E., out of the box, £5. *Held*, that in an indictment the pretence might be laid as made to E.,

and the money, the property of "E. and others," obtained from E. *Reg. v. Dent*, 1 Car. & K. 249.

Same—Mortgaged Property.—C., owning certain cows, sold them to W., taking back a mortgage thereon to secure the purchase-money. W., with C.'s consent, advertised them for sale, C. to select notes realized from the sale, in satisfaction of the mortgage. This arrangement was publicly announced to the bidders, and B. bought the cows, inducing C., by certain representations as to his standing, to take his note. On indictment of D. for obtaining the cows by false pretences, *held*, that C. was properly alleged to be their owner. *Barber v. People*, 17 Hun (N. Y.), 366.

False Pretences as to Identity of Person—Averment of Responsibility.—Defendant was indicted for obtaining money by falsely representing that a promissory note was made by one Albert Pike, of the town of Concord, Erie county, while in fact it had been made by another man of the same name, in the same town. The indictment held no allegation that either was responsible. *Held*, that such allegation was not necessary, and the injurious consequences need not be alleged further than implied from the fact of obtaining the money with intent to defraud, and that evidence was admissible as to the responsibility of the maker of the note and of the person represented as having made it, to show intent. *People v. Cook*, 24 N. Y. Week. Dig. 207; s. c., 8 Cr. L. Mag. 831.

Intent to Defraud—Specifying Particular Person.—By 14 & 15 Vict., c. 100, § 8, it shall be sufficient, in an indictment for obtaining property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person. By section 25, every objection to an indictment, for any formal defect apparent on the face thereof, shall be taken before the jury are sworn. *Held*, that section 8 did not render it unnecessary, in an indictment for obtaining money by false pretences, to state whose property the money was, and that the omission was not a formal defect within section 23. *Sill v. Reg.*, *Dears. C. C.* 132; s. c., 1 El. & Bl. 553; 22 L. J. M. C. 41; 17 Jur. 207.

Cheating at Cards—Allegations.—In an indictment framed upon 8 & 9 Vict., c.

person defrauded is not known to the prosecution, the common-law form of indictment applicable to such circumstances must be used.¹ An omission to allege the ownership of the property was fatal to the validity of the indictment, and objection might be taken, even after verdict and sentence, by motion in order of judgment.² When the money was obtained from the wife,³ or from an agent,⁴ the indictment might properly allege ownership in the husband or principal, respectively. Similarly, when goods are obtained from a firm, the allegation of ownership may be in the firm name, it being unnecessary to set out the names of the individual partners.⁵ But an indictment for obtaining money from a son by false pretences which avers that the money belonged to the father, but does not show how it belonged to him, is insufficient.⁶ By statutes adopted in some of the States, and in England, the necessity of an allegation of ownership of the chattel, money, or valuable security obtained, has been dispensed with.⁷

109. § 17, charging that the prisoner, by fraud in playing at cards, did win, from A to B, a sum of money, with intent to cheat A, it is not necessary to allege that the money was won with the property of A. *Reg. v. Moss, Dears. & B. C. C. 104; s. c., 26 L. J. M. C. 9; 2 Jur. N. S. 1196.*

Attempt to Cheat—Description of Person.—An indictment for false pretences, alleging that defendant attempted to cheat certain persons, firms, and corporations composing a voluntary association known as the Brewers' Association of St. Louis and East St. Louis, a more particular description of which said persons, etc., and of such association, is to the jurors unknown, is insufficient under *Rev. Stat. § 1561*, because not sufficiently describing the persons to be cheated. *State v. McChesney, 90 Mo. 120.*

1. *State v. McChesney, 90 Mo. 120.*

2. Obtaining Goods—Alleging Ownership.—In an indictment for obtaining goods on false pretences, it is necessary to allege ownership of the goods, and the defect will be noticed on appeal, when it had been urged in a motion in arrest of judgment. *Washington v. State, 41 Tex. 583.*

But an indictment for conspiracy to obtain goods by false pretences, not stating whose property the goods were, which it was the object of the conspiracy to obtain, is bad in arrest of judgment. *Reg. v. Parker, 2 G. & D. 709; s. c., 3 Q. B. 292.*

An indictment for obtaining goods by means of false pretences, with intent to defraud a specified person, was bad, unless it stated whose property

the goods were, and the defect was not aided after verdict, under 7 Geo. IV. c. 64, § 21; *Reg. v. Martin, 3 N. & P. 472; s. c., 8 Ad. & El. 481; 1 W. W. & H. 380; 2 Jur. 515; Reg. v. Norton, 8 Car. & P. 196.* See 24 & 25 Vict. c. 86, § 88, *supra*, which renders an allegation of ownership unnecessary.

3. *Reg. v. Moseley, L. & C. 92; s. c., 9 Cox C. C. 16; 31 L. J. M. C. 24; 7 Jur. N. S. 1108; 5 L. T. 328.*

4. *Com. v. Call, 38 Mass. (21 Pick.) 515.*

5. *State v. Williams, 103 Ind. 235.*

6. *People v. Krummer, 4 Park. Cr. Cas. (N. Y.) 217.*

7. 24 & 25 Vict. c. 96, § 88.

Party Intended to be Defrauded—Selling Out—Pennsylvania Act.—Since the passage of the Pennsylvania Criminal Procedure Act of March 30, 1860, it has not been necessary either to allege or prove the person intended to be defrauded. The 19th section of that act declares that "It shall not be necessary to prove any intent on the part of the defendant to defraud any particular person; but it shall be sufficient to prove, that the defendant did the act charged with intent to defraud. *Com. v. McClure, 12 Phila. (Pa.) 579; s. c., 3 Cr. L. Mag. 428.*

Obtaining Property by Trick.—An indictment for obtaining property by means of a trick and fraud should charge it to belong to the true owner. But a variance in this particular upon the trial will not, under the *Mo. Rev. Stat. § 1820*, be fatal, unless the trial court shall find it to be material to the merits of the case, or prejudicial to the defence of the defendant. *State v. Myers, 82 Mo. 558; s. c., 7 Cr. L. Mag. 383.*

5. Sufficiency.—*a. In General.*—At common law, an indictment which alleges that the prisoner did “feloniously” pretend, etc., is bad.¹ In England it has been held that if the truth of the pretences is properly negatived, it is not essential to charge that the defendant did “falsely” pretend.² But the Florida supreme court have held that such an omission invalidated the indictment.³ The words “cheat and defraud” do not alone describe any offence, and when so used in an indictment, the indictment is insufficient.⁴ And it has been held, that an indictment which charged the obtaining of money “by color of a false pretence” was insufficient, the word “color,” as employed in the statute, being applicable to false tokens or writings.⁵ It is not essential that the indictment should allege that the party defrauded sustained loss or injury—at all events where the offence charged is the obtaining of a signature.⁶

It is generally held that where a form is prescribed or sanctioned by statute, an indictment framed in the terms of such form is valid.⁷ In California it has been held that if the indictment charged the offence substantially in the language of the statute defining it, it was sufficient.⁸ Generally speaking, the indictment ought to set out the whole of the essential ingredients of the offence; and consequently it ought to charge that the defendant obtained something by means of the false pretences.⁹

1. *Rex v Walker*, 6 Car. & P. 657. See also *Rex v. Howarth*, 3 Stark. 626.

Allegation of Felonious Intent—Surplusage.—In *State v. Evans*, 86 N. C. 674, the indictment charged, that the defendant wilfully, knowingly, falsely, and feloniously pretended to the prosecutor that he had cut for him, for the use of another, twenty cords of wood, whereas in truth and in fact he had not cut the same. The court held that the averment that the act was done with felonious intent was surplusage, and might be ignored, because calling a misdemeanor a felony would not make it a felony.

2. *Rex v. Airey*, 2 East, 40.

3. *Hamilton v. State*, 16 Fla. 288.

4. *State v. Parker*, 43 N. H. 43.

An indictment for false pretences under the Indiana statute (2 Gav. & H. 445) is not bad for using the word “pretend” instead of the word “represent.” *Jones v. State*, 50 Ind. 475.

5. *State v. Chunn*, 19 Mo. 233.

6. *People v. Genung*, 11 Wend. (N.Y.) 18.

7. *O'Connor v. State*, 30 Ala. 9; *State v. Williams*, 12 Mo. App. 415; s. c., 77 Mo. 310; *Com. v. Resenberg*, 3 Lan. L. Rev. (Pa.) 75; *Jim v. State*, 8 Humph. (Tenn.) 603; *Reg. v. Davis*, 18 Up. Can. Q. B. 180.

Bogus Checks—Constitutional Right.—In *State v. Fancher*, 71 Mo. 460, the de-

fendant objected, that his constitutional right to be informed of the nature of the offence, was violated by an indictment prepared in the form prescribed by the Mo. Rev. Stat. 1879, § 1561, relative to the obtaining of money by bogus checks or other false pretences. The court held, that his constitutional right was sufficiently assured to him if the indictment preserved the substance of the offence, and that the section of the revised statutes was constitutional and the indictment good.

8. *People v. Donaldson*, 70 Cal. 116.

9. See *Wagoner v. State*, 90 Ind. 504.

Availing that Defendant “Obtained.”—In *State v. Lewis*, 26 Kan. 123, an information charged, that the defendant was “paid” money checks and drafts, but nowhere charged in the language of the statute, or in words equivalent thereto, that defendant “obtained” anything. The indictment was held to be fatally defective.

Forged Receipt for Dues.—An indictment charging that the defendant, on, etc., at, etc., by falsely pretending to be a member of a certain Masonic lodge in Ohio, that he was on the way to his father-in-law's funeral, and was out of money to travel, and, by exhibiting a forged receipt from the Ohio lodge for dues, obtained from Masonic lodge of

When the indictment charges a conspiracy to obtain goods by means of false pretences, it is not necessary to specify in the indictment the means by which the ends of the conspirators were to be accomplished.¹ An indictment under the statute for attempting to obtain money or property by means of false pretences need not aver that the defendant failed in the attempt, or that he was prevented from accomplishing his design.²

b. Uncertainty and Duplicity.—The indictment must not contain any contradictory or repugnant allegations.³ Accordingly, it

Masons a sum of money named, upon a promise to repay the same, with intent to defraud Masonic lodge, knowing said pretences to be false and the receipt to be forged,—is good, on motion to quash. *Strong v. State*, 86 Ind. 208.

Conspiring to Obtain Horses.—A count in an indictment, that the defendant, on, etc., at, etc., feloniously, fraudulently, and deceitfully did conspire and agree together, with the fraudulent and malicious intent then and there feloniously, wrongfully, and wickedly to obtain one horse of the value of \$75, and describing the other goods and giving their value,—the personal property of K. C., from the said K. C., by false pretences, and to cheat and defraud her, the said K. C., of the same, contrary, etc.,—is substantially good. *Thomas v. People*, 113 Ill. 531.

Money to Pay Freight.—An indictment for obtaining money by false pretences charged defendants, M. and D., with obtaining money from F., falsely representing to him that D. had goods in possession of a railroad company, to be shipped to S. on the same train F. was travelling on, and that he desired money to pay the freight thereon, and would repay the same to F. upon their arrival at B.; that he had, in fact, no goods in the possession of the railroad company, and that F. was deceived by the representations. *Held*, valid, and it was not necessary to allege that D. had no goods at all, or to allege the value of the goods represented. *State v. Montgomery* (Iowa), 9 N. W. Rep. 120.

Joint Offence—Charging All.—Defendant was indicted for swindling by false pretences. The indictment alleged that the appellant, Dwyer, Edward Eglington, and J. L. Larkin perpetrated the swindle; that the money obtained was the property of J. C. Brown and L. A. Sheldon, but the proof showed that it was obtained from H. E. Phillips, their agent. The indictment alleged that Eglington presented to Phillips the discharge certificate, making certain false statements at

the same time, and receiving the money. There was no allegation directly charging all the defendants with the commission of the acts constituting the offence. Neither were the false representations averred. *Held*, that the indictment was insufficient to support a conviction. *Dwyer v. State* (Tex.), 5 S. W. Rep. 662; s. c., 10 Cr. L. Mag. 324.

1. *Thomas v. People*, 113 Ill. 531.

Obtaining Money—Sufficiency of the Indictment.—In an indictment which charges the defendants with feloniously uniting and combining with others for the purpose of committing the felony of obtaining the money of another by means of certain false pretences, and which charges facts sufficient to show that the defendants, if they had obtained such money by their false representations of alleged existing facts, would have been guilty of this particular felony, is sufficient to withstand a motion to quash. In such case, the indictment need not show that any money was obtained by means of the false pretences. *Miller v. State*, 79 Ind. 198; s. c., 4 Cr. L. Mag. 121.

2. *State v. Decker*, 36 Kan. 717.

3. *Keller v. State*, 51 Ind. 111; s. c., 1 Am. Cr. Rep. 211.

Ambiguous Indictment.—In *Keller v. State*, *supra*, the indictment practically alleged, that the defendant was to pay the prosecutor for certain property, in a note given for the purchase-money, and it is then averred, that the note was to be made payable to the prosecutor and secured by a mortgage upon the real estate. It was held, that the indictment was ambiguous and uncertain, and could not be sustained. The court say: "It is a settled rule of criminal pleading, that the offence charged must be proved in substance as charged. This cannot be done in the averment under examination. The two averments are directly repugnant. Both cannot be true. The facts of the case are not correctly stated. It is averred, that the note for \$500 had been given to Keller, and was secured by

has been held that an indictment for a fraud at common law, which charged the pretences to have been made to one person and the deceit to have been practised on another, is bad;¹ and an indictment which charged the defendant with making false pretences for the purpose of inducing the prosecutor to become his surety on a note, but which charges that the prosecutor, instead of becoming a surety, became the principal, is bad for uncertainty.² But a count in an indictment, which charges the defendant with obtaining a promissory note, is not open to the objection of duplicity, simply because it also alleges that on a subsequent day he obtained the money on the same note.³ An indictment which charged that money was obtained "by means and use of a cheat and a fraud, and a false and fraudulent representation, and false pretences, and a false and bogus check and instrument, with an intent," etc., has been sustained over an objection on the ground of duplicity or multifariousness.⁴

XVI. EVIDENCE.—1. Burden of Proof.—The burden of proving all the allegations in the indictment is upon the prosecution, and the State must prove, not only the representations alleged to have been made, but also their falsity. Proof that the representations were made, does not change the burden to the defendant, of proving their truth.⁵ When the defendant is charged with the obtaining of goods, the prosecution must prove that the goods were delivered on the faith of the false pretences.⁶ The jury ought always to be charged that it is necessary for the State to prove the substance of the charges made in the indictment.⁷

Testimony as to Similar Pretences.—It is now generally held that, for the purpose of proving the intent, evidence of similar pretences made about the time and in the same neighborhood to other persons, of the pretences alleged in the indictment, may be introduced.⁸ Evidence of such prosecution is especially admis-

mortgage. It was shown upon the trial, that, at the time the representations were made, Keller had agreed upon a sale of his house and lot of ground, in the city of Indianapolis, but the deed had not been made, nor had the notes and mortgages been given, and that the facts were known to Boyer, and it was then agreed that a note for \$500 should be made payable directly to Boyer, and secured by mortgage; and it also appeared that this was done. Such proof could not sustain the averments of the indictment. We are clearly of the opinion, that the indictment cannot be sustained. It is ambiguous, uncertain, repugnant, and defective in its averments and negations."

1. *Rex v. Lara*, 2 Leach C. C. 647; s. c. 2 East P. C. 819, 824, 6 T. R. 565.

2. *State v. Locke*, 35 Ind. 419.

Vagueness and Uncertainty.—An indictment charging (in substance) "that

N. W. and others did conspire by false pretences to defraud, of large sums of money, all such persons as should apply to or negotiate with them for a loan of money," was, on the writ of error, held bad, for vagueness and uncertainty. *White v. Reg.*, 10 Ir. C. L. 523; s. c. 13 Cox C. C. 318.

3. *Com. v. Frey*, 50 Pa. St. 245.

4. *State v. Fancher*, 71 Mo. 460.

5. *Babcock v. People*, 15 Hun (N. Y.), 347; *State v. Williams*, 87 N. C. 529.

6. *Reg. v. Jones*, 50 L. T. 726.

7. *State v. Rivers*, 15 Ind. 102.

8. *State v. Long*, 103 Ind. 481; *Com. v. Blood*, 141 Mass. 571; *State v. Beaulleigh* (Mo.), 4 S. W. Rep. 666; *State v. Meyers*, 80 Mo. 558; *People v. Hensler*, 48 Mich. 49; *State v. Bayne*, 88 Mo. 604; *Mayer v. People*, 80 N. Y. 364; *Trogden v. Com.*, 31 Gratt. (Va.) 863. Compare *Strong v. State*, 86 Ind. 208;

sible where it tends to show that the defendant was engaged in a general scheme to defraud the public at large.¹

Todd v. State, 31 Ind. 514; Com. v. Jackson, 132 Mass. 168; Com. v. Alsop, 1 Brewst. (Pa.) 228; Reg. v. Holt, 8 Cox C. C. 411; s. c., Bell C. C. 280; 30 L. J. M. C. 11; 6 Jur. N. S. 1131; 3 L. T. 310.

Representations Made after the Commission of the Fraud charged in the indictment, have been held to be admissible. Reg. v. Stennon, 12 Cox C. C. 111; s. c., 25 L. T. 666.

In State v. Rivers, 58 Iowa, 102, it was held that evidence of prosecution between the same parties, or after the acts complained of, was admissible to show whether in fact the prosecutor was deceived, or was simply using the criminal law to enforce his debt.

Insurance Agent.—The defendant was indicted for grand larceny. It was charged that, as agent for several insurance companies, he had placed the reinsurance of a vessel with one company, and afterwards, after notice of loss of the vessel, he had transferred the reinsurance to another company; that he had represented to the second company, that it was a valid insurance, for which it was liable, and, by means of these false representations, had obtained a large sum of money. On the trial, the State put in evidence to show that the defendant had, on several other occasions, made such transfers in order to save the first company from loss. *Held*, that such evidence was admissible to show the evil motive and fraudulent intent of the defendant in changing the insurance in the present case. People v. Dimick (N. Y.), 14 N. E. Rep. 178.

Attempts to Pawn "Diamond" Rings.—On a trial of an indictment for endeavoring to obtain an advance from a pawnbroker, upon a ring, by the false pretence that it was a diamond ring, evidence was admitted that, two days before the transaction in question, the prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be a gold chain, but which was not so, and had endeavored to obtain from other pawnbrokers advances upon a ring which he represented to be a diamond ring, but which, in the opinion of the witnesses, was not so. The ring was not produced. *Held*, that the evidence was properly admitted. Reg. v. Francis, 2 L. R. C. C. 128; s. c., 43 L. J. M. C. 97; 30 L. T. 503; 22 W. R. 663; 12 Cox C. C. 612.

Admissibility of Other Cases to Show Intent.—C. was indicted in four counts for obtaining money by false pretences from four persons named, the false statements alleged being the same in all these counts; in a fifth count for inserting, with intent to defraud the Queen's subjects, an advertisement in a newspaper, containing the false statements mentioned in the previous counts, and obtaining money thereby. It was shown at the trial, that he had inserted in a newspaper an advertisement containing statements found to be false, offering permanent employment in the preparation of carte-de-visite papers, and adding, "Trial paper and instructions, 1s.," and giving an address. Six envelopes were found in his possession on his being apprehended, each directed to the address given, and containing an answer to the advertisement, and twelve postage stamps. Two hundred and eighty-one other letters were produced by a post-office clerk. These letters had been addressed to C. under the address given in the advertisement, and had been received at the post-office like the other letters; but having been stopped by the post-office authorities, none of them had ever been in his possession or custody; nor was any proof adduced that they were written by the persons from whom they purported to come. Each letter had been opened at the post-office before production at the trial, and each contained twelve stamps. The two hundred and eighty-one letters were admitted: *Held*, that, under the circumstances, the letters were rightly received in evidence. Reg. v. Cooper, 1 Q. B. Div. 19; s. c., 45 L. J. M. C. 45; 33 L. T. 754; 24 W. R. 279; 13 Cox C. C. 123.

1. Com. v. Blood, 141 Mass. 571; Com. v. Coe, 115 Mass. 431; 2 Am. Cr. Rep. 292.

Swindling Gang—Confederate—Evidence of Operations.—In State v. Beaulcleigh (Mo.), 4 S. W. Rep. 666, the defendant was indicted for swindling on a train. It was shown, that the defendant's colleagues got off the train after the commission of the offence, and that the defendant remained with the victim. The court held, that the evidence of one of defendant's colleagues as to the operations of the gang for ten days previous to the crime charged, describing the operations, was admissible for the purpose of proving defendant's intent in remaining.

3. Defendant's Insolvency.—In an indictment for obtaining goods under false pretences, the prosecution may prove the defendant's insolvency at the time of the representations, for the purpose of showing his intent.¹ For the purpose of proving defendant's insolvency, it has been held that the prosecution may show that, three days after pretending that he had ample means to pay all his debts, the defendant mortgaged all his property to another.² And where an indictment alleged that the defendant made a false representation as to which of two persons of the same name was the maker of a note, it was held that evidence of the responsibility of the alleged maker, and that of the irresponsibility of the real maker, was admissible to prove the intent and purpose of the accused.³

4. Declarations and Admissions.—Declarations and admissions of the defendant may be given in evidence, for the purpose of establishing his guilt.⁴ And in that case it was even held that a statement of an accused, who was under a charge of obtaining money by false pretences, to the effect that he could not employ counsel by reason of his poverty, was held to be admissible as evidence against

Representations as to Responsibility.—In *Mayer v. People*, 80 N. Y. 364, the defendant was indicted for obtaining goods on credit, by means of false representations as to his responsibility. The representations showed their falsity; and the knowledge of the accused, that they were false, was established. The court held that the intent to defraud might be supported by proof of dealings of the prisoner with parties other than the complainant, such as purchases made upon the faith of similar representations which tended to show the fraudulent scheme of obtaining property by devices similar to those practised upon the prosecutor. But it was also held that the dealings must be sufficiently connected in time and character to authorize an inference that the purchase from the complainant was made in pursuance of the same general principles.

In *Com. v. Howe*, 132 Mass. 250, the defendant was indicted for obtaining money on the false pretences that a fund had been left by legacy to establish and carry on a charitable institution of deposit, for the benefit of single women and widows; that, in pursuance of the direction and by virtue of the legacy, an institution had been originated and organized; that the same was intended as a benevolent institution for women who had not income enough to support them; that the institution, which was known as the ladies deposit, had paid, to its depositor, interest amounting to a sum very many times larger than the principal amount in deposit; that the payment of

extraordinarily large rates of interest to needy persons had been declared, by the founder of the institution, to be the medium through which its charitable aims should be effected, and thereby obtained a certain sum of money, as and for a deposit to the credit and account of the prosecutor in the ladies' deposit. The court held that evidence of similar representations was admissible for the purpose of proving the guilt of the defendant.

1. *Com. v. Jeffries*, 89 Mass. (7 Allen) 548.

2. *State v. Call*, 48 N. H. 126.

Evidence of Insolvency.—On indictment for obtaining money by false pretences, evidence to prove insolvency of the defendant is not admissible where the indictment did not negative defendant's representations that he was solvent. *State v. Long*, 103 Ind. 481.

3. *People v. Cook*, 41 Hun (N. Y.), 67.

4. *State v. Long*, 103 Ind. 481.

Procuring Orders for People's Support—Admissions as Evidence.—The defendant was charged with having "obtained from the board of commissioners . . . an order issued for the support of E., by falsely representing to the said board that E. was a pauper," etc. Previous to the trial, the defendant stated that he "got the orders issued" for the pauper's support, and that he got the money. *Held*, that his admission was evidence of his instrumentality in having E. placed on the list of paupers, and of his being the only person to whom orders were issued. *State v. Wilkerson*, 72 N. C. 376.

him for the purpose of proving that he had no property or money.¹ But, on the other hand, it has been held, that a plea of infancy in an action brought against the defendant, is not admissible for the purpose of proving that he was a minor, although he may be under indictment for obtaining goods by falsely pretending that he was of full age.² And testimony given by the prisoner, on his examination in proceedings supplementary to execution, has been admitted on the trial of an indictment for obtaining goods by false representations as to the financial standing of the accused.³ It must be kept in view, however, that defendant's admission without corroboration is not sufficient to sustain a conviction.⁴

5. Declarations of Co-conspirators.—If the pretences charged in the indictment form part of the general scheme to defraud entered into by several persons, evidence of a conversation by one of the defendants with the defrauded party is admissible against a defendant who was not present at the time of its occurrence.⁵ And it has been held that where two persons were indicted for obtaining money by conspiracy and false pretences, the evidence of one of them who pleaded guilty was admissible on the count of false pretences.⁶ When two of defendants are jointly indicted for an offence, the prosecution may introduce evidence which tends to prove the offence against one of the defendants, although it does not tend to prove it against the other.⁷

6. Parol Evidence as to Writings.—If the false pretences have been made by means of a letter which has been lost, the contents of the letter may be established by parol evidence.⁸ And it has been held, that, where the defendant is indicted for obtaining a writing, e.g., an order for the payment of money, the production of the order is unnecessary, as parol evidence of its contents is admissible.⁹

1. *Fooks v. State*, 65 Iowa, 196.

2. *Reg. v. Simmonds*, 4 Cox C. C. 277.

3. *Barber v. People*, 17 Hun (N. Y.), 366.

4. **Mortgaging Incumbered Chattels—Mortgagee's Admissions.**—In *State v. Penny*, 70 Iowa, 190, the defendant was indicted for obtaining money on false pretences. He had represented, in obtaining a loan, that the chattels which he pledged as security were not incumbered, when in fact they were. The only evidence to show that they were incumbered, was the admission of the defendant. It was held, that an indictment could not be sustained.

5. *State v. Montgomery*, 71 Iowa, 630.

6. **Co-conspirator as Witness.**—Two were jointly indicted for obtaining money by conspiracy and false pretences: On being arraigned, one pleaded guilty, and the other, not guilty. On the trial of the indictment, the one who had pleaded guilty was admitted as a witness against the other, although it was objected that the evi-

dence of a co-conspirator could not be received under the count of conspiracy. The jury found him not guilty on the count for conspiracy, but guilty on the counts for false pretences. *Held*, that the co-conspirator was admissible as a witness, and that the conviction was right. *Reg. v. Gallagher*, 32 L. T. 406.

7. *Com. v. Blood*, 141 Mass. 571.

8. *Rex. v. Chadwick*, 6 Car. & P. 181.

9. *State v. Wilkerson*, 72 N. C. 376.

Order for Payment of Money—Parol Evidence on Contents.—An indictment charged the defendant with having obtained from the county authorities an order for the payment of money, by means of false pretences and fraudulent representations, in violation of the North Carolina Code, § 1025, which provides that "if any person shall, . . . by any . . . false pretences whatsoever, obtain from any person or corporation any money, . . . with intent to cheat or defraud any person or corporation, such person shall be guilty, etc. *Held*, that on the

When the defendant has obtained money by means of a chattel mortgage, he may, when the mortgage is introduced against him, offer parol evidence of his relationship to it for the purpose of disproving a fraudulent intent.¹

7. Documentary Evidence.—It may be said, generally, that any writings used by the defendant for the purpose of effecting the fraud or any connection with it in any way, are admissible in evidence.² Thus, it has been held, that writings and correspondence which show a general scheme on the part of the defendant to defraud, are admissible, although they may not in terms apply to the indictment under trial.³ And the fact, that a letter containing a false pretence

trial the production of the order was unnecessary, as parol evidence of its contents was admissible. *State v. Wilkerson*, 72 N. C. 376.

1. *State v. Garris* (N. C.), 4 S. E. Rep. 633.

2. Sale of Shares—Statements of Dividends Correct.—Defendant agreed with M. to buy for him one hundred shares of stock, M. to pay twenty per cent down, defendant to hold the stock until full payment and to credit M. with dividends earned in the mean time. The purchase was made by defendant in April, 1873, and M. continued to pay until April, 1877, when defendant acknowledged full payment. In fact, defendant sold the stock in March, 1874. Defendant was indicted for false pretences based on a payment made by M. to him in March, 1876. *Held*, that statements rendered M. by defendant, of dividends earned after the sale and before March, 1876, were properly admitted and were representations by defendant that he still held the stock; that the question of the effect of the lapse of time (two months) between the last dividend statement and payment of the money, laid in the indictment, was for the jury; also, that conversations relative to the purchase, had in March, 1873, between M. and the defendant, were properly admitted. *People v. Baker*, 18 N. Y. Week. Dig. 112.

Deed of Copartnership Evidence—Parol Evidence of False Pretences—Parol Evidence of Representations not Excluded.—A was indicted for obtaining two hundred pounds by falsely pretending that he had obtained from Lord S. the appointment of emigration agent, which was worth six hundred pounds a year, and that for two hundred pounds he would give the prosecutor one third of the agentship. The prosecutor proved, that he gave the money on this pretence, which was false; but that, before he parted with his money, the prisoner prevailed on him to execute a deed of copartnership with him, in which the consideration was

stated to be two hundred pounds, and in which nothing was said of the agentship, or how it was obtained. *Held*, that the putting in of this deed on the part of the prosecutor did not exclude the parol evidence of the false pretences; and that if the deed was a part of the scheme to effect the fraud, the prisoner should be found guilty. *Reg. v. Adamson*, 1 Car. & K. 192; s. c., 2 Moo. C. C. 286.

3. Letters Tending to Prove the Offence Charged.—False pretences are not incompetent evidence because they disclose the fact that other crimes or attempts had been committed; as, a general swindling business. *Com. v. Blood*, 141 Mass. 571.

Letters Purporting to be Written by the Prisoner.—S. and H. were jointly indicted for false pretences, and for a conspiracy. S. was convicted for false pretences, and both for conspiracy. The evidence was, that they were ostensibly carrying on business as publishers under the name of B. & Co., and that H. was the author of a book published by them. To force the sale of the book, S. got M. to write letters purporting to come from a titled lady ordering a copy of the book, and to address them to country booksellers. These letters were delivered by M. to S., and found their way by post to different country booksellers, and enclosed with them was a printed circular from the firm, offering reduced terms for an order of seven copies or more. At the trial, two witnesses produced a number of such letters, some of which had been given to them by the booksellers (other than those named in the indictment) who received them, and some came to them from such booksellers by post. There were no counts in the indictment alleging any intent to defraud these particular booksellers. It was also proved that H., after the frauds charged, had represented himself as B. & Co. *Held*, that the letters were admissible without calling the booksellers who actually received them. *Reg. v. Stenson*, 12 Cox C. C. 111; s. c., 25 L. T. 666.

was written by the prisoner's attorney, does not render it inadmissible on the ground of privilege.¹ The defendant will be bound by any admissions contained in the writings by means of which the fraud was affected. Thus, where he gave a note and mortgage for money, obtained from a bank, it was held that the note and mortgage, when introduced in evidence, were sufficient to prove the *de facto* existence of the bank.² Other writings than those actually used in connection with the fraud, are also admissible if they tend to prove the falsity of the pretences or to establish the defendant's guilt in any way. Thus, it has been held, that the schedules in bankruptcy proceedings against the defendant, showing his assets and liabilities, are competent evidence.³ Similarly, the prosecution may introduce in evidence, writings which tend to establish the falsity or the defendant's pretences as to his ownership of property,⁴ or as to the amount of his trade indebtedness.⁵ The defendant cannot introduce his own books to show the state of accounts between him and the prosecuting witness, unless he also offered evidence *aliunde* on the truth of the accounts.⁶ On the trial of an indictment for obtaining money by means of a false representation to the effect that certain property, pledged in security, was unencumbered, the state cannot offer in evidence the record of chattel mortgages, and the certified copy thereof, without first proving the loss or destruction of the original mortgage, or in some way accounting for them.⁷

1. Letter Written by Prisoner's Solicitor.—A letter written by a solicitor, for a client, making a claim for a lost parcel alleged to contain valuable articles, is not inadmissible on the ground of privilege in a criminal case; but, in order to make a client criminally responsible for a letter written by his solicitor, it must be shown that the letter was written in pursuance of the instructions of the client. A letter by a solicitor, written "in consequence" of an interview with his client, is not equivalent to a letter written by the instructions of the client, and is not admissible in a criminal case against the client. *Reg. v. Downer*, 14 Cox C. C. 486; s. c., 43 L. T. 445; 45 J. P. 52.

2. *Cowan v. State*, 22 Neb. 519. See also *People v. Hughes*, 29 Cal. 260; *Platte Valley Bank v. Harding*, 1 Neb. 461.

3. *Abbott v. People*, 75 N. Y. 602; s. c., 15 Hun (N. Y.). 437; *Trogon v. Com.*, 31 Gratt. (Va.) 862.

4. False Pretences as to Property—Record of Suit to Obtain Property.—In *Com. v. Lungberg* (Pa.), 43 Leg. Int. 260, the defendant was indicted for obtaining money upon the false pretences that he was the owner of certain property. The court held that the record of a suit be-

tween the prosecutor and the defendant's wife, in which he claimed the recovery of property, was admissible to prove the falsity of the representations.

5. False Representations as to Indebtedness—Itemized Account.—In *Smith v. State*, 55 Miss. 513, the defendant was indicted for obtaining goods by false pretences to the effect that he was not trading with any merchants except the seller, and that he was only indebted to him and to one other. An itemized account of his then indebtedness to a witness for the state, which was not referred to in the representations, was held to be admissible.

6. *People v. Genung*, 11 Wend. (N. Y.) 18.

Reading of Letters.—On an indictment for obtaining money by a false pretence that a parcel contained all letters written by the prosecutrix to the prisoner, and which he had promised, in consideration of the money, to give up, the counsel for the prosecution is not bound to have the letters read, although the counsel for the prisoner may cross-examine as to the contents of any of them, and have any read for that purpose. *Reg. v. Colucci*, 3 F. & F. 104.

7. *State v. Penny*, 70 Iowa, 190.

8. Competency, Relevancy, and Admissibility.—It is competent for the prosecution, for the purpose of showing the intent, to introduce testimony to prove the steps preliminary to the commission of the crime.¹ It is always essential, that the prosecution should establish that the property or money obtained was parted with by reason of some of the false pretences made in the indictment; but it is not necessary, however, that this should be established by direct proof; it may be inferred from other facts tending legitimately to show it.² For the purpose of showing that the property was so parted with, the prosecutor may testify as to the influence which the defendant's representations exercised upon him.³ The evidence must be confined strictly to the charges made in the indictment. Thus, on an indictment for obtaining the signature of the prosecuting witness to a note, testimony cannot be introduced for the purpose of showing that the prosecutor has been subjected to a suit for payment of the money specified in the note, there being no count in the indictment for obtaining money by false pretences;⁴ but as long as the evidence simply goes to establish the charges laid in the indictment, it is not necessary that there should be an allegation of the specific fact sought to be proven. Thus, under an indictment for obtaining property by means of a note, evidence that the note was never paid is admissible, although the indictment does not contain any allegation thereof.⁵ The prosecution may offer evidence of any fact which tends to establish the falsity of the pretences used.⁶ But if the indictment charge the defendant with obtaining money upon false pretences as to the amount of his indebtedness, or by pretending that he was out of debt, the indictment must specify the specific sums owed by the

1. *People v. Winslow*, 39 Mich. 505.

2. *Therasson v. People*, 82 N. Y. 238.

3. *People v. Miller*, 2 Park. Cr. Cas. (N. Y.) 197.

Book Accounts of Broker.—In *Com. v. Jeffries*, 89 Mass. (7 Allen) 548, the defendant was indicted for obtaining goods by the false pretence that he was acting as broker for the undisclosed principal. The court held, that the prosecutor might testify that he gave credit to the principal, although in his books of account he entered the transaction as a sale to the defendant, and made out a bill of parcels in that form.

4. *People v. Gates*, 13 Wend. (N. Y.) 311.

5. *Skiff v. People*, 2 Park. Cr. Cas. (N. Y.) 139.

In *State v. Hill*, 72 Me. 238, the defendant was indicted for obtaining a horse by purchase on credit; he had given a note for the purchase price, and had falsely represented that he was the owner of valuable unencumbered real estate.

Evidence to show that the note had not been paid was held to be admissible.

6. Evidence as to Shipment of Goods.

—In *Com. v. Hershell*, Thach. C. C. (Mass.) 70, the defendant was indicted for obtaining goods under pretences of sending them to Charleston, S. C. The court held that the evidence of the person usually employed to cart the goods for the defendant, that no goods had been carried by him for the defendant to any ship bound for that port, was admissible.

Letters Admissible to Show Devices to Impose.

—In *Fooks v. State*, 65 Iowa, 196, the defendant had represented that he was the brother of a nobleman, and that his brother was bringing him money. The court permitted the prosecution to show that the accused addressed letters to his pretended brother in a return envelope of the party defrauded, and that the letters came back to him. On appeal, the evidence was held to be properly admissible, and as tending to show the devices and acts resorted to for the purpose of imposing upon the prosecutor.

accused at the time the representations were made; otherwise, the prosecution will not be allowed to prove any such specific indebtedness at the trial.¹ On a trial for false pretences which consist in representing the value of property, it would seem that the sum named in the indictment as having been represented by the prisoner as the value of the property, is material, and must be proved as laid.² Proof of a forgery has been admitted when necessary to establish the obtaining of goods under false pretences.³ Where the property obtained is a check, evidence that it was drawn upon a bank wherein the drawer had a deposit, and on which he was in the habit of drawing, is admissible, and will warrant the jury in finding that the check was of value.⁴ It has been held that the wife of one of two defendants jointly indicted for the offence, might competently testify against her husband's co-defendant.⁵ The defendant cannot, in justification, offer evidence that he had offered to refund the money obtained, with interest;⁶ but where he is indicted for obtaining goods upon the credit of another, without authority, he may show that the articles purchased were delivered to a member of the family of the person whose credit was used.⁷

9. Pleading and Proof—Variance.—*a. Necessity of Proving Whole Pretences Charged.*—An indictment for obtaining money or prop-

1. *Barber v. People*, 17 Hun (N. Y.), 366.

Misrepresentation of Indebtedness—Items not Included in Statement.—In *State v. Long*, 103 Ind. 481, the indictment charged the defendant with obtaining money by false pretences, and alleged that he represented his indebtedness by a specified sum, when in fact it was much greater. The court held that it was competent to prove an item of indebtedness not specifically stated in the indictment, although some items were therein specified.

2. *Todd v. State*, 31 Ind. 514, following *Com. v. Davidson*, 55 Mass. (1 Cush.) 33, and disapproving *People v. Herrick*, 13 Wend. (N. Y.) 87.

Under an indictment for obtaining money under false pretences simply alleging that the defendant falsely represented that he was the owner of certain stock in a corporation, evidence that the stock was pledged for indebtedness largely exceeding its value, *held*, properly excluded. *State v. Long*, 103 Ind. 481.

3. *Watson v. People*, 64 Barb. (N. Y.) 130.

4. *Spaulding v. Knight*, 116 Mass. 148; *Com. v. Coe*, 115 Mass. 481; s. c., 2 Am. Cr. Rep. 292.

5. **Who Admissible as a Witness.**—B. was charged in a first count with obtaining money from the trustee of a savings bank, by falsely pretending that a document

presented to the bank by the wife of D. had been filled up by the authority of D.; and in a second count he was charged with conspiring with the wife of D. to cheat the bank. The evidence of D. was received in proof of the first count, to show that he had given no authority to fill up the document or to withdraw the deposit. The jury found B. guilty on the first count, and not guilty on the second count. *Held*, first, that the evidence of D. was properly received in proof of the first count, his wife not being indicted, although she was alleged to be one of the parties to the conspiracy charged in the second count. *Reg. v. Halliday*, Bell C. C. 257; s. c., 8 Cox C. C. 298; 29 L. J. M. C. 148; 6 Jur. N. S. 514; 2 L. T. 254; 8 W. R. 423.

Certain Bank Bills were Obtained Under False Pretences. and a broker who had shown no knowledge on the subject, except that he had been a dealer in bank bills for twelve years, and some months previous had refused to take bills of the bank in question, was held incompetent to prove that there was no such bank at the time of the offence, and that its bills were everywhere absolutely without value, however good an expert he might be as to the market value of the bill in his place of business. *People v. Chandler*, 4 Park. Cr. Cas. (N. Y.) 231.

6. *Carlisle v. State*, 77 Ala. 71.

7. *Bozier v. State*, 5 Tex. App. 220.

erty by means of several pretences, which are alleged in the indictment, will be sustained by proof of one or more upon the faith of which the prosecutor was induced to part with his property, but for which he would not have parted with it;¹ and the conviction will be sustained, although it may be shown by the evidence that other matters, not charged in the indictment, in some measure operated upon the mind of the prosecutor as an inducement to him to part with his property.²

b. Variance as to Pretences.—An indictment will be sustained as respects the nature of the pretence, if the pretence charged is proved in substance, and is one which naturally would, and in fact did, lead the prosecutor to part with his property.³ If the defendant have obtained money by means of false pretences, and have given a note therefor, evidence of the giving of the note does not constitute a variance, although the indictment contains no allegation in regard to it.⁴ It has, however, been held that an indictment which alleged a cheating in an executory contract is not supported by proof which establishes an attempt to cheat in an executory contract, which was abandoned before consummation.⁵ However, where an allegation is used that alleges merely the substance, and does not profess to describe the pretences or writing used with literal accuracy, greater latitude is allowed.⁶ If the indictment charge two persons jointly with obtaining money by false

1. *Beasley v. State*, 59 Ala. 20; *Cowen v. People*, 14 Ill. 348; *State v. Dunlap*, 24 Me. 77; *State v. Mills*, 17 Me. 211; *Com. v. Morrill*, 62 Mass. (8 Cush.) 571; *Smith v. State*, 55 Miss. 513; *State v. Vorback*, 66 Mo. 168; *People v. Blanchard*, 90 N. Y. 314; *People v. Oyer & Terminer Court*, 83 N. Y. 436; *Skiff v. People*, 2 Park. Cr. Cas. (N. Y.) 139; *People v. Haynes*, 11 Wend. (N. Y.) 565; *People v. Stone*, 9 Wend. (N. Y.) 182; *Com. v. Daniel*, 2 Pars. (Pa.) 332; *Brett v. State*, 9 Humph. (Tenn.) 31; *Rex v. Ady*, 7 Car. & P. 140; *R. v. English*, 12 Cox C. C. 171; *Reg. v. Hewgill*, 1 Dears. C. C. 315; s. c., 24 Eng. L. & Eq. 556; 2 C. L. R. 600; 18 Jur. 158; *R. v. Hill*, R. & R. 190.

2. *Reg. v. Hewgill*, 1 Dears. C. C. 315; s. c., 2 C. L. R. 600; 18 Jur. 158; 24 Eng. L. & Eq. 526.

3. *People v. Sully*, 1 Buffalo (N. Y.) Supr. Ct. 17. See also *Hess v. Young*, 19 Ind. 379.

4. *Com. v. Coe*, 115 Mass. 481; s. c., 2 Cr. L. Rep. 292.

5. *State v. Corbett*, 1 Jones (N. C.) L. 264.

6. **False Certificate of Stock—Indictment.**—In *Com. v. Coe*, 115 Mass. 481; s. c., 2 Am. Cr. Rep. 292, the defendant was indicted for obtaining money upon a false and fraudulent certificate of stock, and the indictment contained an allega-

tion that the certificate was "false, forged, and counterfeit, and for value." The court held that an allegation was not descriptive, and that proof that a certificate purporting to be for 100 shares of stock, but which was in fact a certificate issued for one share and subsequently altered, constituted no variance.

Representations as to Money on Deposit—Allegations.—In *Moore v. State*, 20 Tex. App. 233, the indictment alleged, that defendant had falsely represented that he had "a large amount of money on deposit" in a certain bank. Evidence of a representation that he had "\$5000 on deposit" was held to support the allegation, which was one of substance.

But in *O'Connor v. State*, 30 Ala. 9, the allegation was, that the prisoner pretended "that he had in Macon \$7000." The testimony showed a pretence that he had \$7 less than \$7000 in a bank in Macon. It was held that the variance was material.

Worthless Drafts.—In *Prelm v. State* (Neb.), 36 N. W. Rep. 295, an indictment charged false representations that certain worthless drafts were worth a certain sum. The court held that evidence of instruments called drafts, but only payable in goods of a certain kind at a certain place, and by the maker, did not support the indictment.

pretences, but the evidence shows a loan to one of such persons only, the variance is fatal.¹ It is not necessary that the pretences should be proved in the precise words made in the indictment, but the idea conveyed by the defendant and set forth in the indictment must be identified.²

c. Variance as to Property.—Any variance as to money obtained, or as to the nature of the property, between the allegation contained in the indictment and the proof introduced by the prosecution, is fatal. Thus, if the indictment and the proof differ as to the amount obtained,³ or as to the currency in which it is alleged the money was paid,⁴ a conviction cannot be sustained. If the evidence shows that the defendant obtained a promissory note or other writing, it will not support an indictment for obtaining money by false pretences, though he afterwards may have obtained payments of the sum charged by virtue of the writing.⁵

1. *Com. v. Pierce*, 131 Mass. 31.

Allegation of the False Representation in an indictment for obtaining money by personating another, is descriptive of the offence, and must be proved as alleged; and proof that two were acting in concert, and of one of them personating the assumed party, with the assent and concurrence of the other, will not sustain the charge of false personation by the latter. *Kirtley v. State*, 38 Ark. 543.

False Pretences to County.—An indictment charging false pretences to a county is supported by evidence of false pretences to its officers. *Roberts v. People*, 9 Colo. 458.

2. *State v. Vanderbilt*, 27 N. J. L. (3 Dutch) 328.

Drafts—Indictment—Variance.—Where a defendant was charged in an indictment with having falsely pretended that a certain draft was a good and valuable draft, and that he had funds in the National Bank of Wooster, Ohio, to pay it, but the evidence only proved him to have said that there was money in the hands of defendant's partner, who lived in Wooster, Ohio, to pay the draft, and that it was a good draft, *held*, that the variance between the indictment and the proof was fatal, and, after conviction upon the charge, the defendant may have a new trial. *Com. v. Garver (Pa.)*, 11 Leg Int. 210; s. c., 4 Cr. L. Mag. 614.

An indictment charging the obtaining of nine dollars from one H., by false pretences that he was indebted to defendant in that amount, *held*, not to be sustained by proof of a pretence that H. owed the defendant six dollars, and obtained six dollars thereby. *Marwilsky v. State*, 9 Tex. App. 377. *Litman v. State*, 9 Tex. App. 461.

3. **Variance Between Information and Proof.**—Appellant was convicted of swindling by means of false pretences, upon an information which charged that he and another obtained nine dollars from one H. on the false pretence that H. was indebted to them in that sum of money. The entire proof showed that the amount claimed and obtained by the accused was six dollars, instead of nine as alleged. *Held*, that the evidence did not correspond with the allegation, nor suffice to support the conviction. *Litman v. State*, 9 Tex. App. 461; *Marwilsky v. State*, 9 Tex. App. 377. Nor in such case is there a fatal variance between an allegation that \$106 was obtained, and proof that the amount obtained was \$109. *Moore v. State*, 20 Tex. App. 33.

4. **The Indictment Charging the Obtaining of \$208 in United States Currency.**—This allegation must be proved as laid, and in the absence of proof that the prisoner received United States currency, a conviction cannot be sustained. *Fay v. Com.*, 28 Gratt. (Va.) 912; s. c., 3 Am. Cr. Rep. 85.

Proof that one obtained by false pretences \$500 "in national bank notes," will sustain an indictment for so obtaining \$500 "in money of the currency of the United States." *Edwards v. State*, 49 Ala. 334.

5. An averment of obtaining money under false pretences is not supported by proof of obtaining certificate of deposit of bank. *Com. v. Howe*, 132 Mass. 250.

An indictment for obtaining from A \$1200 by false pretences, is not supported by proof of obtaining A's promissory note for that sum, which A afterwards paid before maturity. *Reg. v. Brady*, 26 Up. Can. Q. B. 13.

Where the defendant is charged with obtaining a writing, the writing must answer in species and general tenor to the description contained in the indictment.¹

d. Variance as to Party Defrauded.—A variance in the Christian name of the person defrauded, will invalidate a conviction.² If the indictment simply charged the obtaining of money from one "B. and others," and the evidence only reveals an obtaining from B., there is no variance, as the words "and others" may be rejected as surplusage.³ If only the initials of the party defrauded are set out in the indictment, and the proof establishes the taking from a person by his full Christian name, evidence may be introduced to identify the person alleged to have been defrauded, with the person from whom it is shown the property was obtained.⁴

XVII. VERDICT.—On an indictment for obtaining indorsements of a draft by false pretences, and procuring money from a bank upon such indorsement, the verdict found the defendant guilty "of obtaining money by false pretences as charged in the indictment," and it was sustained on the ground that the words "of obtaining money by false pretences" could be stricken out as surplusage.⁵ A verdict returned on an indictment which contains two counts for the offence, will be sustained if either of the counts is good.⁶ A verdict of guilty under a count which charges the de-

Variance.—An indictment charged that the defendant, by false representations, obtained money from an insurance company. The proof showed that the defendant drew on the company, and the draft was paid by the check. *Held*, that this was a substantial agreement with the allegation in the indictment. *People v. Dimick* (N. Y.), 14 N. E. Rep. 178; s. c., 10 Cr. L. Mag. 324.

1. In *People v. Reed*, 70 Cal. 529, the indictment charged the defendant with obtaining a promissory note which, it was alleged, had been executed by the party defrauded. The evidence showed that the note was jointly executed by him and by another. It was held that the conviction could not be sustained.

In *Wallace v. State*, 11 Lea (Tenn.), 542, the defendant was charged with obtaining by false pretences a note transferred to S. The variance was held to be fatal.

2. In *State v. Horn* (Mo.), 6 S. W. Rep. 96, the defendant was indicted under a Missouri statute which required that the name of the party defrauded should be set forth. The indictment charged that Samuel H. did unlawfully and feloniously intend to cheat and defraud; did obtain from one John F. money and property of the said John F. The evidence showed that the Christian name of the defendant was Syd-

ney, and that of F., Joseph. It was held that the variance was fatal.

3. **Goods Obtained from B "and Others"**—**Evidence Only as to B.**—A was charged with an attempt, by false pretences made to John Baggally "and others," fraudulently to obtain goods, the property of the same parties. The evidence was, that the representation was made to John Baggally alone. *Held*, that there was no variance, as the words "and others" might be rejected as surplusage. *Reg. v. Kealey*, T. & M. 405; s. c., 2 Den. C. C. 69; 5 Cox C. C. 193; 20 L. J. M. C. 57; 15 Jur. 230.

4. An indictment charged a false pretence to have been made to H. B. Jones, and the proof showed that it was made to Hiram B. Jones. *Held*, the variance was immaterial if the proof showed that H. B. Jones and Hiram B. Jones were the same person. *Franklin v. State*, 52 Ala. 415.

5. *Wallace v. State*, 2 Lea (Tenn.), 29.

Verdict.—Where, in the trial of an indictment for obtaining goods by false pretences, the jury returned, "that the prisoner was guilty of unlawfully and fraudulently obtaining goods under false pretences," and the foreman stated, that the jury could not agree on the fact of the intent, the court ordered a new trial. *Com. v. Moorar, Thach.* (Mass.) C. C. 410.

6. *Thomas v. People*, 115 Ill. 531; s. c., 5 Am. Cr. Rep. 127.

defendant with obtaining money by false pretences, is not inconsistent with a finding that he was not guilty under a second count charging him with conspiring with another to defraud the same person.¹ And it has been held that if the indictment contains two counts charging a conspiracy to obtain goods, and a third count for obtaining money by false pretences, a verdict finding the defendant guilty of the conspiracy which shows nothing as to the third count, is equivalent to a verdict of not guilty as to one count.² In some jurisdictions a verdict of guilty of an attempt may be returned under an indictment for obtaining by false pretences.³

XVIII. RESTITUTION OF THE PROPERTY.—In cases where goods have been obtained from another by mere fraud, the court had formerly no power of awarding restitution and conviction of the offender as in case of felony;⁴ but in England, restitution may now be awarded under the powers conferred by 24 and 25 Vict. c. 6 § 100.⁵ By virtue of this statute, it is now held that when a

1. In *Reg. v. Halliday*, Bell C. C. 257; s. c., 8 Cox C. C. 298; 29 L. J. M. C. 148; 8 Jur. N. S. 514; 2 L. T. 54. B. was indicted in a first count for obtaining money from the trustees of a savings bank by falsely pretending that a document presented to the bank by the wife of D. had been filled up by the authority of D. In a second count he was charged with conspiring with the wife of D. to defraud the bank. The evidence of D. was received, in proof of the first count, to show that he had given no authority to fill up the document or to withdraw the deposit. The jury found the defendant guilty on the first count, and not guilty on the second count. It was held that the findings were not inconsistent.

2. *Thomas v. People*, 115 Ill. 531; s. c., 5 Am. Cr. Rep. 127.

3. *Reg. v. Goff*, 9 Up. Can. C. P. 438; 14 and 15 Vict. c. 100, § 9.

A defendant indicted for misdemeanor in obtaining money under false pretences cannot, under C. S. C. c. 99, § 62, be found guilty of larceny. Where a defendant, on such an indictment, had been found guilty of larceny, *held*, that the court had no power, under C. S. U. C. c. 112, § 3, to direct the verdict to be entered as one of "guilty," without the additional words. *Reg. v. Ewing*, 21 Q. B. 523.

Constructive Larceny.—By proviso of section III of the Act of March 31, 1860 (P. L. 410, Pennsylvania), it is provided, "that if, upon the trial and of any person indicted for such a misdemeanor (false pretences), it shall be proved that he obtained the property in question in such manner as to amount in law to larceny,

he shall not, by reason thereof, be entitled thereof to be acquitted of such misdemeanor," etc. *Held*, that the distinction between the offences of constructive larceny and cheating by false pretences is clearly defined; and, as neither of the counts in the indictment would sustain a charge of larceny, the defendant could not be convicted of that offence. *Com. v. Moore*, 99 Pa. St. 570; s. c., 4 Am. Cr. Rep. 230.

4. *Parker v. Patrick*, 5 T. R. 175; *Rex v. De Veaux*, 2 Leach, 585. See also *Noble v. Adams*, 7 Taunt, 59; *Stephenson v. Hart*, 4 Bing. 476.

5. **English Statute 24 & 25 Vict. c. 6. s. 100.**—This statute is in the following terms: "If any person guilty of any such felony or misdemeanor as is mentioned in this act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the court before whom any person shall be tried for any such felony or misdemeanor shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner; provided, that if it shall appear, before any award or order made, that any valuable security shall have been *bona fide* paid or discharged by some person or body corpo-

sale of goods has been induced by false pretences, and the owner of the goods has prosecuted the thief to conviction, his property in the goods reverts on the conviction, and he can recover the goods from the person in whose possession they are, even though that person had, before the conviction, paid them in market overt or otherwise without notice of the fraud; and it is not necessary, as a condition precedent to the recovery of the goods, that the original owner should have obtained an order of restitution.¹

FALSE REPRESENTATIONS.—See FALSE PRETENCES.

rate liable to the payment thereof, or being a negotiable instrument, shall have been *bona fide* taken or received, by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed, of,—in such case the court shall not award or order the restitution of such security; provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods, or documents of title to goods, for any misdemeanor against this act."

The Court May Order the Restitution to the Owner of Property which has been obtained by false pretences, of the proceeds of sale of such property if they are in the hands of the person convicted of false pretences, or his agent. Such an order is an order made in a criminal matter, and is not subject to appeal. *Reg. v. Justices of Central Criminal Court*, 18 L. R. Q. B. Div. 314; s. c., 56 L. J. M. C. 25; 35 W. R. 243; L. R. 17 Q. B. Div. 498.

3. *Bentley v. Vilmont*, L. R. 12 App. Cas. 471; s. c., 47 L. J. Q. B. Div. 18.

Sale in Market Overt.—In *Bentley v. Vilmont*, *supra*, one H. obtained the goods by false pretences from G., and pawned them to D. D. sent them to S. to be warehoused and sold, and they were eventually sold by S. to B. The sale took place in the city of London, and the warehouse of S. was therefore market overt. G. and B. both claimed the goods from S., and an interpleader issue was tried between them, with the result that G. obtained judgment for the goods. Lord Esher, M.R., said: "If a thief sold goods in market overt, the property in the goods vested in the pur-

chaser, and passed away from the person from whom the goods were stolen. Then the statute came in. Now, if the goods were not sold in market overt, the statute was not wanted, because the thief could give no property to anyone; therefore, the statute was only wanted in the case of goods sold in market overt. Then, in order to stimulate the person from whom the goods were stolen, to prosecute, the legislature stepped in and gave him the goods again. It was a hard case on two innocent parties, but the legislature thought it best, in the public interest, that, if the person from whom the goods were stolen prosecuted the thief to conviction, the property should be restored to him, and the court might in its discretion make an order for the restitution of the property. . . . The property had passed to the person who bought it in the market overt, but, upon conviction, it was to be restored to the original owner. . . . As to false pretences, there were two clauses: first, where there was a false pretence but no contract of sale; then, no property passed, and the statute was not required for such a case as that; secondly, where there was a contract of sale induced by false pretences; there it had been held that the property passed by contract, but the contract was voidable and was good until avoided; but it was also held, that it could not be avoided once the property had passed into the hands of a *bona fide* purchaser for value, without notice. Now, it was only in the last case that the statute was required. The statute must have some meaning when applied to false pretences; and therefore it applied where the goods had passed, by a contract of sale, to a fraudulent person, and had got into an innocent third person's hands for value." This decision formerly overruled *Moyce v. Newington*, L. R. 4 Q. B. Div. 32. See also, on the subject, *Lindsay v. Cundy*, L. R. 1 Q. B. Div. 348; s. c., L. R. 2 Q. B. Div. 196; L. R. 3 App. Cas. 459.

FALSE SWEARING.—The offence of false swearing consists in falsifying under oath, administered by a competent officer, in a proceeding which is not judicial, but where the oath is taken to affect a judicial right.¹ Thus, it has been held in England that a false oath under the Bills of Sale Act, before a commissioner for taking affidavits in the court of queen's bench, for the purpose of getting a bill of sale filed, is not perjury, but false swearing.²

A false oath before a surrogate in order to obtain a marriage license;³ or a false oath taken before commissioners appointed by the king to inquire into cases in which a royal grant was required to confirm title to lands;⁴ or a false declaration on registration of voters, or at a municipal or parliamentary election,⁵—is false swearing, and not perjury.

False swearing is a misdemeanor at common law.⁶ The

1. Whart. Cr. Law (9th ed.), sec. 1244.

2. Reg. v. Hodgkiss, L. R. 1 C. C. R. 212.

3. Reg. v. Chapman, 1 Den. C. C. 432. See Warwick v. State, 25 Ohio St. 21; Call v. State, 20 Ohio St. 330; Reg. v. Barnes, 10 Cox C. C. 539; Rex v. Foster, Russ. & Ry. C. C. 459.

4. Hobart, 62.

5. Reg. v. Ellis, Car. & M. 564; s. c., 6 Jur. 287; Reg. v. Bowler, Car. & M. 559; s. c., 6 Jur. 287; Reg. v. Lucy, Car. & M. 511; Reg. v. Dodsworth, 8 C. & P. 218; s. c., 2 Jur. 131; Rex v. Price, 3 East, 419; s. c., 2 Smith, 525.

At Parliamentary Election—By Whom Questions are Asked.—On an indictment under 2 and 3 Will. IV. c. 45, § 58, for giving a false answer at the poll at an election of members of parliament for a borough, it is not essential that the returning officer should himself put the three questions to the voters under sec. 53, but it is sufficient if the town clerk does it in his presence and by his direction; neither is it necessary to show that the agent who required the questions to be put was expressly appointed by the candidate; it is sufficient to show that he has acted as agent for the candidate. Reg. v. Spalding, Car. & M. 568.

At Election—Omission to Read Qualifications.—A voter having changed his residence since the last registration cannot be indicted under 2 and 3 Will. IV. c. 45, for swearing that he still has the same qualification, if the sheriff's deputy should omit, at the time the voter tenders his vote, to read over to him the specific qualification from the register. Reg. v. Lucy, Car. & M. 511.

Must be Wilful.—If a person knew that at the time of polling he gave a false answer as to his having the same qualifica-

tion as at the time of registration, it would be no defence to an indictment for that offence that he acted under the advice of an electioneering committee; but if, possessing property of equal value with that for which he was registered, he acted *bona fide*, and under an impression that he was entitled to vote, he ought to be acquitted. Reg. v. Dodsworth, 8 C. & P. 218; s. c., 2 Jur. 131.

Same—Son of Same Name as Father.—The son of a burgess, of the same name as his father, living in the house in respect of which his father had been qualified, but the father having for some time been absent, and the son paying the rates, is not indictable for untruly answering questions put to voters upon his voting. Reg. v. Goodman, 1 F. & F. 502.

6. Reg. v. Chapman, 1 Den. C. C. 432; s. c., T. & M. 90; Rex v. Hodgkiss, L. R. 1 C. C. 212. See Rex v. De Beauvoir, 7 Car. & P. 17; Reg. v. O'Brian, 2 Str. 1143.

To Defraud United States.—False swearing to defraud the United States is made punishable in the same manner as perjury by Act of Congress of March 1, 1823. United States v. Bailey, 34 U. S. (9 Pet.) 238; bk. 9, L. ed. 113. In this case the court say: "The false swearing and false affirmation, referred to in the act, ought to be construed to include all cases of swearing and affirmation required by the practice of the Treasury Department in regard to the expenditure of public money, or in support of any claims against the United States. The language of the act is sufficiently broad to include all such cases, and we can perceive no reason for excepting them from the words, as they are within the policy of the act, and the mischief to be remedied. The act does no more than change a common-law offence into a statute offence."

indictment must aver that the false answer was given by defendant wilfully¹ and corruptly. It need not specify the words used, but if it does, they must be proved;² but if the act charged would be an offence regardless of circumstances stated, the fact that they cannot be proved on the trial will not affect the indictment, as they may be treated as surplusage.³ If false swearing is charged as to several statements, proof as to any one of them will sustain the charge.⁴ To prove that the assertion or declaration was false in fact, there must be the same corroboration of a witness, either by another witness, or by additional circumstances, as is required to support a charge of perjury.⁵

FALSE TOKENS.—A false token is a false writing or false sign of the existence of a fact fraudulently used.⁶ The use of false

1. An indictment upon 5 and 6 Will. IV. c. 76, sec. 34, for giving a false answer on voting for a town councillor, is bad if it does not allege that defendant wilfully gave the false answer. *Reg. v. Bent*, 2 C. & K. 179; s. c., 1 Den. C. C. 157.

2. Words Averred must be Proved.—Where an averment states the words of the affirmative answer, they must be proved as alleged. *Reg. v. Bowler*, Car. & M. 559; s. c., 6 Jur. 287.

3. Benefit Society—Affidavit as to Loss—Indictment—Surplusage.—An indictment on 5 and 6 Will. IV. c. 62, sec. 13, for making a false declaration before a magistrate, stated that by the rules of a benefit society any full free member of it who sustained a loss by an accidental fire was to be indemnified to the extent of £15, on making a declaration before a magistrate verifying his loss; and that the defendant was a full free member of the benefit society, and had made a false declaration before a magistrate that he had sustained a loss by fire. On the trial, the rules of the society could not be proved; but held, that the allegation in the indictment respecting the rules might be rejected as surplusage, as the offence of the defendant, in making the false declaration as to the fire, would be an offence within the statute, if no such benefit society had ever existed. *Reg. v. Boynes*, 1 C. & K. 65.

Pawnbroker's Ticket—Affidavit as to Loss.—An indictment charging A. with having made a false declaration before a justice that he had lost a pawnbroker's ticket, whereas he had not lost the ticket, but "had sold, lent, or deposited it with one C.," is not bad for uncertainty, because the words "had sold, lent, or deposited it" are mere surplusage, and therefore an error in them does not affect the indictment. *Reg. v. Parker*, 1 L. R. C. C. 225; s. c., 39 L. J. M. C. 60; 21 L. T. 724; 18 W. R. 353.

4. Evidence—Proof of One of Allegations—Sufficiency.—If, in an indictment for swearing falsely before a surrogate to obtain a marriage license, the description of the deponent and other things material are alleged to be falsely sworn (but not alleging the false swearing to be in an affidavit), proof of the false swearing as to any one of the other things will sustain the count. *Reg. v. Chapman*, 1 Den. C. C. 432.

5. *Reg. v. Browning*, 3 Cox C. C. 437, note.

Under Pawnbroker's Act.—To prove that a declaration under the pawnbroker's act (39 and 40 Geo. III. c. 99) is false in fact, it is necessary to negative the defendant's statement by the oath of two witnesses, in the same manner and to the same extent as on the proof of an assignment for perjury. *Reg. v. Browning*, 3 Cox C. C. 437.

Proof of Declaration.—To prove the making of a false declaration under the Pawnbroker's Act (39 and 40 Geo. III. c. 99), it is not absolutely necessary to call the magistrate before whom it was made, or some one present at the time. *Reg. v. Browning*, 3 Cox C. C. 437.

Certificate of Loss.—Where a person is indicted for having made a false declaration as to a fire having taken place at his house, evidence may be given that, with the declaration, he sent a certificate, which stated the fire to have occurred, and that the signatures to that certificate were all forgeries, as this evidence may go to show that the declaration was wilfully false. *Reg. v. Boynes*, 1 C. & K. 65.

At the Polls.—A copy of the original register, made according to 2 and 3 Will. IV. c. 45, sec. 55, may be received in evidence; and it is sufficient if it resembles the original in respect of the voter's name and description. *Reg. v. Dodsworth*, 8 C. & P. 218; s. c., 2 Jur. 131.

6. 1 Bouv. Law Dict. (15th Ed.) 644.

tokens is indictable at common law.¹ The offence may be committed by cheating by means of false dice;² or passing the worthless note or check of another, or of a fictitious maker, representing it to be good;³ or the use of marks upon packages indicating a greater weight or measure than they in reality contain.⁴ But a mere naked lie is not such a false token as comes within the law.⁵ Thus delivering a less amount of merchandise than is pretended;⁶ or falsely pretending to be sent to fetch goods;⁷ or fraudulently claiming to be a merchant, and thus obtaining credit;⁸ or knowingly selling wrought goods, under sterling alloy, for gold of standard weight;⁹ or by obtaining from a judgment creditor a receipt and an order to discharge the judgment, upon the faith of an assertion of readiness to pay;¹⁰ or knowingly selling a blind horse upon a representation that he is sound,¹¹—does not constitute a

What Constitutes a False Token.—

It is said that some difficulty has arisen as to what shall be considered as a token. It is clearly not a mere affirmation or promise, but must be something real and visible, as a ring, a key, or a writing; and even a writing would not suffice, except it was in the name of another, or so framed as to afford more credit than the mere assertion of the party defrauding. *People v. Gates*, 13 Wend. (N. Y.) 311; 1 Chit. Cr. L. 997; 2 East P. C. 689.

1. *Com. v. Warren*, 6 Mass. 74; *People v. Babcock*, 7 Johns. (N. Y.) 201; *People v. Gates*, 13 Wend. (N. Y.) 311; *People v. Stone*, 9 Wend. (N. Y.) 183; *Respublica v. Teischer*, 1 U. S. (1 Dall.) 335; bk. 1, L. ed. 163.

2. *People v. Gates*, 13 Wend. (N. Y.) 311; *Respublica v. Teischer*, 1 U. S. (1 Dall.) 335; bk. 1, L. ed. 163.

3. *State v. Patillo*, 4 Hawks. (N. C.) 348; *Com. v. Speer*, 2 Va. Cas. 65.

4. *Respublica v. Powell*, 1 U. S. (1 Dall.) 47; bk. 1, L. ed. 31.

5. *Com. v. Warren*, 6 Mass. 74; *People v. Miller*, 14 Johns. (N. Y.) 371; *People v. Babcock*, 7 Johns. (N. Y.) 201; *Hartmann v. Com.*, 5 Pa. St. 60; *State v. Delyon*, 1 Bay (S. C.), 353; *State v. Sumner*, 10 Vt. 587; *Rex v. Osborn*, 3 Bur. 1697; *Rex v. Dunnage*, 2 Bur. 1130; *Rex v. Bower*, Cowp. 323; *Reg. v. Jones*, 2 Ld. Raym. 1013; *Reg. v. Hannon*, 6 Mod. 311; *Rex v. Lewis*, Say. 205; *Rex v. Butterfield*, Say. 146; *Rex v. Botwright*, Say. 147; *Rex v. Bryan*, 2 Str. 866; *Rex v. Channell*, 2 Str. 793; *Rex v. Wheatley*, 1 Wm. Bl. 273; s. c., 2 Bur. 1137.

A Naked Lie.—In *Com. v. Warren*, 6 Mass. 72, the court say that “by the English statute of 33 Hen. VIII. c. 1, passed before the settlement of this country, and considered here as part of our common law, cheating by false tokens is made an indictable offence. The object

of the law is to protect persons who, in their dealings, use due diligence and precaution, and not persons who suffer through their own credulity, carelessness, or negligence. But as prudent persons may be overreached by means of false weights, measures, or tokens, or by a conspiracy, where two or more persons confederate to cheat, frauds effected in either of these ways are punishable by indictment. And by an English statute of 30 Geo. II. c. 24, which is not in force in this State, the same prosecution has been extended to cheating by pretences.”

In the case of *People v. Miller*, 14 Johns. (N. Y.) 371, the defendant called on the witness Wilson and wished to see a note which was given by the defendant to one Marsh or bearer, and on its being handed to him to look at, he mounted his horse and rode away with it, and refused to deliver it to the witness. The court say: “The evidence did not make out any criminal offence at all: it was a mere private fraud, which, according to the doctrine laid down by this court in the case of *People v. Babcock*, 7 Johns. (N. Y.) 204, is not indictable. A fraud indictable at common law must be such as would affect the public, and such as common prudence would not be sufficient to guard against, as the using of false weights and measures or false tokens, or where there has been a conspiracy to cheat. 6. T. R. 565. The fraud in this instance is not one falling within the rule.”

6. *Rex v. Osborn*, 3 Bur. 1697; *Rex v. Dunnage*, 2 Bur. 1130; *Rex v. Wheatley*, 1 W. Bl. 273; s. c., 2 Bur. 1129.

7. *Rex v. Bryan*, 2 Str. 866.

8. *Com. v. Warren*, 6 Mass. 72.

9. *Rex v. Bower*, Cowp. 323.

10. *People v. Babcock*, 7 Johns. (N. Y.) 201.

11. *State v. Delyon*, 1 Bay (S. C.), 353.

cheating by means of false tokens. Neither is a mere false representation in writing,¹ such as obtaining goods by giving in payment a check upon a banker with whom the party keeps no account, and which he knows will not be paid.²

FALSE WEIGHTS AND MEASURES.

I. Definition, 796.

II. What Constitutes the Offence, 796.

III. Inspection and Seizure, 798.

1. *Obstructing Inspection*, 800.

IV. Actions and Proceedings, 800.

1. Definition.—False weights and measures are such weights and measures as do not comply with the standard prescribed by the state or government, or with the custom prevailing in the place and business in which they are used.³

II. What Constitutes the Offence.—The offence consists in knowingly using false weights and measures as and for correct ones, and leading other persons to accept and treat them as such, to their detriment. Selling goods by false weights and measures is punishable at common law.⁴ But merely selling a less quantity than is

1. *Rex v. Lara*, 2 Leach C. C. 652; s. c., 2 East P. C. 819, 827; 6 T. R. 565; *Rex v. Wavell*, 1 Moo. C. C. 224.

2. *Rex v. Lara*, 2 Leach C. C. 652; s. c., 2 East P. C. 819, 827; 6 T. R. 565; *Rex v. Wavell*, 1 Moo. C. C. 224. *Compare* *Rex v. Jackson*, 3 Campb. 370.

3. Where the evidence shows that the scales are correct with the standard in a State treasurer's office, it is improper to charge the owner with a difference in weight according to other scales not shown to be correct by the standard. *McGeorge v. Walker* (Mich.), 7 West. Rep. 900.

False Scales.—A pair of scales had a hollow brass ball hanging upon the weigh end of the beam, and the ball was constructed with a neck which could be unscrewed so as to allow shot to be placed inside, and being hung by a hook upon the beam was easily removable. The scales were correct in that state, but if the shot inside the ball was removed the scales were unjust and against the purchaser. *Held*, that the justices were justified in finding that the ball loaded with shot was no part of the scales, and that consequently they were unjust. *Carr v. Stringer*, 3 L. R. Q. B. 433; s. c., 37 L. J. Q. B. 168; 18 L. T. 399; 16 W. R. 859; 9 Best & S. 238.

Weighing Machines out of Repair.—At a station of a railway company was a weighing-machine working by a spring, and having a dial-plate and an index finger, with figures from zero to 560 lbs., which was used for weighing parcels and passengers' excess luggage. The machine became disordered; the index stood at 4 lbs. instead of zero. *Held*, that the company

was properly convicted of having in its possession a weighing-machine which was found to be incorrect and unjust. *Great Western R. Co. v. Bailie*, 5 Best & S. 928; s. c., 34 L. J. M. C. 31; 11 Jur. N. S. 264; 11 L. T. 418; 13 W. R. 203.

Same—Testing—Failure to Adjust.—A weigh-bridge at a railway station, which weighs correctly if properly adjusted before use, found by the inspector, who does not adjust it, to be incorrect, is not a weighing-machine found to be incorrect upon proper examination, within 5 & 6 Will. IV. c. 63, s. 28. *London & N. W. R. Co. v. Richards*, 2 Best & S. 326; s. c., 8 Jur. N. S. 539; 5 L. T. 792.

4. *Com. v. Warren*, 6 Mass. 72; *People v. Gates*, 13 Wend. (N. Y.) 311; *Respublica v. Powell*, 1 Dall. (U. S.) 47; bk. 1 L. ed. 31; *People v. Stone*, 9 Wend. (N. Y.) 182; *Rex v. Young*, 3 T. R. 98.

Where a Baker Employed by the Army of the United States was indicted for a cheat in baking 219 barrels of bread and marking them as weighing 88 lbs. each, whereas they only severally weighed 68 lbs., the court said that "this was clearly an injury to the public, and the fraud the more easily to be perpetrated since it was the custom to take the barrels of bread at the market weight without weighing them again. The public indeed could not by common prudence prevent the fraud, as the defendant was himself an officer of the public *pro hac vice*. They were therefore of the opinion that the offence was indictable." *Respublica v. Powell*, 1 U. S. (1 Dall.) 47; bk. 1 L. ed. 31.

Under the English Statute.—By the English statute of 33 Hen. VIII. c. 1, passed

pretended is not indictable at common law. To constitute the criminal offence of using false weights and measures, there must be a plausible contrivance against which common prudence would not have guarded.¹ However, if a person has measured grain in a bushel and put something in the bushel to fill it up, or has measured in a bushel short of the stated measure, he is indictable.²

before the settlement of the United States, and considered as a part of their common law, cheating by false tokens is made an indictable offence. The object of the law is to protect persons who in their dealings use due diligence and precaution, and not persons who suffer through their own credulity and carelessness or negligence. *Com. v. Warren*, 6 Mass. 72.

New York Doctrine.—In *People v. Stone*, 9 Wend. (N. Y.) 182, Sutherland, J., said: "The better opinion seems to be that in order to render a cheat or fraud indictable at common law, on the ground that it was effected by means of a false token, the token must be such as indicates a general intent to defraud, and therefore is an injury to the public. A mere privy token seems not to come within the meaning of the term 'false token' as used at common law."

At common law private cheats were not indictable. The only remedy was by action. The cases in which fraud was indictable at common law were: the use of false weights and measures; the selling of goods with counterfeit marks; playing with false dice; and frauds affecting the course of justice and immediately injuring the interests of the public or the crown. These depend on the principle that they evince a general intent to defraud. *People v. Gates*, 13 Wend. (N. Y.) 311.

1. *Rex v. Young*, 3 T. R. 98; *Harris Cr. L.* 249.

2. *Rex v. Pinkney*, 2 East P. C. 820.

False Representations as to Quantity or Weight.—The prisoner having agreed with the prosecutrix to sell and deliver a load of coal at a certain price per hundred-weight, delivered a load which he knew to be only 14 cwt., but which he fraudulently pretended to be 18 cwt., stating that it had been weighed at the colliery; and he produced a ticket which showed the weight to be 18 cwt., and which ticket he said he had made out himself when the coal was weighed, and he thereupon received the money for 18 cwt. It was held that upon this evidence the prisoner was properly convicted of obtaining money of the prosecutrix by false pretences. *Reg. v. Sherwood, Dears. & B. C. C.* 251; s. c., 26 L. J. M. C. 81. The attention of the court was drawn to *Rex v. Reed*, 7 C. &

P. 848, a precisely similar case, in which the twelve judges held the other way, but it was considered that that case was already overruled by *Reg. v. Roebuck, Dears. & B. C. C.* 24; s. c., 7 Cox C. C. 126; 25 L. J. M. C. 101; 2 Jur. N. S. 597; *Reg. v. Abbott*, 1 Den. C. C. 273; 2 Car. & K. 630; 2 Cox C. C. 430; *Reg. v. Bryan, Dears. & B. C. C.* 265; s. c., 26 L. J. M. C. 84; 3 Jur. N. S. 620.

In *Reg. v. Goss*, 29 L. J. M. C. 86; s. c., Bell C. C. 208, it was attempted to induce the court of criminal appeal to reconsider the decision in *Reg. v. Abbott, supra*, the facts being precisely similar. But the court confirmed that decision, holding the prisoner was rightly convicted. And in *Reg. v. Ragg*, Bell C. C. 215; s. c., 8 Cox C. C. 262; 29 L. J. M. C. 86; 6 Jur. N. S. 178; 1 L. T. 337; 8 W. R. 193, which was argued at the same time as *Reg. v. Goss*, and which was similar to *Reg. v. Sherwood, Dears. & B. C. C.* 251; s. c., 26 L. J. M. C. 81, they also upheld the conviction. The case of *Reg. v. Byan, Dears. & B. C. C.* 265; s. c., 7 Cox C. C. 313, 26 L. J. M. C. 84; 3 Jur. N. S. 620, was relied on by the counsel for the prisoner, but Erle, J., pointed out in the judgment of the court that there the false representation was a matter of undefined opinion, whereas here the statement was not one of undefined opinion, or of exaggerated praise, but a false pretence of a definite fact, about which, with the means of information which the prisoner had, there could be no mistake.

Sale by Lump, Not by Weight or Quantity.—The difference between a mere lie and an indictable false pretence upon the subject of false weights is thus stated by Bramwell, B.: "If a man is selling an article, such as a load of coal, for a lump sum, and makes a false statement as to its weight or quantity, for the purpose of inducing the intended purchaser to complete the bargain, that is not a false 'pretence within the statute. But if he is selling it quantity, and says there is a greater quantity than there really is, and thereby gets paid for a quantity of coal over and above the quantity delivered, I am satisfied he is indictable." *Reg. v. Ridgway*, 3 F. & F. 838. See also *Reg. v. Lee, L. & C.* 418; s. c., 32 L. J. M. C. 129.

As a general rule, the mere possession of false weights and measures, without proof of their use, will not support a conviction for this offence. Particularly is this true where kept in a place where goods are not exposed or kept for sale, nor weighed for conveyance or carriage.¹

III. Inspection and Seizure.—It is the duty of the public inspector, or other person charged with the duty of maintaining the standard of weights and measures, to inspect and seize all weights and measures which do not come up to the standard fixed by the statute. The inspector does not require a special warrant in order to authorize him to act in each individual case, his general warrant being sufficient for that purpose.²

Selling Loaves of Bread Deficient in Weight.—The defendant had contracted with the guardians of a poor-law union to deliver loaves of a specified weight to any poor persons bringing a ticket from the relieving officer. The tickets were to be returned by the defendant at the end of each week, with a statement of the number of tickets sent back, whereupon he would be credited for the amount, and the money would be paid at the time stipulated in the contract. The defendant delivered to certain poor people who brought tickets loaves of less than the specified weight, returned the tickets with the note of the number sent, and obtained credit in account for the loaves so delivered, but before the time of payment had arrived the fraud was discovered. *Held*, that the delivery of a less quantity of bread than that contracted for was a mere private fraud, no false weights or tokens having been used, and therefore not an indictable offence; that the defendant was properly convicted of attempting to obtain money, for although he had only obtained credit in account, and could not, therefore, have been convicted of the offence of actually obtaining money by false pretences, yet he had done all that was depending on himself towards the payment of the money, and was therefore guilty of the attempt; and that this was a case within 7 & 8 Geo. IV. c. 29, s. 53, because it was an attempt to obtain money by false and fraudulent representation of an antecedent fact; it was not a mere sale of goods by a false pretence of their weight. *Reg. v. Eagleton*, *Dears. C. C.* 515; *s. c.*, 6 Cox C. C. 559; 24 L. J. M. C. 158; 1 Jur. N. S. 940.

1. Possession Without Use.—Thus, a farmer had in his barn or outhouse a balance, or portable weighing-machine, and two iron weights, which were found by the inspector of weights and measures to be light. The inspector saw no produce about the premises, and could not prove

that the farmer exposed or kept for sale, or weighed for conveyance or carriage, any goods or produce. He was convicted by justices under 5 and 6 Will. IV. c. 63, § 28. *Held*, that the conviction was wrong. *Griffiths v. Place*, 20 L. T. 484.

Same—Use at Police Station-house.—Justices convicted a person for possession of false weights and an unjust weighing-machine. He was receiver of the metropolitan police and a station-house, and all chattels there were vested in him under Geo. IV. c. 43; § 16. In the station-house were weights which were light, and a weighing-machine which, from an injury, gave light weight; these were used in weighing coals which were allowed to the constables. The conviction was quashed, because the weights and weighing-machine were not being used within 5 and 6 Will. IV. c. 63, § 21, and the station-house not being a store where goods were exposed or kept for sale, nor weighed for conveyance or carriage. *Wray v. Reynolds*, 1 El. & El. 165; *s. c.*, 7 W. R. 86.

Persons Weighing for Third Party for Hire.—The extent and duty of private persons weighing on their own scales, for their neighbors, for a small fee, is to use reasonable diligence to know that the scales are correct, and reasonable care to avoid mistakes in using them. *McGeorge v. Walker* (*Mich.*), 7 West. Rep. 900.

2. *Kershaw v. Johnson*, 1 Car. & K. 329; *Hutchings v. Reeves*, 9 Mees. & W. 747; *s. c.*, 6 Jur. 439.

Powers and Duties of Inspectors—Right of Search.—An inspector of weights and measures, appointed by the sessions under 5 and 6 Will. IV. c. 63, § 17, and having a general warrant from a magistrate, under the statute (§ 28), to act as such within his jurisdiction, may, by virtue of such appointment and warrant, enter any shop within his district, at all seasonable

Where weights or measures have been duly stamped or sealed within the prescribed time, but the stamp or seal has become obliterated by time or use, the person using them are not liable for the penalty imposed for the use of unauthorized weights or measures, provided such weights or measures are otherwise unobjectionable.¹

An inspector is not authorized in seizing any weight without having first compared it with the standard in order to ascertain whether it is just or not.²

times, to examine and seize false weights and measures, and need not have a special warrant from a justice in each individual case. *Hutchings v. Reeves*, 9 Mees. & W. 747; s. c., 6 Jur. 439.

A servant assisting such inspector in the discharge of his duty, but who has not himself received any warrant or other authority in writing from the quarter sessions or justice of the peace, is a person acting in pursuance of the act, and in execution of the powers thereof, so as to entitle him, in an action brought against him for carrying away measures declared false by the inspector, to plead the general issue, and give the special matter in the evidence. *Hutchins v. Reeves*, 9 Mees. & W. 747; s. c., 6 Jur. 439.

Liability of Inspector.—Under a statutory provision which enacts "that if any side or sides of sole leather shall vary when thoroughly dried, so as to weigh five per cent. more or less than the weight marked thereupon by any inspector, the inspector who inspected the same shall be subject to the payment of the whole variation, at a fair valuation, to be recovered by the party injured thereby;" the words "thoroughly dried" mean that the leather is to be suitable and sufficiently dried so as to be in proper state for sale and use. *Tenney v. How*, 41 Mass. 335.

The Court of the Clerk of the Market. the chief business of which was to test the weights and measures, and to punish by fine if they were not according to the standard, has been virtually superseded. Now an inspector of weights and measures, or a magistrate, may enter any place where goods are exposed for sale, and, if the weights and measures are found incorrect, may seize and forfeit them; and the party in whose possession they are found, or who obstructs the examination, is fined a sum not exceeding five pounds. 41 and 42 Vict. §§ 25, 48; Har. C. L. 315. By section 21, no weight above 56 lbs. is required to be inspected and stamped; but the inspector

may still enter places within the meaning of the act, in order to inspect, although no weight of 56 lbs. or under be kept therein. *Kershaw v. Johnson*, 1 Car. & K. 329.

Under the Pennsylvania Act of April 15, 1845, only scales, weights, etc., which are in actual use must be tested and sealed, and not those kept in stock for sale. *Stolle v. Gabel*, 14 Phila. (Pa.) 616.

1. *Starr v. Stringer*, L. R. 7 C. P. 383; s. c., 26 L. M. 735.

2. *Kershaw v. Johnson*, 1 Car. & K. 329.

Right of Seizure.—An inspector of weights and measures duly entered a shop to examine weights and measures and weighing machines. He seized and carried away, as forfeited, a pair of weighing scales, and detained them after being requested to give them up; the owner sued in a county court, when the jury found that the scales were in fact unjust, that they were a weighing-machine, not a weight or measure, and that the defendant *bona fide* believed that he was acting in pursuance of the act. *Held*, that under 5 and 6 Will. IV. c. 63, § 28 weighing machines are not forfeited, though unjust, although weights and measures are, and consequently that the defendant was not authorized to seize the scales. *Thomas v. Stephenson*, 2 El. & Bl. 108; s. c., 22 L. J. Q. B. 258; 17 Jur. 597.

Liability to Seizure.—Under 5 and 6 Will. IV. c. 63, earthen vessels are liable to seizure if ordinarily used as measures, and if, on examination, they are found to be unjust. *Washington v. Young*, 5 Ex. 403; s. c., 19 L. J. Ex. 348.

Weight in Favor of a Purchaser.—A person, when in the act of selling provisions upon the highway, used, for the purpose of weighing the provisions, a spring balance which was incorrect, as being against the seller and in favor of the purchaser. No fraud on the public was intended. *Held*, that the spring balance could not be seized under

1. *Obstructing Inspection*.—Obstructing the inspection of weights and measures is a criminal offence. An indictment for obstructing the inspection of weights and measures must show in what act the alleged obstruction exists.¹

IV. Actions and Proceedings.—In an action for deceit in selling to plaintiff merchandise contained in specified measures, and for delivering less than agreed, the declaration should charge the selling of the merchandise in short and defective measures.²

Whether a measure or weighing-machine is unjust, is a question of fact for the trial court.³

22 and 23 Vict. c. 56, § 3 (repealed), nor was the seller liable to the penalty imposed by that section upon the persons having in their possession false and unjust beams, scales, or balances. *Booth v. Shadgett*, 8 L. R. Q. B. 352; s. c., 42 L. J. M. C. 98; 29 L. T. 30. Provided for by 41 and 42 Vict., c. 49, § 25.

Distress by Officer—Justification.—In an action against an officer and his assistant for distraining the goods of the plaintiff, it appeared that the annoyance jury of Westminster had visited the plaintiff's shop, and had condemned his scales. It further appeared that only two of the jury entered the shop, the rest being in the street, near the door and window. *Held*, that the distress was not justifiable, unless all the jury were sufficiently near to concur in the condemnation of the scales. *Holland v. Heath*, 2 Jur. 234.

Action against Jurymen.—In an action for seizing weights and measures, four defendants pleaded that they were sworn with divers, to wit, twenty others, as a leet jury, according to the custom of the manor of Stepney; and that it was the custom of the jury so sworn to examine weights and measures within the manor, and seize them if defective. There was evidence at the trial that only five of the leet jurors were actually in the plaintiff's shop when the defendant made the seizure there, though the rest were close at hand; but the judge refused to let any question go to the jury on this part of the case, being of opinion that the objection was on the record. *Held*, that the objection was on the record, and was valid; it not appearing by the plea that the examination and seizure were made by the jury sworn at the court leet, according to the custom. *Sheppard v. Hall*, 3 Barn. & Ad. 433.

Validity of the Customs.—A custom in a manor, for the leet jury to break and destroy measures found by them to be false, is lawful. *Wilcock v. Windsor*, 3 Barn. & Ad. 43.

1. Obstruction of Inspection by Jury —

An avowry stated the holding of a court leet, and an adjournment, and that the jurors proceeded, according to the custom of the manor, to examine the weights and measures within the manor, and that the plaintiff, not regarding his duty, but contriving to prevent the examination, according to the custom, of weights and measures, while the jurors were proceeding in their examination, knowingly and unlawfully obstructed them; that, therefore, at the court holden by adjournment, it was pretended that he obstructed the jury in the execution of their duty in examining the weights and measures within the manor, and that, by the judgment of the court, he was amerced for his obstruction. *Held*, that the presentment was insufficient, for not stating what the act of obstruction by the plaintiff was. *Frost v. Lloyd*, 9 Q. B. 130; s. c., 16 L. J. Q. B. 13; 11 Jur. 59.

2. Action for Deceit—Declaration.—A declaration in an action for deceit, which charges the defendant with fraudulently selling to the plaintiff divers large quantities of ale and beer, to wit, etc. (specifying the quantities under a *videlicet*), contained in puncheons and casks, and with deceitfully delivering less and deficient quantities, is not sufficient, as the defendant ought to be charged with fraud in selling the liquors in short and defective measures. *Miles v. Dell*, 3 Stark. 23. See also *Frend v. Butterfield*, 11 Ad. & E. 246.

3. B. was charged with wilfully selling an unjust weighing-machine. The machine consisted of a centre-pan on a vertical spring, and when articles were put exactly in the centre it weighed correctly, but when put a little on one side it weighed incorrectly. The magistrate convicted, and the quarter sessions, on appeal, affirmed the conviction. *Held*, that it was and must be a question of fact as to whether a weighing-machine was unjust, and the justices, having

FALSIFYING.—(See also ACCOUNT STATED.)

- I. Definition, 801.
 II. Falsifying Accounts, 801.
 III. Falsifying Record, 802.

- IV. Indictment, 802.
 1. *Averment of Jurisdictional Facts*, 803.

I. Definition.—In criminal law, falsifying is fraudulently making false an account or record.¹

II. Falsifying Accounts.—Falsifying accounts consists in the omission or change of an account with a fraudulent intent; such as making false entries in books of account,² by changing such

found that fact, the conviction must be affirmed. *Reg. v. Baxendale*, 44 J. P. 763.

Lying Representations.—A person who is cheated as to quantity, but without the use of false weights, measures, or tokens, may pursue a civil remedy for the injury, but he cannot prosecute by indictment. *Com. v. Warren*, 6 Mass. 72.

Collection of Fine.—A fine assessed by the mayor of Cincinnati, for the violation of an ordinance relating to weights and measures, may be collected either by commitment of the person upon whom it is imposed, or by *ieri facias*. *Huddleston v. Ruffin*, 6 Ohio St. 604.

1. 1 Bouv. Law Dict. (15th ed.) 644. See *Rex v. Hall*, Russ. & Ry. C. C. 463; s. c., 2 Stark. 67.

2. *Com. v. Este*, 140 Mass. 279; s. c., 7 Cr. L. Mag. 184; *Humphrey v. People*, 18 Hun (N. Y.), 393; *Reg. v. Chapman*, 1 Car. & K. 119.

False Entries in Book of Bank.—The crime of making false entries by an officer of a national bank, with intent to defraud, defined in U. S. Rev. Stat. § 5209, includes any entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or to defraud the association. The crime may be personally or by direction, and it is immaterial that the act was not done in a skilful manner, or that the falsity could be easily detected by inquiry or by examination of other books. *United States v. Britton*, 107 U. S. (17 Otto) 655; bk. 27, L. ed. 420; *United States v. Harper*, 33 Fed. Rep. 471. See *State v. Baumhager*, 28 Minn. 226; s. c., 9 N. W. Rep. 704; *United States v. Allen*, 10 Biss. C. C. 90; *Reg. v. Chapman*, 1 Car. & K. 119.

Entries to Deceive Examining Agents.—The provision of U. S. Rev. Stat. § 5209, which punishes false entries to deceive agents appointed under § 5240 to examine the affairs of national banking associations, embraces entries made with that intent, whether made before or

after the appointment of the agent. *United States v. Britton*, 107 U. S. (17 Otto) 655; bk. 27, L. ed. 520.

Connivance of Other Officers.—It is immaterial that a bank official who makes false entries does so with the knowledge and consent of the other officers of the bank, in order to deceive the State bank department. *Humphrey v. People*, 18 Hun (N. Y.), 393.

Falsifying by County Treasurer.—

Where the evidence showed that defendant having come into possession of an order on the county treasurer which he knew that his predecessor had redeemed, but had neglected to mark "paid," falsely marked it as paid and redeemed by himself, and falsely credited himself in the books of his office with the amount as disbursed by himself, and subsequently returned it to the county auditor as paid and redeemed by himself, and fraudulently obtained credit therefor upon the books of the county auditor, it was held sufficient to warrant the jury in finding an actual conversion by defendant of public money to his own use, and therefore sufficient to sustain a verdict of guilty of embezzlement. *State v. Baumhager*, 28 Minn. 226; s. c., 9 N. W. Rep. 704.

False Entries as Evidence—Entries in Books of Town Treasurer.—False entries in the books of a town treasurer are not alone sufficient to charge him with embezzlement, as they could only constitute a step in the direction of the crime. *Com. v. Este*, 140 Mass. 279; s. c., 7 Cr. L. Mag. 184.

Same—As Evidence of Intent.—An indictment under Mass. Stat. 1846, ch. 171, § 1, against an officer of a bank for fraudulently taking and secreting particular and designated moneys with intent to convert the same to his own use, is not supported by proof that he received the money in question as a deposit in the bank from a depositor, and entered the same in the name of the depositor in an account-book kept for that purpose and that he afterwards fraudulently erased the entry,

entries, as by erasing a correct entry and making a false one,¹ or by omission to make proper entries.

A fraudulent intent is essential to constitute the crime of falsifying; but the wilful omission or falsifying of a record or an account is *prima facie* evidence of intent.²

The fraudulent omitting or falsifying of accounts or records is by some statutes made an offence in and of itself.³

III. Falsifying Record.—Falsifying records consists either in the wilful omission to make the proper record, omitting or erasing an existing record, or entering up a false record. A conspiracy to falsify a record is also an indictable offence.⁴

IV. Indictment.—An indictment for falsifying an account or a record must aver that it was done with fraudulent intent; but in an indictment under the Federal statute⁵ for making false entries in the books of a national banking association, a charge that the false entries were made to “injure and defraud the said association, and certain persons to the grand jury unknown,” is a sufficient averment of the intent.⁶

altered the footing of the column so as to make it appear that no such sum had been received, and entered the amount as deposited upon the account of the depositor in the ledger as having been received two months before the time of its actual receipt, if there is also evidence from which it may be reasonably inferred that the erasure, alteration, and false entry were not made until several days after the receipt of the money, and the making of the original and true entry thereof, during which time there is no proof of any fraudulent intent on his part respecting it, or that it was not put, kept, and used with other funds of the bank. *Com. v. Shephard*, 83 Mass. (1 Allen) 575.

1. *Com. v. Shephard*, 83 Mass. (1 Allen) 575; *Rex v. Tyers*, 1 Russ. & Ry. C. C. 402.

2. *Com. v. Este*, 140 Mass. 279; s. c., 7 Cr. L. Mag. 184; *Com. v. Shephard*, 83 Mass. (1 Allen) 575; *State v. Baumhager*, 28 Minn. 224; s. c., 9 N. W. Rep. 704; *Humphrey v. People*, 18 Hun (N. Y.), 393.

3. As to national banks, see U. S. Rev. Stat. § 5209.

In England.—Every one commits a misdemeanor who, being a clerk, officer, or servant, or employed or acting in the capacity of a clerk, officer, or servant, wilfully, and with intent to defraud, destroys, alters, mutilates, or falsifies, any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer; or wilfully, and with intent to defraud, makes, or con-

curs in making, any false entry in, or omits or alters, or concurs in omitting or altering, any material particular from or in any such book, or any document or account. 38 and 39 Vict. c. 24, § 2.

“False” as Used in Federal Statute.—The word “false,” as used in the U. S. Rev. Stat. § 5209, means knowingly and wilfully false; an innocent mistake as to the amount of an item is not punishable. *United States v. Allen*, 10 Biss. C. C. 90.

4. Conspiracy to Falsify Record of Marriage.—Thus a conspiracy to cause a marriage falsely to appear of record, and to obtain for that purpose from a justice of the peace a false certificate thereof, and from other parties a false assertion that they were witnesses to the ceremony, with intent to prevent a person from contracting another marriage, is indictable. *Com. v. Waterman*, 122 Mass. 43.

In New York. “a person who wilfully and unlawfully removes, mutilates, destroys, conceals, or obliterates a record, mark, book, paper, document, or other thing, filed or deposited in a public office or with any public officer by authority of law, is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both.” N. Y. Penal Code, § 94. See *People v. Wise*, 2 How. 92.

The Value of the Book or Paper is of no importance, but must be a paper, proceeding, or record of court. *Ayers v. Covill*, 18 Barb. (N. Y.) 263.

5. U. S. Rev. Stat. § 5209.

6. *United States v. Britton*, 107 U. S. (17 Otto) 655; bk. 27, L. Ed. 520.

1. *Averment of Jurisdictional Facts*.—To give the Federal courts jurisdiction, the indictment must show that the alleged offence was committed upon the accounts and in the usual course of business of a national bank. It is not necessary to aver in terms that the false entry was made "in an account of, and in due course of the business of the bank." An allegation that the false entry was made in a book belonging to and in use by the association in transacting its banking business, and known and designated as "Profit and Loss No. 6," was held sufficient.¹

FAMILY.—(See also GUARDIAN AND WARD; HUSBAND AND WIFE; INFANCY; MASTER AND SERVANT; PARENT AND CHILD.)

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| I. Defined Generally, 803. | IV. Family Arrangements, 808. |
| II. In Homestead and Exemption Laws, 804. | V. Family Meetings, 808. |
| III. In Wills, 807. | VI. Family Bible, 809. |

I. Generally.—Father, mother, and children. All the individuals who live under the authority of another, including the servants of the family. All the relations who descend from a common ancestor or who spring from a common root.²

1. United States v. Britton, 107 U. S. (17 Otto) 655; bk. 27. L. Ed. 520.

False Entres as to Payment of Interest.

—In an indictment for making false entries of money received for interest due, if the falsity of the entry does not consist in the fact that there was no interest due from the person named, but in the fact that money which the entries declared had been received from him on account of interest due were not received from him on that or any other account, there is no need to aver that no such interest was due; and the want of such an averment does not render the accounts argumentative or repugnant. United States v. Britton, 107 U. S. (17 Otto) 655; bk. 27. L. Ed. 520.

2. Bouv. L. Dict.

"In common parlance, the family consists of those who live under the same roof with the *pater-familias*; those who form . . . his fireside. But when they branch out and become the heads of new establishments, they cease to be part of the father's family." King v. Darlington, 4 T. R. 797.

In a Decree.—The word "family," in a decree for the investment of a sum of money for the "petitioner and her family," was declared to mean "children." Mercier v. West Kan. City Land Co., 72 Mo. 473.

For Service of Process.—As against arrest on civil process, the children, do-

mestic servants, and permanent boarders of a householder have been deemed to be of his family, but not visitors. Oystead v. Shed, 13 Mass. 520.

The term "family" includes a widowed mother whom a son has taken to live with him, within the meaning of a statute providing for the service of process. Ellington v. Moore, 17 Mo. 424.

In Pauper Settlement Act.—In an act relating to the settlement of paupers the word "family" embraces all persons whom it is the right of the head of the family to control and his duty to support, "ordinarily his wife, his minor children, unemancipated, and his servants." Cheshire v. Burlington 31 Conn. 326.

In an Insurance Policy.—In an action upon a policy of insurance, where the question arose as to whether the occupation of the house by two hired men, who slept there but took their meals elsewhere and were employed at another place during the day, was such an occupation as complied with the warranty that a family should live in the house, it was declared that a family was a number of persons living together in one house under one head, and that no specific number was necessary to constitute a family, nor was it necessary that they should eat or be employed in the same house. The court thought that the evidence tended to show that the servants

II. In Homestead and Exemption Laws.—The family relation is one of *status*, and not of contract merely.¹ There must exist a legal² or moral³ duty on the part of the head of the family to support the members thereof, and a corresponding dependence of the members upon the head.⁴ The family relation may exist among those who

were part of the plaintiff's family. *Poor v. Hudson Ins. Co.* (N. H.), 2 Fed. Rep. 432. *Contra: Poor v. Insurance Co.*, 125 Mass. 274.

1. *Revalk v. Kraemer*, 8 Cal. 66; *Whalen v. Cadman*, 11 Iowa, 226; *Tyson v. Reynolds*, 52 Iowa, 431; *McMurray v. Shuck*, 6 Bush (Ky.), 111; *Thomps. Homest. and Ex. § 47. Compare Race v. Oldridge*, 90 Ill. 250; s. c., 32 Am. Rep. 27.

The word "family," used in connection with the estate of a deceased person, includes not alone the widow and minor children of the deceased, but includes also such persons as constituted the family of the deceased at the time of his death, whether servants or children who have attained their majority; but it does not include boarders. *Strawn v. Strawn*, 53 Ill. 263.

2. The test of a *legal* duty has been rarely applied, and unquestionably a *moral* duty to support the members of a family is sufficient to constitute one its head. *Thomps. Homest. and Ex. § 45.*

An unmarried woman living upon her land with her mother is said not to be a householder with a family. *Woodworth v. Comstock*, 10 Allen (Mass.), 425. *Compare Marsh v. Lazenby*, 41 Ga. 153; *Consughton v. Sands*, 32 Wis. 387; *Parsons v. Livingston*, 11 Iowa, 104.

3. An unmarried woman keeping house, and there bringing up two children of her deceased sister, is the "head of a family," and entitled to a homestead exemption. *Arnold v. Waltz*, 53 Iowa, 706; s. c., 36 Am. Rep. 248; *Ex parte Brien*, 2 Tenn. Ch. 33. See also *Bradley v. Rodelspoger*, 3 S. Car. 226.

A brother living with his widowed sister and her four small children, and providing for them, is the head of a family. *Wade v. Jones*, 20 Mo. 75.

A bachelor who supports a widowed sister who keeps house for him may be the head of a family. *Bailey v. Comings*, (E. D. Mo.) 16 Natl. Bank. Reg. 382.

An unmarried *bona fide* housekeeper, with an unmarried sister and two brothers, all under twenty-one years of age, living with him, whose parents are both dead and whose support and education he has assumed, constitute a family. *McMurray v. Shuck*, 6 Bush (Ky.), 111.

4. *Whitehead v. Nickelson*, 48 Tex. 517; *Roco v. Green*, 50 Tex. 483.

But the relation of parent and child or of husband and wife need not exist. *Garaty v. Du Bose*, 5 S. Car. 493. *Compare Sallee v. Waters*, 17 Ala. 482; *Abercrombie v. Alderson*, 9 Ala. 981.

"The family may consist of a wife and children, or of other persons who may stand in a state of dependence in the family relation; or it may consist of persons standing in either of these relations to the head of the family, whether the father, or mother, or a brother, or a sister, or other relation, is the head; but they must be persons who are dependent in some measure on the head for support, and who have an interest in his holding his property, and would be prejudiced by its seizure and sale under execution or other process, and who would be benefited by its exemption. . . . The relation of master and servant, or, more properly speaking, of employer and employee, as it ordinarily exists in this country, does not constitute a family. And therefore a single man, who has no other persons living with him than servants and employees, is not the head of a family within the meaning of statutes creating homestead exemptions." *Calhoun v. Williams*, 32 Gratt. (Va.) 18; s. c., 34 Am. Rep. 759; *Calhoun v. McLendon*, 42 Ga. 405; *Garaty v. Du Bose*, 5 S. Car. 493. And the rule is the same although the servants are old and confidential, and have long managed the domestic affairs of the master, and were formerly his slaves. *Howard v. Marshall*, 48 Tex. 471. So of a widow residing in her own house, but having no other persons living with her than servants. *Murdock v. Dalby*, 13 Mo. App. 41.

But a widower with no family but himself and a servant may be a *householder*. *Pierce v. Kusic*, 56 Vt. 418.

A widow having no children of her own is not the head of a family by reason of the fact that her husband left children by a former marriage, whom she is under no obligation to support. *Lathrop v. Soldiers', etc., Assoc.*, 45 Ga. 483. See also *Kidd v. Lester*, 46 Ga. 231.

A minor whose father is dead and his mother remarried is not of the family of the father-in-law, if he does not choose to reside with him, and is not dependent on him. *Freto v. Brown*, 4 Mass. 675. See also *Gay v. Ballou*, 4 Wend. (N. Y.) 403.

Though a husband is not bound to provide for the children of his wife by a former husband, yet if he takes them into his house they become members of his family, and he shall be deemed to stand in *loco parentis*, and be liable in a contract made by his wife for their education or other necessities. *Stone v. Carr*, 3 Esp. 1; *Cooper v. Martin*, 4 East, 76; *Tubb v. Harrison*, 4 T. R. 118; *Gay v. Ballou*, 4 Wend. (N. Y.) 403; *Sanderlin v. Sanderlin*, 1 Swan (Tenn.), 441. *Compare Hardy v. Alberton*, 7 Q. B. D. 264.

An adult residing with his stepmother and transacting her business is not a member of her family. *Bowne v. Witt*, 19 Wend. (N. Y.) 475.

A married daughter and her children residing with her mother are no part of the latter's family. *Roco v. Green*, 50 Tex. 483.

A widower having two daughters, both of whom are married, and with their husbands board with him, is not the head of a family. *Carter v. Adams* (Ky.), 4 S. W. Rep. 36.

An unmarried man who occupies a dwelling as a home, having an aged father and two nephews, one of age and the other a minor, living with him, is not the head of a family where such persons are not dependent on him. *Harbison v. Vaughan*, 42 Ark. 539.

A husband living as a boarder for seven years, separate from his wife, and not contributing to her support, they having no children, is not the head of a family within the meaning of the statute of exemptions. *Linton v. Crosby*, 56 Iowa. 386; s. c., 41 Am. Rep. 107.

A widow, seventy-five years of age, having three unmarried daughters living with her, the oldest forty-five years of age, and the youngest twenty-six, and all three healthy and robust women, is not the head of a family "dependent on her for support." *Decuir v. Benker*, 33 La. Ann. 320.

A father is not the head of a family because he is accompanied by a son who is not dependent on him. *Allen v. Manasse*, 4 Ala. 554.

A man is not bound to maintain his wife's mother. *Rex v. Munden*, 1 Strange. 190; *Anon.*, 3 N. Y. Leg. Observer, 354.

Upon marriage with its mother, a minor bastard child received into the house of the husband becomes a member of his family. *Hardy v. Alberton*, 7 Q. B. D. 264.

An unmarried man, with whom his brother and brother's wife live, keeping house for him, he furnishing the neces-

saries for housekeeping and living, is not the head of a family. *Whalen v. Cadman*, 11 Iowa. 226.

Strangers and boarders are not members of a family. *Tyson v. Reynolds*, 52 Iowa. 431.

The word "family," as used in a statute concerning the absolute property of the widow in cases of administration, includes children or those persons who have a legal or moral right to expect to be fed and clothed by the widow, and does not include assistants who may be necessary to keep the house and manage a farm. *Whaley v. Whaley*, 50 Mo. 577.

A woman and her infant son who lives with and is dependent on her for support constitute a family. *Cantrell v. Conner*, 51 How. Pr. (N. Y.) 45; *Coughanour v. Hoffman*, 13 Pac. Rep. (Idaho) 231. So do a father and his dependent minor children. *Robinson's Case*, 3 Abb. Pr. (N. Y.) 466; *Barney v. Leeds*, 51 N. H. 253; *Myers v. Ham*, 20 S. Car. 522.

A man and his daughter living together, the wife and mother being dead, constitute a family. *Cox v. Stafford*, 14 How. Pr. (N. Y.) 519.

A father living with his indigent daughter and her minor children is the head of a family. *Blackwell v. Broughton*, 56 Ga. 390.

An unmarried woman who has the care and custody of her bastard child has been held entitled to claim a homestead. *Ellis v. White*, 47 Cal. 73.

"There can be no doubt that one who, with his sister, keeps house for his younger brothers and sisters, thus partly contributing to their support, is the head of a family under the exemption laws, though neither a husband nor a father, and though the children be not wholly dependent on him." *Duncan v. Frank*, 8 Mo. App. 286.

An unmarried son who supports his mother and sisters is the head of a family. *Marsh v. Lazenby*, 41 Ga. 153; *Connaughton v. Sands*, 32 Wis. 387. So also where he cares for his minor sisters only. *Greenwood v. Maddox*, 27 Ark. 648, 658. And where he lives with and supports his mother only. *Parsons v. Livingston*, 11 Iowa. 104.

A father who lived with and provided for a married son and his wife has been held to be the head of a family. *Tyson v. Reynolds*, 52 Iowa. 431.

A widow without minor children, but with a son who, with his wife and children, reside with her, and constitute a part of the household of which she has been the recognized head and principal support for years, is said to be the head

are not the progeny of a common ancestor,¹ and among relatives who have no common residence.² Where the obligation of the head of the family to support the members is not a legal obligation, the family relation must exist in perfect good faith.³ There may be two heads of families in one house.⁴

When the members of a family marry or leave the home permanently, the relation ceases as to them.⁵

of a family. *Riley v. Smith* (Ky.), 5 S. W. Rep. 869.

A widow keeping a boarding-house, with a female friend residing with her, and female servants besides the boarders, is said to be the head of a family. *Race v. Oldridge*, 90 Ill. 250; s. c., 32 Am. Rep. 27.

A widow remained upon her husband's farm, and carried it on for eleven years after his death as her only means of support. Her children were of full age and married, and had left her. She rented the farm and stock, reserving and occupying one room in the house. It was held that she was entitled to the benefit of the exemption law as the head of a family engaged in agriculture. *Collier v. Latimer*, 8 Baxt. (Tenn.) 420; s. c., 35 Am. Rep. 711.

1. A wife living with her husband on her land is the head of a family within the meaning of the *Colorado* statute relating to homestead exemptions. *McPhee v. O'Rourke* (Col.), 15 Pac. Rep. 420.

On the death of the husband the wife becomes the head of the family. *Revalk v. Kraemer*, 8 Cal. 66; *Strawn v. Strawn*, 53 Ill. 263; *Sanderlin v. Sanderlin*, 1 Swan (Tenn.), 441.

A husband and wife constitute a family. *Kitchell v. Burgwin*, 21 Ill. 40; *Regan v. Zeeb*, 28 Ohio St. 483. Although the wife may have deserted him, and may be residing in another State, and he may be living in improper relations with another woman. *Whitehead v. Tapp*, 69 Mo. 415; *Brown v. Brown*, 68 Mo. 388; *Gates v. Steele* (Ark.), 4 S. W. Rep. 53.

But it has been held that the adoption of another's child by an unmarried person and the maintenance of servants and a household does not constitute that person the head of a family entitled to a homestead exemption. The word "family" is used to represent the progeny of common ancestors. In *re Lambson*, 2 Hughes (U. S.), 233.

2. A widower with two daughters of tender age, whom he kept in the care of his mother, providing for them and sending one of them to school from his mother's house while he himself occupied a single room about one mile distant as

an office and dwelling, without servants or other family than his children, who were sometimes with him at his office, where he lodged, and cooked and ate his meals, was declared to be a "house-keeper with a family." *Seaton v. Marshall*, 6 Bush (Ky.), 429.

A person with no wife, but having a child dependent on him, boarding at another house in the same town, is the head of a family. *Salle v. Waters*, 17 Ala. 482.

A man who has ceased to keep house, and whose wife and children are temporarily absent from the State, is still the head of a family. *State v. Finn*, 8 Mo. App. 261.

But it has been said that "the word *family* as used in the exemption laws, we think embraces a collective body of persons, generally relatives and servants, —a household living together in one house or curtilage,—and does not embrace separate individuals who have no common home." *Zimmerman v. Franke*, 34 Kan. 650; *Wilson v. Cochran*, 31 Tex. 677.

An unmarried man, residing in Kansas, having a father, mother, and unmarried sister residing in Illinois, towards whose support he regularly contributes a part of his earnings, is said not to be a member of the family within the meaning of the exemption laws. *Zimmerman v. Franke*, 34 Kan. 650.

3. The benefit of the homestead and exemption laws cannot be obtained by living with and supporting those whom there is neither a legal nor moral obligation to care for. *Blackwell v. Broughton*, 56 Ga. 399; *Whitehead v. Nickelson*, 48 Tex. 517; *Thomps. Homest. & Ex. § 50*.

4. *Brown v. Brown*, 68 Mo. 388.

A widow who, with her children, resides in the house and on the land of her aged father, being permitted to cultivate such portion of the land as she chose, is the head of a family, though her father lives in the same house and claims control over the house and farm. *Bachman v. Crawford*, 3 Humph. (Tenn.) 213.

5. *Roco v. Green*, 50 Tex. 483.

A family consisting of a widower, his daughter, and a distant female relative,

III. In Wills.—In the construction of wills, the word "family" must derive its particular signification from the context.¹ When applied to personal property, it generally means next of kin.² But when applied to real property, it is said to mean the heir at law.³ The context may confine the meaning to particular relations,⁴ or may enlarge it to include relations of every degree,⁵ and relations by marriage.⁶

is dissolved by the marriage of the daughter. *Whitehead v. Nickelson*, 48 Tex. 517.

A son or a daughter residing with the parent does not cease to be a member of the family on arriving of age, from that fact alone. A son over twenty-one years of age, residing with his father, receiving his support and under his control, is a member of his family within the meaning of a contract with a railroad company for family transportation. *Chicago & N. W. R. v. Chisholm*, 79 Ill. 584.

1. *Williams v. Williams*, 1 Sim. N. S. 358; 40 Eng. Ch. 357; *McLeroth v. Bacon*, 5 Ves. 167.

The word "family" "may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children, excluding his wife; or, in the absence of wife and children, it may mean his brothers and sisters, or next of kin; or it may mean the genealogical stock from which he may have sprung." 2 Story's Eq. Juris. (13th Ed.) § 1065 b.

The import of the word "family" can scarcely be regarded as the same in England and the United States. 2 Redf. on Wills (2d Ed.), 71.

Formerly, bequests to the family were frequently held void in England for uncertainty. *Harland v. Trigg*, 1 Br. C. C. 142; *Doe d. v. Joinville*, 3 East, 172; *Robinson v. Waddelow*, 8 Sim. 134. Compare *Parkinson's Trust*, 8 Sim. N. S. 242. But now the subject-matter and the context of the will are to be taken into account, and the bequest upheld if it can be made out what the testator intended by the word "family." 2 Redf. on Wills (2d Ed.), 71; 2 Story's Eq. Juris. (13th Ed.) § 1071; *Hill v. Bowman*, 7 Leigh (Va.), 650.

The expression "if he shall get married and have a family," in its ordinary sense, in a will or settlement, means to get married and have issue of such marriage, and not merely to get married and have a family by becoming a housekeeper. *Spencer v. Spencer*, 11 Pai. (N. Y.) 159.

"Branches of the family," in a will, does not refer to the descendants of mar-

ried daughters. *Doe d. Smith v. Fleming*, 2 Cr. M. & Ros. 638.

A bequest to one's wife, "towards the support of her family," has been held to give her children such an interest in the estate as to enable them to maintain a bill in their own names to protect such interest. *Woods v. Woods*, 1 My. & Cr. 401; *Beales v. Crisford*, 13 Sim. 592; 36 Eng. Ch. 591.

2. *White v. Briggs*, 22 Eng. Ch. 583; *Grant v. Lyman*, 4 Russ. 292; *Cruwys v. Colman*, 9 Ves. 320.

3. *White v. Briggs*, 22 Eng. Ch. 583; *Wright v. Atkyns*, 17 Ves. 255; s. c., 19 Ves. 299; *Griffiths v. Evan*, 5 Beav. 241; *Doe d. v. Smith*, 5 M. & Sel. 126; 2 Redf. on Wills (2 Ed.), 72.

4. *Cruwys v. Colman*, 9 Ves. 320.

Under a power to give to any of the family of the testator, "family" has been held to mean children. *Dominick v. Sayre*, 3 Sandf. (N. Y.) 555.

Where a testator, dying without children, left his fortune "to the good of my family, whoever survives me longest," subject to a life estate in the wife, it was held that "family" meant next of kin. *In re Maxon*, 4 Jur. N. S. 307.

A bequest of certain slaves and their families was restricted to such slaves and their wives and children residing in the same house with them, and not extended to their grandchildren. *Pringle v. McPherson*, 2 Desau. (S. Car.) 524.

5. A codicil, in the form of a letter to the testator's wife, saying, "I should be unhappy if I thought it possible that any one not of your family should be the better" for what he left her, was construed to include descendants of every degree in the word "family." *Williams v. Williams*, 1 Sim. N. S. 358; 40 Eng. Ch. 357.

A power to an unmarried woman to appoint a fund among "her own family or next of kin," was held to be capable of extension to any relative. *Snow v. Teed*, L. R. 9 Eq. 622.

6. *Cruwys v. Colman*, 9 Ves. 320.

The word "family," in a will by a deceased husband, would usually be understood to include the wife as well as

Commonly the term "family" as used in wills does not include parents.¹

IV. Family Arrangements.—A family arrangement is an agreement made between a father and his son, or children, or between brothers, to dispose of property in a different manner to that which would otherwise take place.²

The mere relations of the parties will frequently give effect to such contracts otherwise without adequate consideration.³

A family arrangement entered into without concealment or fraud on either side is binding on the parties, though they may have been mistaken as to their rights; but fraud or concealment vitiates it.⁴

V. Family Meetings. (*Louisiana Law*).⁵—A family meeting or council is a meeting of at least five relations⁶ or, in default of relations, friends⁷ of a minor convoked by a judge,⁸ to confer as to the guardianship and administration of the property of such minor.⁹

the children. *Bowditch v. Andrew*, 8 Allen (Mass.), 339.

A power by will to the testator's widow to dispose of property for the benefit of herself and family was held to authorize a gift by her will to an illegitimate son of one of the testator's sons. *Lambe v. Eames*, L. R. 6 Ch. App. Cas. 597.

A testator directed the purchase of a house, to be held in trust for the benefit of A. during his life, and to be conveyed to his "family" at his death. It was held that the word "family" included his wife and son, but did not include a stepson who had lived in the family and been supported by him. *Bates v. Dewson*, 128 Mass. 334.

1. Unless the contrary clearly appears from the context of a will, a devise to the family of a person who has children is a devise to such children. *Heck v. Clippinger*, 5 Pa. St. 385; *Whelan v. Reilly*, 3 W. Va. 597; *Wood v. Wood*, 3 Hare, 65; 25 Eng. Ch. 64; *Burt v. Hell-yar*, L. R. 14 Eq. 160; *Pigg v. Clarke*, L. R. 3 Ch. D. 672; *Gregory v. Smith*, 15 Eng. L. & Eq. 202; *Barnes v. Patch*, 8 Ves. 604; *McLeroth v. Bacon*, 5 Ves. 159; *Blackwell v. Bull*, 1 Keen, 176; *James v. Ld. Wynford*, 2 Sim. & Gib. 350.

A bequest to A. in trust for his family does not include A. *Wallace v. McMicken*, 2 Disn. (Ohio) 564.

But a bequest to A. and his family is for the benefit of A. and his children. *Wood v. Wood*, 3 Hare, 65; *Barnes v. Patch*, 8 Ves. 604; *Parkinson's Trust*, 1 Sim. N. S. 242; *Beales v. Crisford*, 13 Sim. 592.

2. *Bouv. L. Dict.*

3. *Gordon v. Gordon*, 3 Swanst. 400; *Tweddell v. Tweddell*, 1 Tur. & Russ. 1; 1 Chit. Gen. Pr. 67.

4. An agreement between two brothers, the younger of whom disputed the legitimacy of the elder, for a division of the family estates was rescinded after a lapse of nineteen years, it having been established that the elder brother was legitimate, and that at the time the agreement was made the younger brother knew that a private ceremony of marriage had passed between the parents, and that he had not communicated such fact to the elder, and that on the supposition of the latter's illegitimacy the younger had no legal power to secure to him the benefits of the agreement. *Gordon v. Gordon*, 3 Swanst. 400.

5. See, generally, La. Civ. Code, art. 305-311; Code Civ. p. 1, tit. 10. c. 2, s. 4; Rev. Laws La. (Voorhies, 2d Ed.) secs. 1494-1500. 2667; *Bouv. L. Dict.*

6. Voorhies Rev. Laws La. sec. 1499. A relation failing to attend when summoned is liable to a fine, sec. 1495.

7. Voorhies Rev. Laws La. sec. 1496.

8. The judge of the parish where the tutor is domiciled must order the meeting. *State v. Halphen*, 2 Rob. (La.) 160; *State ex rel. Boissac v. Petit*, 14 La. Ann. 565.

9. As to the powers and duties of the family meeting, see Voorhies La. Rev. Stat. secs. 1500, 2667; *Succession of Elliott*, 31 La. Ann. 31; *Webb v. Webb*, 5 La. Ann. 595; *State v. Pitot*, 2 La. 536; *Hooke v. Hooke*, 6 La. 474; *Morris v. Kemp*, 14 La. 251; *Beale v. Walden*, 11

The relations must be selected from among those domiciled in the parish or within thirty miles thereof,¹ the nearest relations being selected first, the relation being preferred to the connection, and the eldest being preferred among relations of the same degree.² Relations having an interest contradictory to that of the minor must not be selected.³ The under-tutor must be present.⁴

The meeting is called for a fixed time, by citations delivered at least three days before such time.⁵ It is presided over by a justice of the peace or notary public, and the members of the meeting are sworn to give advice according to the best of their knowledge touching the interests of the persons respecting whom they are called upon to deliberate.⁶

The officer before whom the meeting is held must make a particular *procès-verbal* of the deliberations, cause the members of the meeting to sign it, if they know how to sign, must sign it himself, and deliver a copy to the parties to have it homologated.⁷

The deliberations are of a *quasi*-judicial nature, and must be written out in English.⁸

VI. Family Bible.—A family Bible is one containing a record of the births, marriages, and deaths of the members of a family.⁹

These entries, when original,¹⁰ and when the book comes from the proper custody,¹¹ are admissible in evidence in

Rob. (La.) 67; Beard v. Murray, 3 Rob. (La.) 119.

1. Voorhies Rev. Stat. La. sec. 1499.

2. Bouv. L. Dict.

3. Mayronne v. Waggaman, 30 La. Ann., Part II. 974; Chalon v. Walker, 7 La. Ann. 477.

4. Stafford v. Villain, 10 La. 328. But the under-tutor cannot be a member of the meeting. Tutorship of Bates, 2 La. Ann. 941.

By refusing to approve the deliberation of a family-meeting, the under-tutor is exonerated from responsibility. Voorhies Rev. Stat. La. sec. 1498.

Where the meeting is held to emancipate a minor, the tutor must be cited to be present. Gerald v. Gerald, 5 La. Ann. 242.

5. But, the members of the meeting and the under-tutor may waive citation. Succession of Byrne, 38 La. Ann. 518; Judson v. Hertz, 11 La. Ann. 715; Gas-sen v. Palfrey, 9 La. Ann. 560.

The meeting must be held in the parish where the judge who called it sits. Beale v. Walden, 11 Rob. (La.) 67.

6. Hartz v. Hartz, 8 La. N. S. 527.

7. Succession of Mitchell, 33 La. Ann. 353.

8. Tegre v. Tegre, 6 Mart. (La.) 665; Maxent v. Maxent, 1 La. 438. Mere

irregularities do not vitiate the proceedings. Succession of Landry, 11 La. Ann. 85; Etie v. Cade, 4 La. 391.

9. Bouv. L. Dict.

10. A copy is not admissible, unless the absence of the original is accounted for. Greenleaf v. Dubuque & S. C. R., 30 Iowa, 301.

An entry respecting the age of a child in a book called a family Bible, in the handwriting of the brother of the child, and supported by his oath, that by the direction of his deceased father he copied that and other entries respecting the ages of the family from another book, in which the original entries were made in his father's writing, without accounting for the non-production of the book in which the original entries were made, is not evidence. Curtis v. Patton, 6 S. & R. (Pa.) 135.

11. Hubbard v. Lees, 4 Hurl. & C. 418.

A Bible, containing a family record in the handwriting of a deceased daughter, which remained in the possession of the mother until her death, and then went into the possession of another daughter, from whom the witness, a son, got it, is competent evidence of the age of one of the children of that mother. The fact that the record was not considered correct by the family, affects its credibility

proof of the facts therein stated,¹ without proof of the handwriting.²

FANCY.—See note 3.

FARE.—The price of passage, or the sum paid, or to be paid, for carrying a passenger.⁴

only. *Southern Lf. Ins. Co. v. Wilkinson*, 53 Ga. 535.

1. *Monkton v. Attorney-General*, 2 Russ. & M. 147.

An entry in a family Bible, in the handwriting of a reputed father, of the birth of a son, is evidence of the legitimacy of such son. *Berkeley Peerage Case*, 4 Campb. 401.

An entry in a prayer-book of a deceased mother, reciting her marriage with the reputed father of a claimant of a peerage, is evidence of such marriage. *Sussex Peerage Case*, 11 Cl. & Fr. 85.

The entry in the family Bible of a son's birth by a parent, and proved by his oath, is competent evidence of the son's age. *Carskadden v. Poorman*, 10 Watts (Pa.), 82.

An entry in a family Bible belonging to and kept by a father has been held inadmissible to prove the place of the son's birth. *Union v. Plainfield*, 39 Conn. 563.

2. It need not be proved that they were made by a relative. *Weaver v. Leiman*, 52 Md. 708; *Jones v. Jones*, 45 Md. 144; *Hubbard v. Lees*, 4 Hurl. & C. 418. Who made the entries, where they were made, and whether the book has been so kept as to be accessible at all times to members of the family, are said to be matters to be considered in determining the probative force of the entries only. *Weaver v. Leiman*, 52 Md. 708. But in another case it was said that the entry must have been made by some one having authority to make it. *Watson v. Brewster*, 1 Pa. St. 381. And in another case it was said that an entry is not evidence of the birth or death of a son, unless made by a parent, since deceased. *Greenleaf v. Dubuque & S. C. R. Co.*, 30 Iowa, 301. Compare *Southern Lf. Ins. Co. v. Wilkinson*, 53 Ga. 535.

Family Physician signifies the physician who usually attends, and is consulted by members of the family in the capacity of a physician. *Price v. Insurance Co.*, 17 Minn. 473; s. c., 10 Am. Rep. 166; *Reid v. Insurance Co.*, 58 Mo. 421.

Family Library.—The professional

books necessary to a professional man, who supports a family, for the practice of his profession, are exempt from execution as a part of his "family library." *Robinson's Case*, 3 Abb. Pr. (N. Y.) 466.

A Family Homestead is the residence or dwelling-place of a family. *Barney v. Leeds*, 51 N. H. 253. See title EXEMPTIONS.

Authorities.—Thompson on Homesteads and Exemptions, ch. 2; 2 Redfield on Wills (2d Ed.), sec. 71 *et seq.* The general characteristics of the family are summed up in Schouler's Domestic Relations (3d Ed.), sec. 3. See the "Idea of the Family in Modern Society," 28 Jour. Jur. 617.

3. **Fancy Bread.**—Where an act requiring that bread should be sold by weight, made an exception in the case of French or fancy bread, these terms were held to apply to bread which was sold as such at the time of the passage of the act, which was bread made of a finer quality of flour. Bread made of the same materials as ordinary bread, but baked in loaves of a different shape, was not within the meaning of the exception, although called and sold as fancy bread. *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355. Bread usually sold as fancy bread at the time of the passage of the act, but which subsequently became that most in use, is no longer fancy bread within the meaning of the act. *Queen v. Wood*, 10 B. & S. 533; s. c., L. R. 4 Q. B. 559.

4. *Chase v. N. Y. Cent. R. Co.*, 26 N. Y. 526.

Rate of Fare.—Under a statute of *New York*, which provided that any railroad company that should ask and receive "a greater rate of fare than that allowed by law," should forfeit \$50, it was held that the penalty was incurred where a conductor required five cents in addition to the legal fare because the passenger had no ticket. "The statute means," said the court, "that any railroad company which shall ask and receive a greater price for the carriage of a passenger than that allowed by law, shall forfeit \$50." *Chase v. N. Y. Cent. R. Co.*, 26 N. Y. 526.

FARINA.—See note 1.

FARM.—See note 2.

1. **Farina**, as used in the customs law, applies to a food preparation made from that portion of the wheat kernel which contains the largest percentage of gluten. *Union Nat. Bank v. Seeberger*, 30 Fed. Rep. 429.

2. From the Saxon *fearme feorhme*, food or provisions.

In English Law—Definition.—The rent of land held under lease, anciently reserved and paid in provisions. *Burr. L. Dict.*; 2 *Bl. Com.* 318.

Rent reserved on a lease of land, payable in money; called *blanche ferme*, or white rent, to distinguish it from rent paid in provisions. *Burr. L. Dict.*; 2 *Bl. Com.* 42; *Plowd.* 195.

A term in lands, a lease of lands, or leasehold interest in lands. This is now the proper technical signification of the word, especially in the description in a declaration in ejectment. *Lane v. Stanhope*, 6 Term 345; *Plowd.* 195; 2 *Chit. Bl. Com.* 318; 1 *Chit. Gen. Prac.* 160.

A lease of other things than land; as, of imposts. *Burr. L. Dict.* A land taken upon lease under a rent, generally annual, payable by the tenant. As thus used, it is a collective word, consisting of many things; as, a messuage, land, meadow, pasture, wood, common, etc. *Whart. L. Lex.*; 2 *Bl. Com.* 318. This is its meaning in common acceptance, and for the purpose of description in a deed. 1 *Chit. Gen. Prac.* 160; *Plowd.* 195.

In a Deed or Will.—By the grant of a farm, will pass a messuage and much land, meadow, pasture, wood, etc., thereunto belonging or therewith used; for this word doth properly signify a capital, or principal messuage, and a great quantity of demesnes thereunto appertaining. Also by the grant of all farms, or all farms, it seems leases for years do pass. *Pres. Shep. Touch.* 93; 4 *Cruise Dig.* 264; *Co. Litt.* 59.

Under the word farm in a will, where the testator's estate included a farm composed of copyhold and freehold, which he had let to a tenant as one entire subject, such appearing from the will to have been the testator's intention, it was held that both copyhold and freehold passed. *Doe dem. Blasyse v. Lucan*, 9 East, 448. Under similar circumstances, but where the farm was composed of leasehold and freehold, it was held that the leasehold passed as well as the freehold. *Lane v. Stanhope*, 6 Term, 345.

In American Law—Definition.—Any considerable tract, or a number of smaller tracts, of land, set apart for cultivation by a single occupant, whether as a tenant or owner, and upon which he resides, even though disconnected and separated by the lands of adjoining owners, if used together. *Kendall v. Miller*, 47 *How. Pr.* (N. Y.) 446.

In a Deed or Will.—In a deed the general description of the premises conveyed as "my homestead farm", may be restricted by the particular description. A grantor, having four parcels of land acquired by different conveyances, but which he occupied together, and on a portion of which he resided, executed a deed in which the premises were described as "my homestead farm in S., and is the same land which was conveyed to me," etc. He here specified the names of the grantors of three of the parcels, together with the date of their deeds, place of record, the number of acres in each parcel, and the number of the town lot in which the three parcels were situated. The description closed as follows: "For a more particular description reference, may be had to said deeds; and the same is my homestead farm". The grantor's residence was on one of the three parcels specially described. It was held that the fourth parcel did not pass by this deed. Said the court: "The term 'homestead' by no means necessarily implies the four parcels of land which the grantor owned, although they lay and were occupied together." *Woodman v. Lane*, 7 N. H. 241.

But unless a contrary intention on the part of the grantor or testator clearly appears, the word farm in a deed or will will carry all parts of a tract used and occupied together. B., after adding a small piece of woodland to a farm which he had long owned and lived upon, made a mortgage of his farm to S., in which the premises were described as "my homestead farm, containing seventy acres, more or less," and also by metes and bounds, so as to exclude the said woodland. He afterwards made a conveyance of his lands and all his personal property to assignees, in trust, for the payment of his creditors. In this conveyance to assignees, the only description of the lands which could include the woodland was this: "The farm whereon I live, containing about seventy acres, which estate is now under a mortgage to S." It was held

that the woodland, though excluded from the first conveyance, passed to the assignees in the second. *Wheeler v. Randall*, 6 Metc. (Mass.) 529. A testator devised to his daughter "the farm on which F. now lives, . . . bounded eastwardly and westwardly by lands owned by H." F. then occupied, under a written agreement with the testator, about 1.41 acres of land, composed of three several parcels or purchases, containing one hundred, eighteen, twenty-three acres, respectively. The lot of eighteen acres lay between the others, bounded northwardly by the one hundred acres, and on the southeasterly corner by the twenty-three acres, which was a long and narrow strip extending to the south. The testator was also the owner of several hundred acres of other land, but none of it adjoined or was in the immediate vicinity of the lots in question. The principal portions of the two smaller lots were woodland, though a few acres of each had been cultivated, and larger portions were used in connection with the main parcel of 100 acres for mowing grass and pasturing the farm stock. F. maintained the fences around all the lots, but he resided and all the buildings were located on the main parcel. H. owned land lying along the entire easterly line of the eighteen and the one hundred acre lots, and he also owned land lying along nearly the entire westerly line of the 100 acres, and the greater portion of the westerly line of the eighteen acres; but he owned no land which bounded or adjoined any portion of the twenty-three acres. It was held that the devise carried the whole tract, including all three parcels. *Kendall v. Miller*, 47 How. Pr. (N. Y.) 446.

The use of the word farm in a deed or will creates a latent ambiguity, which may be removed by evidence *aliunde*. In a deed the premises were described as the grantor's "home farm." That a particular piece of land claimed to be within such description was, at the time of the grant, in a state of nature, unenclosed, and separate from the rest of the farm, and the grantor afterwards remained in possession, and occupied it as his own until his death, are circumstances admissible in evidence to show that such piece of land was not within the grant. *Doolittle v. Blakesley*, 4 Day (Conn.), 265; s. c., 4 Am. Dec. 218. Under the word farm in a devise, disconnected tracts of land may pass, if such appear to have been the intention of the testator. To show this intention, "evidence *aliunde*, including parol evidence, is admissible, showing the circumstances under which

the estate was devised, how it was used, held, and occupied by the testator, the manner in which he was accustomed to regard it and speak of it." *Taylor v. Mixer*, 11 Pick. (Mass.) 347; *Black v. Hill*, 32 Ohio St. 313; *Gafney v. Kenison* (N. H.), 10 Atl. Rep. 706; *Allen v. Richards*, 5 Pick. (Mass.) 514; *Down v. Down*, 1 Moore, 80.

The words "all my farm" in a will are not equivalent to "all my estate," and will not, of themselves, pass a fee without words of limitations. *Den v. Sayre*, Penn. (N. J.) 446; *Lambert v. Paine*, 3 Cranch (U. S.), 131; *Reeve Dom. Rel.* 489.

In a Statute.—Two detached pieces of land, occupied as one farm, are parts of a farm, within the meaning of a statute that prohibits certain turnpike companies from taking tolls from any person when passing from "one part of his farm to the other," along the turnpike road. *Com. v. Carmalt*, 2 Binn. (Pa.) 235.

Farm let.—Usual words of operation in a lease. 2 Bl. Com. 317.

Farm out.—To let for a term, at a certain rent, usually applied to the farming of revenues. *Burr. L. Dict.* By its charter, a railroad company was authorized "to farm out" the right of transportation over its road. It was held that the plain and obvious meaning of the words "to farm out," in this connection, was to lease. *State v. Rich. & Dan. R. Co.*, 72 N. Car. 637.

Land used exclusively for farming purposes.—A new charter granted to the city of Hartford, by which the city limits were extended, provided that land within the territory annexed that was "used exclusively for farming purposes, or was vacant and unoccupied land," should not be taxed for city purposes beyond a certain rate. It was held that a tract of land lying within the territory annexed, that was actually used for farming purposes, but which was held for building purposes, and which was worth very much more for such purposes than for farming purposes, was to be considered as land "used exclusively for farming purposes," within the statute. "The intention or expectation with which a man holds land," said the court, "is something invisible, an idea or contemplation of the mind, and cannot qualify the holding so as to constitute it in any sense a use." *Gillette v. Hartford*, 31 Conn. 351.

Products of his own farm.—By a statute of North Carolina that imposes a license charge on the sale of certain intoxicating liquors, it is provided that nothing therein contained "shall pre-

FARMER.—See note 1.

FAST.—See note 2.

vent any person from selling spirits or wines, the products of his own farm, in quantities of not less than one quart." It was held that this exception did not include the case of spirits manufactured in part from grain grown on the defendant's farm, and in part from the tolls earned by the defendant's grist mill situated on his farm. Said the court: "A mill situated on a farm is not the product of it. It is not the result of the cultivation of the soil. It is not essential to it. It is a structure enclosing machinery for purposes of manufacture—transformation, not transmutation—and its earnings, the tolls, are not the products of the owner's farm, but the products of the farms of other people." *State v. Patterson* (N. Car.), 4 S. E. Rep. 47.

Farming Implements and Utensils.—A threshing-machine used by a farmer to thresh the grain of other people, for hire, as well as his own, is not exempt from execution under an act exempting "the proper tools or implements of a farmer," and is assets in the hands of his administrator. *Meyer v. Meyer*, 23 Iowa, 359. A "McCormick Advance Reaper and Mower" is a "farming utensil" within the meaning of an act exempting "farming utensils," under certain circumstances, from execution. *Voorhees v. Patterson*, 20 Kan. 555.

1. A farmer is not within stat. 29 Car. 2, ch. 7, § 1, which enacts, that "no tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business, or work of their ordinary calling, upon the Lord's Day," etc., and inflicts a penalty recoverable before justices of the peace. Said Blackburn, J.: "Certainly, he (a farmer) is not within the persons enumerated in the act, and the only question is, Is he within the expression, 'other persons whatsoever'? . . . It is impossible to suppose that so numerous and exten-

sive a class as farmers, would be referred to under general words if it was meant to be included. 'Other persons' here must mean some person not quite a tradesman, laborer, etc." *Reg. v. Cleworth*, 4 Best. & S. 927.

Where the ordinance of a municipal corporation, forbidding the sale of fresh meat within certain limits except by persons licensed to sell, contained a proviso in favor of "farmers," authorizing them to sell meat, the produce of their farms, it was held, that a person following the business of a butcher, who sold meat without being licensed, could not claim the protection of the proviso, although the meat sold came of sheep fattened on his farm, if the farm were used only as an appendage to his business as a butcher. *Rochester v. Pettinger*, 17 Wend. (N. Y.) 265.

2. **Very fast.**—An ordinance of a town provided that railroad trains should not be run through the town at a greater rate of speed than eight miles per hour. In an action against a railroad company to recover for the killing of a cow by a train of cars, it was proved that the train was running "very fast." It was held, that this substantially proved that it was running at a greater rate of speed than eight miles per hour. *I. & St. L. Co. v. Peyton*, 76 Ill. 340.

Fast estate.—Real property. A term sometimes used in wills. *Bouv. L. Dict.*; *Jackson v. Merrill*, 6 Johns. (N. Y.) 185; *Lewis v. Smith*, 9 N. Y. 502.

Fast fish.—By the usage of the whale-fishery, a whale is to be considered as a fast fish if it is attached by any means, such as the entanglement of the line around it, etc., to the boat of the party first striking it, though the harpoon does not continue in the body; and when it is so attached, it cannot be taken by any other party. *Hogarth v. Jackson*, 2 Car. & P. 595.

FAST FREIGHT LINES.

I. Definition, 814.

II. Railway Partnerships, 814.

III. Limitation of Liability, 814.

I. Definition.—A fast freight line or despatch company is a common carrier,¹ in the nature of an express company, generally using its own vehicles and operating over several railroads.

II. Railway Partnerships—Several railway companies forming a fast freight line are usually considered partners, liable jointly and severally for goods lost or damaged in transportation by such line.²

III. Limitation of Liability.—It has been held that a transportation company cannot relieve itself from liability for loss of goods accepted by it for transportation, by a stipulation in the bill of lading that in case of loss the railroad shall be responsible in whose actual custody the goods are at the time of such happening, the railroad company being merely its agent.³

1. *Block v. Merchants' Despatch, etc., Co. (Tenn.)*, 6 S. W. Rep. 881; *Merchants' Despatch & Transportation Co. v. Cornforth*, 3 Colo. 280; s. c., 25 Am. Rep. 757; *Merchants' Despatch & Transportation Co. v. Leyser*, 89 Ill. 43; *Merchants' Despatch & Transportation Co. v. Joesting*, 89 Ill. 152; *Stewart v. Merchants' Despatch & Transportation Co.*, 47 Iowa, 229; *Wilde v. Merchants' Despatch & Transportation Co.*, 47 Iowa, 249; *Bancroft v. Merchants' Despatch & Transportation Co.*, 47 Iowa, 262.

2. *Block v. Erie & North Shore Despatch Fast Freight Line*, 139 Mass. 308; s. c., 21 Am. & Eng. R. R. Cas. 1. In this case, by a bill of lading, the Erie & North Shore Despatch contracted to carry plaintiff's goods from Boston, by the Fitchburg railroad and thence by the Erie & North Shore Despatch, to Chicago, and then to deliver them to connecting railroad lines to be forwarded to Denver, their destination, not naming the several railroad companies forming the association, but providing that, in case of loss or damage of the goods, "that company shall alone be held answerable therefor in whose actual custody the same may be at the time of the happening thereof." Held, that the words "that company" referred only to the companies named in the contract, and that plaintiff need not sue the member of the Despatch Line on whose road the goods were lost, the Despatch Co. being liable as a partnership.

The general subject of "Connecting Lines of Carriers in Partnership" has been fully treated under the title CARRIERS OF GOODS, Vol. II. p. 874.

3. *Block v. Merchants' Despatch Trans. Co. (Tenn.)*, 6 S. W. Rep. 881; 35 Am. & Eng. R. R. Cas. —. (Folkes, J., dissenting.) This decision is a somewhat novel one, and is worth quoting at some length. Caldwell, J., said: "Despatch companies and express companies have, since the earliest years of their existence, endeavored to put themselves without the rules applicable to common carriers, and to shield themselves against responsibility for the acts and omissions of other carriers whose conveyances they habitually use in the performance of their own contracts. Their efforts in this direction have been uniformly unsuccessful, because regarded by the courts as contrary to public policy. 'It has been attempted,' says Mr. Lawson, 'on the part of express, forwarding, and despatch companies, to evade the responsibility of common carriers on the ground that they are not the owners of the vehicles employed in the transportation; but this pretence has not been permitted in the courts. The names which they assume are regarded as immaterial, the duties which they undertake being the criterion of their liability. They are therefore held to the responsibility of common carriers, both when they are and when they are not interested in the conveyances by which the goods are transported. If an express company, engaged to transport goods, sends them by a railroad company employed by it to perform the service, the railroad company becomes the agent of the express company, and the latter is liable to the consignor for its acts.' Lawson Cont. § 233. Mr. Hutchinson, speaking on the same subject, says: 'Be-

cause of this peculiarity in the employment of the means of conveyance afforded by others, the contention has been made by these companies that they were not common carriers, but transacted their business in the character of forwarders, and were not therefore liable for losses occurring from the negligence of those whom they thus employed. But this claim to exemption from the ordinary liabilities of common carriers has not been sustained by the courts. Those subsidiary means of transportation have been held to be the mere agencies employed by such companies, for whose acts they are strictly responsible; and the carrier whose vehicle is thus used becomes likewise liable, upon principles of agency, to the owner of the goods, according to the terms of his contract with his employer.' Hutch. Carr. § 70. The latter author, in the language just quoted, has reference to express companies; but in the second section following he says the same rules are applicable to despatch companies in the same manner and for the same reasons. Then he says: 'Other carriers, under the name of despatch companies, fast freight lines, and the like, have also come into existence, and conduct their business upon the same principle as express companies; that is, by the employment of the means of transportation furnished them by others, and to which for some reasons the same rigid rule of responsibility as common carriers is applied.' Hutch. Carr. § 72. One of the earlier leading cases on this subject was decided by the supreme court of Massachusetts in 1867. The defendants there were express companies. Chief-Justice Bigelow, in delivering the opinion of the court, said: 'But it is urged, in behalf of the defendants, that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is that persons exercising the employment of express carriers or messengers, over railroad and by steamboat, cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them, nor subject to their direction or supervision; and that the rules of the common law regulating the duties and liabilities of carriers, having

been adapted to a different mode of conducting business, by which the carrier was enabled to select his own servants and vehicles, and to exercise a personal care and oversight of them, are wholly inapplicable to the contract of carriage by which it is understood between the parties that the service is to be performed, in part at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignee of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination unless the fulfilment of their undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are to be carried by land or water, by the carrier himself, or by agents employed by him. The contract does not imply a personal trust, which can be executed only by the contracting party himself, or, under his supervision, by agents and means of transportation directly and absolutely within his control. . . . The truth is that the particular mode or agency by which the services are to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier, at common law, continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him.' *Buckland v. Express Co.*, 97 Mass. 126-130.

"Some ten years later, Justice Strong delivered a very instructive opinion on the same general subject. He said: 'The exception or restriction to the common-law liability introduced into the bills of lading by the defendants, so far as it is necessary to consider it, is that the express companies are not liable in any manner, or to any extent, for any loss, or damage, or detention of such package, or its contents, or any portion thereof, occasioned by fire. The language is very broad; but it must be construed reasonably, and, if possible, consistently with the law. If construed literally, the exception extends to all loss by fire, no matter how occasioned, whether occurring

accidentally, or caused by the culpable negligence of the carriers or their servants, and even to all losses by fire caused by wilful acts of the carriers themselves. That it can be operative to such an extent, is not claimed; nor is it insisted that the stipulation, though assented to by the shippers, can protect the defendants against responsibility for failure to deliver the packages according to their engagement, when such failure has been caused by their own misconduct or that of their servants and agents. But the circuit court ruled the exception did extend to negligence beyond the carriers' own line, and that of the servants and agents appointed by them and under their control,—that it extended to losses by fire resulting from carelessness of a railroad company employed by them in the service which they undertook, to carry the packages; and the reason assigned for the ruling was that the railroad company and its employees were not under the control of the defendants. With this ruling we are unable to concur. The railroad company, in transporting the messenger of the defendants, and the express matter in his charge, was the agent of somebody—either of the express company, or of the shippers or consignors of the property. That it was the agent of the defendants, is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service for the defendants; a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had they any control over the railroad company or its employees. It is true, the defendants had also no control over the company or its servants, but they were its employees; presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his, because done in his service and by his direction. Moreover, a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency, but it must be subordinate

to him, and not to one who neither employs it, nor pays it, nor has any right to interfere with it. If, then, the Louisville & Nashville R. Co. was acting for these defendants, and performing a service for them when transporting the packages they had undertaken to convey, as we think must be conceded, it would seem it must be considered their agent. And why is not the reason of the rule, that common carriers cannot stipulate for exemption from liability for their own negligence and that of their servants and agents, as applicable to the contract made in these cases as it was to the facts that appeared in the case of *Railroad Co. v. Lockwood*, 17 Wall. 357? The foundation of the rule is that it tends to the greater security of consignors, who always deal with such carriers at disadvantage. It tends to induce greater care and watchfulness in those to whom the owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors and makes common carriers more unreliable. This is equally true, whether the contract be for exempting from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case he may have no actual control. Theoretically, he has; but, most frequently, when the negligence of his servant occurs he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible because he has put the servant in a place where the wrong could be done. It is quite as important to the consignor that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself, and the servants under his orders, should be. For these reasons we think it not advisable to construe the exceptions in the defendants' bill of lading as excusing them from liability for the loss of the packages by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed." *Bank v. Express Co.*, 93 U. S. 181-183."

FATHER.—See note 1. (See also PARENT AND CHILD; CHILD.)

FAULT.—See note 2. (See also BAILMENT; NEGLIGENCE.)

1. **Father**, as used in 26 Geo. II. ch. 33, § 11, which provides for the consent of the father, in certain cases, to the marriage of a minor, solemnized by license, means legitimate father. *Priestly v. Wynne*, 11 East, 1.

2. The negligence of a tenant occasioning injury to the demised premises by fire is a fault within the meaning of the landlord and tenant act of *New Jersey*, which provides that "whenever any building or buildings erected on leased premises shall be injured by fire, without the fault of the lessee, the landlord shall repair the same as speedily as possible, or in default thereof the rent shall cease until such time as such building or buildings shall be put in complete repair." *Dorr v. Harkness* (N. J.). 36 Alb. L. J. 255.

In an action against a railroad company, to recover for injury received through the alleged negligence on the part of the servants of the company, the court instructed the jury that, if the accident happened "without fault" on the plaintiff's part, their verdict should be in his favor. The jury having found in favor of the plaintiff, on appeal it was urged by the appellant that the instruction should have been that, if the accident happened with the exercise of "ordinary care" on the part of the plaintiff, etc.; but the court held that the two forms of expression were equivalent. *Chicago & N. W. R. Co. v. Ryan*, 70 Ill. 212.

Fault or neglect.—The act of Congress of May 9, 1866, authorizes the court of claims to decree to a disbursing officer "relief from responsibility on account of losses by capture or otherwise when in the line of his duty, whenever said court shall have ascertained the facts of any such loss to have been without fault or neglect on the part of any such officer." It was held that "fault or neglect" are not "technical words, and must be taken in their common and popular signification. The former imports 'error or mistake,' and the latter, 'omission, forbearance to do anything that can be done or that requires to be done.'" The degree of care and diligence which the act requires, is that which "a careful, prudent man would require of his agent in a matter of private interest, or exercise in his own affairs." *Malone v. United States*, 5 Ct. of Cl. 486.

Sale with all faults.—"It appears to be now settled that, if goods are sold ex-

pressly 'with all faults,' the seller is not liable to an action in respect of latent defects, although he was aware thereof at the time of the sale, unless some artifice or fraud was practised to prevent the vendee from discovering such defects, or unless there be an express warranty against some particular defects." 1 Chit. Const. 645 (11 Am. Ed.); *Baglehole v. Warlters*, 3 Camp. 154, overruling *Mellish v. Motteux*, Peake, 115; *Schneider v. Heath*, 3 Camp. 506; *Pickering v. Dowson*, 4 Taunt. 779; *Baywater v. Richardson*, 1 Ad. & E. 508; *Ward v. Hobbs*, L. R. 32 B. 150; *Early v. Garrett*, 9 Barn. & C. 928; *Pearce v. Blackwell*, 12 Ired. (N. Car.) 49; *Hanson v. Edgerly*, 29 N. H. 343; *Paddock v. Strobbridge*, 29 Vt. 470. Where the vendor of a house, being aware of a defect in the main wall, plastered it up and papered it over for the purpose of concealing it from the purchaser, it was held that this was a direct fraud, which avoided the contract of sale and enabled the purchaser to recover back the purchase-money. *Anon.*, cited by Gibbs, J., in *Pickering v. Dowson*, 4 Taunt. 785.

"In *Shepherd v. Kain*, 5 B. & Ald. 240, a vessel was advertised for sale as a 'copper-fastened vessel,' on the terms that she was to be 'taken with all faults, without allowance for any defect whatsoever.' She was only partially copper-fastened, and would not be called in the trade a copper-fastened vessel. *Held*, that the vendor was liable for the misdescription, the court saying that the words 'with all faults' meant all faults which the vessel might have consistently with its being the thing described, *i. e.*, a copper-fastened vessel. But in the very similar case of *Taylor v. Bullen*, 5 Exch. 779, where the vessel was described as 'teak-built,' and the terms were 'with all faults, . . . and without allowance for any defect or error whatever,' it was held that the addition of the word 'error' distinguished the case from *Shepherd v. Kain*, and covered an unintentional misdescription, so as to shield the vendor, in absence of fraud, from any responsibility for error in describing the vessel as 'teak-built.'" *Benj. Sales*, § 602. In *Whitney v. Boardman*, 118 Mass. 242, the plaintiff sold to the defendant a lot of "Cawnpore buffalo hides," expected to arrive at Boston from Calcutta. In the contract of sale it

FAVORABLE.—See note 1.

FEALTY.—In feudal and English law, fidelity; the feudal obligation by which the tenant or vassal was bound to his lord, to be faithful and true to him, and to perform the services incident to his tenure; the bond of fidelity, obedience, and service, by which, generally, a subject is bound to his sovereign, particularly a vassal to his lord. General fealty is otherwise, and more commonly called allegiance. The oath itself, by which the feudal obligation was assumed, and fidelity to the lord sworn by the tenant. The distinction between these two senses of the word is not generally observed, the oath being considered as the obligation itself.²

FEAR.—See note 3. See also **DURESS.**

FEAT.—See note 4.

was provided that the hides were "to be taken [with] all faults except for sea damage only, if any, for which a fair allowance is to be made." *Held*, that the purchaser was bound to take the hides, if they could be known and sold as Cawnpore buffalo hides, "with all defects arising in any way, either from defects in the care, or in the packing, or in the shipping or transporting of the hides, not, however, included in the term 'sea damage,'" that being especially provided for in the contract. "The phrase 'with all faults,'" said the court, "cannot be limited, as the defendants contend, 'to all such faults or defects as the thing described ordinarily has. That would be to deprive it of force entirely. Its meaning is, such faults or defects as the article sold might have, retaining still its character and identity as the article described.'"

It seems that the expression "with all faults," in a contract of sale, may refer to the quantity as well as to the quality of the article purchased. *Pettitt v. Mitchell*, 4 Man. & Gr. 819.

If goods are sold with "all faults," parol evidence is admissible to show that these words have a well-established meaning in the trade in such goods, and what that meaning is. *Whitney v. Boardman*, 118 Mass. 242.

1. **Rates as favorable** means no more than prices as low, and that simply, irrespective of any circumstances or conditions. *Decatur Gas-Light & Coke Co. v. Decatur*, 120 Ill. 67.

2. *Burrill's Law Dict.* See also 1 Bl. Com. 367; 2 Bl. Com. 45, 86.

Fealty and homage are sometimes confounded; but they do not necessarily

imply the same thing. Fealty was a solemn oath, made by the vassal, of fidelity and attachment to his lord. Homage was merely an acknowledgment of venue, unless it was performed as *homagium ligeum*; that, indeed, did in strictness include allegiance as a subject, and could no. be renounced; but *homagium non ligeum* contained a saving or exception of faith due to other lords, and the homager might at any time free himself from feudal dependence by renouncing the land with which he had been invested. *Chitty's Note*, 2 Bl. Com. 46; *Whart. L. Lex.*

Fealty was always considered as the essential feudal bond between lord and vassal, without which no feud could exist. Hence it was always, in England, an indispensable incident to every kind of tenure, except frankalmoign. In modern times, however, it has fallen into disuse, and it is no longer the practice to enact its performance. Even in theory, it is now confined to copyhold tenure, and is usually respited by a small payment by the tenant. *Burrill's Law Dict.*; *Harg. Co. Litt.*, Note 20; 3 Kent Com. 511, 512.

3. **Putting in fear.**—See **ROBBERY.**

4. **Feats of horsemanship.**—A corporation that maintains a driving-track for public horse-racing is not liable to a tax on its gross receipts, under section 108 of the act of Congress of June 30, 1864, as a corporation conducting a public exhibition of "feats of horsemanship." The court said: An exhibition of horse-racing "is an exhibition of feats of horses, and not of their riders, and is, therefore, not within the statute." *U. S. v. Buffalo Park*, 16 Blatch. (U. S.) 189.

FEDERAL.—A term used in opposition to the word “national” to denote a government of “states united by a federation or treaty, which, binding them sufficiently for mutual defence and the settlement of questions bearing on the welfare of the whole, yet leaves each state free within certain pretty wide limits to govern itself.”¹

FEE.—That which is held of some superior, on condition of rendering him services.² (See also **ESTATES**.)

Fees are a reward or wages given to one as a recompense for his labor and trouble for the execution of his office or profession, as those of an attorney or a physician.³ Wages; salary; commission.

1. The Encyclopædic Dictionary, *sub voce*.

When in 1856, in *Ohio*, upon a motion to enter the mandate of the supreme court of the United States, issued on a judgment of that court, reversing the judgment of the supreme court of the State of Ohio, it was held that the supreme court of the United States had appellate jurisdiction in certain cases over the State courts of last resort, Bartley, C. J., dissented, saying, *inter alia*: “It is claimed, however, that the government of the United States is a national government, of which the States are mere subordinate departments, so that the judicial power of the several States and that of the United States are blended, and must be regarded as one and the same, and consequently, that the courts of each may be enabled to exercise authority by virtue of the judicial power of the other. This involves an inquiry into the true theory and nature of our system of government, in regard to a matter not depending on mere speculation, but a true exposition of which is to be found by reference to the constitution itself, and the public records and history of its formation. A national government is the government of the people of a single state, or nation, united as a community by what is termed the social compact, and possessing complete and perfect supremacy over persons and things, so far as they can be made the lawful objects of civil government. A *federal* government is distinguished from a *national* government by its being the government of a community of independent and sovereign states, united by a compact. The thirty-ninth number of the ‘Federalist’ furnishes the following distinction between a national and a federal government. ‘The idea of a national government involves in it not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation this supremacy is completely vested in the national legislature. Among communities

united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case all local authorities are subordinate to the supreme, and may be controlled, directed, or abolished by it at pleasure. In the latter the local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a national one, since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.’” *Piqua Bank v. Knoup*, 6 Ohio St. 342, 393.

2. Bouvier.

3. Bacon; Bouvier.

Attorney's Fees.—See **ATTORNEY AND CLIENT**, Vol. I. p. 964, n. 1; **ADMIRALTY**; **PARTITION**; **SHERIFF'S COSTS**, etc.

4. **As Distinguished from Costs**—Costs and fees are essentially different. The former are an allowance to a party for the expenses incurred in prosecuting or defending a suit. They are an incident to the judgment, while the latter are compensations to public officers for services rendered individuals in the progress of the cause, or (in another aspect) not in the course of litigation. *Tillman v. Wood*, 53 Ala. 578. They are compensation for particular acts and services, as the fees of clerks, sheriffs, lawyers, physicians, etc., whereas wages are the compensation paid or to be paid for services by the day, week, etc., as of laborers, etc. *Rees v. Simms*, 10 Ind. 85. See also *Musser v. Good*, 11 S. & R. (Pa.) 247; **COSTS**, Vol. III. p. 313.

It is a sum of money paid to a person for a service done him by another. *Blow v. Huston*, 28 Eng. Law & Eq. 360.

When Due.—No fees are due until the service is rendered; and it is extortion in an officer to take any money by color of his office when he has not done the particular service for which the fee is allowed. *Wil-*

Definition.

FEED—FEELINGS.

Definition.

FEED.—A certain amount of food or provender given to horses, cattle, etc., at a time.¹

FEELINGS.—That element in the moral constitution of man, which is possessed of sensibility or sensitiveness.²

liams v. State, 2 Sneed (Tenn.), 162; Port Wardens of Mobile v. Southerland, 47 Ala. 517.

Where, in a statute in relation to executions, the expression "other and greater fees" was used, it was held that the word "fees" was in two senses; in one to denote the charges of the officer for his personal services; in the other—the popular and general use—all the expenses attending the levy, and included in it. *Camp v. Bates*, 13 Conn. 9.

When synonymous with "charge," "compensation," "commissions," etc., in statute. *McPheters v. Morrill*, 66 Me. 124; *Smith v. Drew*, 8 Pac. Rep. 625; *Supervisors of Jefferson Co. v. Johnson*, 64 Ill. 149. See also *Mo. Riv., Fort Scott & Gulf R. Co. v. Shirley*, 20 Kan. 660.

A jury cannot allow counsel fees in a case as damages. *Flanders v. Tweed*, 15 Watts (Pa.), 450.

Where three members of the bar entered their appearance for the defendant to suits instituted against him, and all were equally called upon and acted as the attorneys of the defendant, no warrant of attorney having been given to either by the defendant, it was held that the attorney's fee in the bill of costs was to be divided amongst all who had acted in the case, and who had appeared to the suits. *Hurst v. Durnell*, 1 Wash. (C. C.) 438.

1. **Feed-stable.**—On an indictment for keeping a "livery, feed, or sale stable in a town of less than 2000 inhabitants," without paying the tax of \$10 required by the act, § 585, Code of 1880, the defendant contended that he did not keep such a stable as was within the meaning of the act; but the court held otherwise, *Cooper C. J.*, saying: "The appellant also contends that the evidence does not show that he kept either a livery, sale, or 'feed stable.' The evidence is that he had a stable at which he exposed a sign, that he let stalls at ten cents per day to those desiring to have their use, and that a person renting a stall could either supply the food for the stock or the defendant would furnish it from his store, charging only its market value; that the stable was locked at night by the defendant and that no stock was permitted to be taken out until both the stall rent and the account for food furnished was paid. This, we think, was sufficient to

show that the stable was a "feed-stable" within the meaning of the statute. It is immaterial that food was not kept at the stable, or that it was not furnished unless ordered by the owner of the stock. In truth, the defendant supplied both the stabling and the food for all who applied, and this he could not do without obtaining the privilege license required by law." *Morgan v. State*, 64 Miss. 511.

2. Where an action was brought for an injury to the plaintiff's wife by reason of an alleged insufficiency in a highway, which the defendant was bound to keep in repair, and it appeared that, in consequence of the injury, the plaintiff's wife miscarried, and was prematurely delivered of twin living children, with which she was pregnant at the time of the accident, and that said children both died very soon after their birth, the judge charged the jury as follows: "Now, whatever loss she has sustained by the impairment of her bodily faculties, . . . she is entitled to recover for that, and for everything that would be the natural result of this injury, and was a result of it. If this miscarriage was brought about by this injury, any suffering occasioned thereby, any injury to her feelings, or pain that was personal to her, should be compensated." To this, the defendant excepted, and it was held to be error, the court, *Powers J.*, saying: "Upon the question of damages, the fact of Mrs. Bovee's miscarriage was made prominent at the trial. In the notice a threatened miscarriage is set forth, and in the declaration the actual fact is alleged as one of the injuries sustained. The proofs disclosed the fact that this plaintiff was prematurely delivered of twin living children. The plaintiff was entitled to recover all damages that were naturally and legitimately consequent upon the negligence of the town. If the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject of compensation; but the rule goes no farther. Any injured 'feelings' following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If

FELLOW-SERVANTS.—(See also MASTER AND SERVANT.)

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 - 3. Constitutionality of Statutes, 862.
 - 4. Contracts in Contravention, 863.
- IX. Pleading, 863.
- X. Who Are and Who Are Not Fellow-servants—Alphabetical List of Occupations, 864.

I. General Rule.—The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services. The perils arising from the carelessness and negligence of those who are in the same employment are no exception to this rule; and where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable (save for statutes to be noticed hereafter) to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service.¹

the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachael, she wept for her children and *would not* be comforted, a question of continuing damage is presented too delicate to be weighed by any scales which the law has yet invented. The language of the charge is: "If this miscarriage was brought about by this injury, any suffering occasioned thereby, *any injury to her feelings*, . . . should be compensated." If the court used the words italicized as synonymous with the term "suffering" which had already been specified, the jury might not have been misled. But in view of the prominence given to the fact of the miscarriage, the jury might easily understand that the

plaintiff's injured feelings, induced by reflecting upon her great calamity and grieving over her disappointed hopes, was a matter proper for their consideration. We think the charge was misleading in this respect." *Bovee and Wife v. Town of Danville*, 53 Vt. 183.

1. This rule has become so well established that the citation of decisions to support it would be superfluous; a few general references will be sufficient. Wood, Master & Servant, ch. 16; Story, Agency (9th Ed.), § 453 *et seq.*; Evans, Agency, ch. 9; Pierce, Railroads, ch. 13; 1 Redfield, Railways, ch. xx, sec. iii, § 131; 2 Rorer, Railroads, p. 1187; Shearman & Redf. Negligence, § 86; Wharton, Negligence, § 205; 2 Thompson, Negligence, ch. xx; Beach, Contributory Negligence, § 98 *et seq.*

II. Origin and History of the Rule.—The history of the rule goes back to 1837. In that year Lord Abinger decided *Priestly v. Fowler*, 3 Mees. & W. 1. Here a butcher's servant was sent out on an overloaded wagon, which broke down and injured him. In 1850, in *Hutchinson v. York, Newcastle & Berwick R. Co.*,¹ the rule was first directly applied in England to railway companies. In America the first case came to trial at *nisi prius* in 1838, and was decided by the South Carolina Court of Errors in 1841. This was the case of *Murray v. South Carolina R. Co.*,² where it was held that a railroad company is not liable to one of their firemen for an injury arising from the negligence of a competent engineer. The judges, neither at *nisi prius* nor at the hearing on appeal, knew anything of the English case. In 1842 the question came up in Massachusetts in the case of *Farwell v. Boston & Worcester R. Co.*,³ Chief Justice Shaw writing the opinion. The two preceding cases were before the court, but Judge Shaw begins by stating that, while the court has had the benefit of those decisions, they would treat the case as of new impression. This case decided that where a railway company employed a switch-tender who was careful and trusty in his general character, and, after he had been long in their service, employed an engineer who knew the character of the switch-tender, the company were not answerable to the engineer for an injury received by him in consequence of the carelessness of the switch-tender in the management of the switches. The rule thus established was almost universally followed, and the labor of the courts since has been in properly applying it and determining its principal limitations.⁴

1. 5 Exch. 343.

2. 1 McMullan, 385.

3. 4 Metc. (Mass.) 49.

4. In *Murray v. South Carolina R. Co.*, 1 McMullan (S. Car.), 385, Evans, J., in the course of his opinion said: "With the plaintiff, the defendant contracted to pay hire for his services. Is it incident to this contract, that the company should guarantee him against the negligence of his co-servants? It is admitted that he takes upon himself the ordinary risks of his vocation; why not the extraordinary ones? Neither are within his contract; and I can see no reason for adding this to the already known and acknowledged liability of a carrier, without a single case or precedent to sustain it. The engineer no more represents the company than the plaintiff. Each, in his several department, represents his principal. The regular movement of the train of cars to its destination is the result of the ordinary performance, by each, of his several duties. If the fireman neglects his part, the engine stands still for want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems

to me it is, on the part of the several agents, a joint undertaking, where each one stipulates for the performance of his several part. They are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of another; and, as a general rule, I would say that where there was no fault in the owner, he would be liable only for wages to his servants."

In *Farwell v. Boston & A. R. Co.*, 9 Metc. (Mass.) 49, Chief Justice Shaw's able opinion contains the following language: "If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons con-

cerned, under given circumstances. To take the well-known and familiar cases already cited; a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

"The liability of passenger-carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance, and skill on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, § 590 *et seq.*

"We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured, than could be done by a resort to the common employer for an indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy,

if he have any, against the actual wrong-doer."

Roman Law.—It has been said that "at no period under the Roman law was the master liable for the negligence of a servant in injuring his fellow-servant." Beven's Emp. Liab. Act, 1880, p. 3.

France.—The very earliest time at which this question arose was possibly in the year 1834, where a man employed in loading a cargo was injured by the carelessness of a fellow-servant, and brought suit for damages before the court of Lyons. Article 1384 of the Code Civil provided: "A person is liable, not only for the damage which he occasions by his own act, but also for that which is caused by the acts of persons for whom he must answer, or for the things which he has in his keeping." The court of first instance laid it down that the article did not apply to such a case, on the ground that the injured workman had accepted the danger. This judgment was affirmed on appeal, holding that when workmen are engaged together, and one sustains injury through the negligence of the other, the action lies against the wrong-doer, but as against the employer the salary was held to be set off against the risk. Dalloz, 1837, 2me partie, 161. This rule was followed in another case—Dalloz, 1839, 2me partie, 168.

These rulings, however, were subsequently reversed, and it was determined that the above-quoted article of the Code Civil rendered the employer liable. Dalloz, 1841, 1ère partie, 271.

Italy.—The Italian follows the French Code. Article 1153 of the Italian Code corresponds with article 1384 of the French, and would probably be given the same construction. Beven's Emp. Liab. Act, 1880, p. 6.

The Prussian Law, as it stood until June 7, 1881, recognized the doctrine of the non-liability of the employer when, as Professor Brun, says: "These rules are not sufficient to meet the exigencies of modern life, especially in the case of such great industrial undertakings as railways, shipping, carriers, factories, mines, etc. If, in accordance with the rules of Roman law, the liability of the employer is limited to his negligence in selection and supervision (*culpa in eligendo et custodiendo*), whilst otherwise the employee in fault is alone liable, and in cases of accident there is no liability at all, the profit gained and the risk incurred by the employer would be out of all proportion to each other, and almost the whole risk would be transferred to the public and to

III. Reasons for the Rule.—In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each other shall perform his appropriate duty, each is generally an observer of the conduct of the others, can give notice of any misconduct in capacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means, the safety of each will be more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other.¹

IV. Duties of the Master—Person Performing is not a Fellow-servant.—The master, as such, is required to perform certain duties, and the person who discharges any of these duties, no matter what his rank or grade, no matter by what name he may be designated, cannot be a servant within the meaning of the rule under discussion. He is an agent, and the rules of law applicable to principal and agent must apply. The liability of the master, however, for the non-performance of such duties as the law implies from the contract of service, does not rest upon the ground of guaranty of their performance, but upon the ground whether the master was negligent or not in their performance.²

the workman. For this reason the German Commercial Code has, in the case of carriage by land and by water, and especially in the case of railways, introduced a general liability on the carrier, from which *vis major* is the only exception, and has gone so far as to prohibit contracts in derogation of this liability. Further provision for the liability to pay compensation in the case of death or personal injuries, occurring in connection with railways, mines, quarries, pits, and factories, is made by an imperial law of the 7th of June, 1871. Ev. Mr. C. P. Ilbert, Doc. 362, House Coms. Eng. Parl. 1876, p. 27, Int. 315.

The Irish Law closely follows the English cases: *McEnery v. Waterford*, etc., R. Co., Ir. C. L. R. 312; *Potts v. Plunkett*, 9 Ir. C. L. R. 290; *Carroll v. Hughes*, 6 Ir. Jur. N. S. 49.

Scotch Law.—It is in the Scotch law that we find a decision where the question was one of first impression and uninfluenced by statutory or code enactments, holding the employer liable to an employee for the negligence of a fellow-servant. The case of *Dixon v. Rankin*,

1 Smith & Bate's Am. R. Cases, 569, strongly asserts the liability of the employer, and asserted that the Scotch law was perfectly fixed, and admitted of no doubt whatever as to his liability. That case followed the earlier Scotch cases, and was decided in 1852. In 1855 the case of *Reid v. Bartonshill Coal Co.*, 3 Macq. 266, came before the Scotch court, and the Scotch court followed the rule in *Dixon v. Rankin*.

On appeal to the House of Lords, it was declared that the Scotch law must be assimilated with the law of England, and from that time the course of decision in the two countries has harmonized. *McFarland v. Caledonian R. Co.*, 6 Macq. 102.

1. *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49.

2. *Gunter v. Graniteville Mfg. Co.*, 18 S. Car. 262; s. c., 44 Am. Rep. 573, *Crispin v. Babbitt*, 81 N. Y. 516; *Flike v. Boston*, etc., R. Co., 53 N. Y. 549; *McCosker v. Long Island R. Co.*, 84 N. Y. 77; s. c., 5 Am. & Eng. R. R. Cas. 564; *Brothers v. Carter*, 52 Mo. 372; *Corcoran v. Hallbrook*, 59 N. Y. 517; *Hannibal*,

The duties which the master is required to perform are—

1. *To Furnish Suitable Machinery and Appliances.*—The master, whether a natural person or a corporation, although not to be held as guaranteeing the absolute safety or perfection of machinery or other apparatus provided for the servant, is bound to observe all the care which the exigencies of the situation reasonably require, in furnishing instrumentalities adequately safe for use.¹

etc., R. Co. v. Fox, 31 Kan. 586; s. c., 15 Am. & Eng. R. R. Cas. 325; Fones v. Phillips 39 Ark. 17. And see cases cited under CRITERION OF FELLOW-SERVICE, *infra*.

In *Mullan v. Philadelphia & Southern Mail Steamship Co.*, 78 Pa. St. 25, Justice Woodward delivered the opinion of the court, saying that "Where a master places the entire charge of his business, or a branch of it, in the hands of an agent, exercising no discretion and no oversight of his own, the neglect of the agent, of ordinary care in supplying and maintaining suitable instrumentalities for the work required, is a breach of duty for which the master should be liable. The negligence of the agent, with such power, becomes the negligence of the master."

In *Indiana Car Co. v. Parker*, 100 Ind. 191, the court say: "The duty which the master owes to the servant is one which he cannot rid himself of by casting it upon an agent, officer, or servant employed by him. The distinction between a negligent performance of duty by an agent or servant, and the negligent omission of duty by the master himself, is an important one. Where the duty is one owing by the master, and he entrusts its performance to an agent, the agent's negligence is that of the master. As the master is charged with the imperative duty of providing safe and suitable appliances, this duty he must perform; and if he entrusts it to an agent, and the agent performs it in his place, the agent's act is that of the master. In authorizing an agent to perform such an act, the principal is, in legal contemplation, himself acting when the agent acts, for he who acts by an agent acts by himself. This principle does not conflict with any of the general rules we have stated, for the agent assumes, by authority, the master's place, and does what the law commands the master to do. He is, for the occasion, and in the eyes of the law, the master. If it be true that the agent's act is the master's act, then it must be true that the negligence involved in the act is that of the master himself. The rule which absolves the master from liability for the negligence of the fellow-servant,

has no application whatever where the agent stands in the master's place. The reason of the rule fails; and where the reason fails, so does the rule itself. The reasons which support the rule are, that servants take the risks of the employment upon which they enter, and that public policy requires that fellow-servants should each be an observer of the other." *Farwell v. Boston, etc., R. R. Co.*, 4 Metc. (Mass.) 49."

Negligence of Master and Fellow-servant Combined.—In *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; s. c., 11 Am. & Eng. R. R. Cas. 254, it was held that in an action for damages for personal injuries caused by a collision between two trains of cars, an instruction to the effect that, if the negligence of the company had a share in producing the injury, the company is liable, even though the negligence of a fellow-servant contributed also, is not erroneous; for if the negligence of the company contributed to, it must necessarily have been an immediate cause of, the accident, and it is no defence that another was likewise guilty of wrong. See note *post*, "Injuries caused partly by defective machinery and partly by negligence of master."

1. Where it is the duty of the master to furnish sound apparatus, machinery, etc., and defective machinery causes an injury to the servant, the rule which exempts the master from liability for injury to a servant through the negligence of a fellow-servant does not apply. *Cunningham v. Union Pac. R. Co.* (Utah), 7 Pac. Rep. 795; *Hough v. Texas & Pacific R. Co.*, 100 U. S. 213; *Booth v. Boston, etc., R. Co.*, 67 N. Y. 593; *Laning v. Railroad Co.*, 49 N. Y. 521; *Delaney v. Hilton*, 50 N. Y. Sup'r Ct. 341; *Sioux City, etc., R. Co. v. Finlayson*, 26 Neb. 272; s. c., 18 Am. & Eng. R. R. Cas. 77; *Bean v. Oceanic Steam Nav. Co.*, 24 Fed. Rep. 124; *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204; *Philadelphia, etc., R. Co. v. Keenan*, 103 Pa. St. 124; *Gunter v. Mfg. Co.*, 15 S. Car. 443; *Houston, etc., R. v. Myers*, 55 Tex. 110; *Kain v. Smith*, 25 Hun (N. Y.), 146; *Painton v. Railroad Co.*, 83 N. Y. 7; *Smith v. Oxford Iron Co.*, 42 N. J. L.

467; s. c., 36 Am. Rep. 535; *Schultz v. Chicago, etc., R. Co.*, 48 Wis. 375; *Little Rock, etc., R. v. Duffy*, 35 Ark. 602; *Cowles v. Richmond, etc., R. Co.*, 84 N. Car. 309; s. c., 2 Am. & Eng. R. R. Cas. 90; 37 Am. Rep. 620; *Mansfield Coal Co. v. McEnery*, 91 Pa. St. 185; *McMahon v. Henning, 1 McCrar. (C. C.)* 516; *Chicago & A. R. Co. v. Platt*, 89 Ill. 141; *Penn. Co. v. Lynch*, 90 Ill. 333; *Chicago & A. R. Co. v. Mahoney*, 4 Ill. App. 262; *Chicago, etc., R. Co. v. Avery*, 109 Ill. 314; s. c., 17 Am. & Eng. R. R. Cas. 649; *Allerton Packing Co. v. Eagan*, 86 Ill. 253; *Houston, etc., R. v. Dunham*, 49 Tex. 181; *Handrath v. Railroad Co.*, 46 Md. 230; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Keilley v. Belcher, etc., Mining Co.*, 3 Saw. (U. S.) 500; *Memphis, etc., R. Co. v. Thomas*, 51 Miss. 637; *Kelly v. Erie Telegraph, etc., Co.*, 34 Minn. 321; *Ft. Wayne, etc., R. Co. v. Gildersleeve*, 33 Mich. 133; *Columbus, etc., R. Co. v. Troesch*, 68 Ill. 545; *Perry v. Ricketts*, 55 Ill. 234; *Toledo, etc., R. Co. v. Moore*, 77 Ill. 217; *Chicago, etc., R. Co. v. Jackson*, 55 Ill. 492; *Gibson v. Pac. R. Co.*, 46 Mo. 163; *Wonder v. R. Co.*, 32 Md. 411; *O'Donnell v. Allegheny Valley R.*, 59 Pa. St. 349; *Perry v. Marsh*, 25 Ala. 659; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 518; *Buzzle v. Laconia Mfg. Co.*, 48 Me. 113; *Cayzer v. Taylor*, 10 Gray (Mass.), 224; *Snow v. R. Co.*, 8 Allen (Mass.), 441; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94; *Fiefield v. Northern R. Co.*, 42 N. H. 225; *Harrison v. Central R. Co.*, 31 N. J. L. 293; *Ryan v. Fowler*, 24 N. Y. 410; *Warren v. Erie R. Co.*, 39 N. Y. 468; *Noyes v. Smith*, 28 Vt. 59; *Trask v. California So. R. Co.*, 63 Cal. 96; *Hallower v. Henly*, 6 Cal. 209; *Houston, etc., R. Co. v. Marcelles*, 59 Tex. 334; s. c., 12 Am. & Eng. R. R. Cas. 231; *Foster v. Pussey (Del.)*, 14 Atl. Rep. 545.

In *Ford v. Fitchburg R. Co.*, 110 Mass. 240, the supreme court of Massachusetts held that "the rule of law which exempts the master from responsibility does not excuse the employer from the exercise of ordinary care in supplying suitable instrumentalities for the performance of the required work; and the fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation."

In an action on behalf of a fireman of a railway company, killed by the washing out of a culvert, the negligence of the

company's bridge-builder in constructing, and of the roadmaster in repairing, the culvert, is attributable to the company. *Davis v. Central Vermont R. Co.*, 55 Vt. 84; s. c., 11 Am. & Eng. R. R. Cas. 713.

A railroad company is liable, to any one of its servants operating its road, for the negligence of any other one of its servants whose duty it was to keep the road in good condition, and who culpably failed to perform such duty or to give proper warning; for, in such a case, the two classes of servants would not be fellow-servants or co-employees but the latter class would really be the representative of the master, the railroad company, and the failure of the servant would be within the line of his duty. *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 243; *Houston, etc., R. Co. v. Rider*, 62 Tex. 267.

In an action by a wife, for damages for the death of her husband, occurring in the employment of the defendant, it appeared that the death was caused by a fire originating from a defective pipe put up under the supervision of the defendant's superintendent; and it did not appear that the deceased knew, or had reason to know, of the defect. *Held*, that the superintendent was not a fellow-employee of the deceased in the sense intended by § 1970 of the Civil Code; and that the work of putting up the pipe, being done under his supervision, was the same as though done by him in person; that the deceased had the right to rely upon the implied engagement of the defendant that the pipe was properly placed and constructed, and that the defendant was therefore liable. *Beeson v. Green Mountain Gold-Mining Co.*, 57 Cal. 20.

Agents of a railroad company intrusted with the duty of purchasing a locomotive are not to be regarded as the fellow-servants of those operating it. *Cumberland, etc., R. Co. v. State*, 44 Md. 283.

In an action to recover damages for alleged negligence causing the death of M., plaintiff's intestate, it appeared that M. was employed as a mechanic in defendant's repair shop. By the rules of the shop, known to all the employees, when a locomotive was sent to the shop for repairs, aside from repairing defects reported, a thorough examination was required to be made, to discover and repair other defects, if any. The ordinary course of business was to put the locomotive into the hands of the bolier-makers for examination and repairs, then into the hands of machinists, and finally it was

turned over to mechanics to set the safety-valves; this last work was usually committed to M. and another. While they were engaged in setting the safety-valve of a locomotive which had passed through this course, the boiler exploded and M. was killed. The explosion was caused, as the evidence tended to show, by defects in the boiler, which would have been discovered had the boiler-makers performed their duty. Those employed in the shop were competent and skilful mechanics; they had reported to the master-mechanic that the locomotive was "all right." *Held*, that plaintiff was properly nonsuited, as the death of M. was caused by the negligence of his co-servants; that the case was not within the principle holding the master responsible for unsafe machinery furnished for the use of the employee, as the locomotive was not placed in his hands for use. *Murphy v. Boston & A. R. Co.*, 88 N. Y. 146; s. c., 8 Am. & Eng. R. R. Cas. 510.

The plaintiff, a mason employed with other masons, carpenters, and section-men in the erection of a water-tank and wind-mill for the defendant railroad company, was injured by the falling of a portion of the framework for the wind-mill, which he was assisting to raise. The apparatus for raising such framework consisted of a windlass or crab, tackle-blocks, ropes, the water-tank itself, and an anchor-post set in the ground about sixty feet distant, all of which had been placed in position and adjusted under the direction of the foreman. The fall of the framework was caused by the giving way of the anchor-post, which had not been set in the ground to a sufficient depth. *Held*, that the whole apparatus for hoisting could not be considered as a single machine which the defendant was bound to furnish adjusted and in position to do the work, but the placing and adjustment of the detached appliances were a part of the work to be done. The injury was caused, therefore, not by any failure of the defendant to furnish proper and safe machinery or appliances, but by the negligence of the foreman in the management of such appliances. *Peschel v. Chicago, M. & St. P. R. Co.*, 62 Wis. 338.

Plaintiff, a carpenter, sued defendant, a contractor and his employer, on account of an injury received by falling from a defective scaffold; but, it appearing that the scaffold was erected by a fellow-servant, the defendant not being present, and there being no evidence that defendant was negligent in the employment of

unskilled workmen, or in failing to furnish suitable materials with which to erect the scaffold, *held*, that no recovery could be had, and that the trial court properly directed a verdict for defendant. *Benn v. Null*, 65 Iowa, 407.

The owner of a building is not liable to a mason employed by him for injuries occasioned by the defective construction of a ladder by a carpenter also employed by him, it being no part of the carpenter's employment to make ladders for the use of other workmen than himself. *Mercer v. Jackson*, 54 Ill. 397.

A building contractor who has provided safe and suitable machinery is not liable for a personal injury to an employee occasioned by co-employees' errors or negligence in selecting the particular appliances; as, portions of a derrick employed in setting stone. *Harms v. Sullivan*, 1 Ill. App. 251.

While the rule is generally applicable that when it is the duty of the employee of a railroad corporation, in the course of his work, to ride over the road of the corporation, it is its duty to provide a track suitable and sufficient for the purpose, and to maintain it in good order, it must be considered with some qualification when the road has become dilapidated and out of repairs, and is in the process of reconstruction, in which work the employee is engaged. Thus, B., plaintiff's intestate, was one of a number of laborers in defendant's employ, engaged in repairing a track, the use of which had been partially abandoned, and which had fallen into decay. A construction train upon which B. was riding, ran off the track at a crossing, and he was killed. Rain had fallen the night before, and the space alongside the rails for the flanges of the wheels to run in had become filled up with mud, which had frozen and so caused the accident. T. was defendant's general foreman, having charge of the work of reconstruction and repairs. He had charge of the train at the time of the accident. It was his duty to see that the crossings were properly cleaned and kept in safe condition. He attempted to perform this duty, but failed to do it properly. In an action to recover damages for alleged negligence causing the death, *held*, that the negligence causing the injury was that of a co-employee, and that defendant was not liable; also that the fact that the duty was imposed upon B. of reconstructing the entire road, did not alter his relations as co-employee here. *Brick v. Rochester, etc., R. Co.*, 98 N. Y. 211; s. c., 21 Am. & Eng. R. R. Cas. 605.

Injuries Caused Partly by Defective Machinery and Partly by Negligence of Fellow servants.—When an injury is occasioned to a servant, partly through a defect in the machinery, track or apparatus of the master, and partly through the negligence of a fellow-servant, the master is not exonerated from liability. *Perry v. Ricketts*, 55 Ill. 234; *Chicago, etc., R. Co. v. Jackson*, 55 Ill. 495; *Cone v. Delaware, etc., R. Co.*, 81 N. Y. 206; s. c., 2 Am. & Eng. R. R. Cas. 57; 37 Am. Rep. 491; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497; *Paulmier v. Erie R. Co.*, 5 Vroom (N. J.), 151; *McMahon v. Henning*, 1 McCrary (C.C.), 516; *McDade v. Washington, etc., R. Co. (D.C.)*, 26 Am. & Eng. R. R. Cas. 325; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; s. c., 12 Am. & Eng. R. Cas. 204; *Elmer v. Locke*, 135 Mass. 575; s. c., 15 Am. & Eng. R. R. Cas. 300; *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149; s. c., 11 Am. & Eng. R. R. Cas. 206; *Ellis v. New York, etc., R. Co.*, 95 N. Y. 246; s. c., 17 Am. & Eng. R. R. Cas. 641.

The last case cited was an action to recover damages for alleged negligence causing the death of E., plaintiff's intestate. It appeared that the deceased was a brakeman upon a freight train on defendant's road, and was in the caboose car of the train when, seeing that a collision was imminent between it and another train following, he stepped out of the front door of the car onto the platform of the next car. The cars were furnished with buffers, but they so overlapped each other that they were useless, and, in consequence, when the trains collided, E. was caught between the ends of the two cars and killed. *Held*, that a dismissal of the complaint was error; that it was a duty the defendants owed its employees to provide cars with buffers appropriately placed.

But although the machinery is defective so that otherwise a recovery might be had for an injury received, yet if the *promoting cause* of the injury is the negligence of a fellow-servant, no recovery can be had. *Wood M. & S. (2d Ed.)* § 426; *Memphis, etc., R. Co. v. Thomas*, 51 Miss. 637; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 233; *King v. Boston, etc., R. Co.*, 9 Cush. (Mass.) 112; *Hayes v. Western R. Co.*, 3 Cush. (Mass.) 270; *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258.

A switchman employed in the yard of a railroad company was injured, while making a coupling, by the engine used for switching being backed down upon him without warning and catching his

hand between a freight car and the "goose-neck" coupling iron projecting from the rear end of the engine. The engine was not a regular switch-engine (which does not have the "goose-neck" projection, and is so constructed that the view therefrom backward is unobstructed), but was a common passenger engine. It had, however, been used by the switchman for sixteen days, was of the kind generally used in small yards, and was safe for switching purposes if used with proper care. *Held*, that the negligence of those in charge of the engine, and not any insufficiency or unfitness in the engine itself, was the proximate cause of the injury, and that the company was therefore not liable. *Fowler v. Chicago & N. W. R. Co.*, 61 Wis. 159; s. c., 17 Am. & Eng. R. R. Cas. 536.

The chains connecting the lever with the draw-bar were frequently broken, so that it was necessary for the brakeman to go beneath the platform to uncouple the cars. While the brakeman was so engaged, the conductor, not knowing his position, signalled the engineer to go ahead, and the train, in starting injured the brakeman so that death ensued. *Held*, that the negligence of the conductor in starting the train, and not the failure to have the chains repaired so that the cars could be uncoupled with the lever, was the proximate cause of the injury. *Pease v. Chicago & N. W. R. Co.*, 61 Wis. 163; s. c., 17 Am. & Eng. R. R. Cas. 527.

Safe Place to Work.—At common law the master assumes the duty toward the servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work; and where the service required of an employee is of a peculiarly dangerous character, it is the duty of the master to make reasonable provision to protect him from the dangers to which he is exposed while engaged in the discharge of his duty. *Hannibal, etc., R. Co. v. Fox*, 31 Kan. 586; s. c., 15 Am. & Eng. R. R. Cas. 325.

A was dumping bricks upon a scaffold, when it fell and he was injured. *Held*, that the man who built the scaffold was not A's fellow-workman in such a sense that A could not hold his master liable for his injuries; that it was the master's business to provide a suitable scaffold for A to work on; and that the fact that the scaffold gave way, was *prima facie* evidence of negligence. *Green v. Banta*, 48 N. Y. Sup'r. Ct. 156.

Plaintiff, under the direction of defendant's foreman, put up a staging about 28 feet high, firmly nailing the two planks

which constituted the floor. During his absence, another workman, under directions of the foreman, removed one of the planks, placing another in its place, without fastening it. Plaintiff, not knowing that any change had been made, returned to his work on the staging, which let him fall to the ground. *Held*, that not the failure of the plaintiff's fellow-workman to nail the plank which replaced the nailed one, but the act of the foreman in misleading plaintiff into danger, was the cause of the injury, for which defendant was liable. *Heckman v. Mackey*, 35 Fed. Rep. 353.

But in *Killea v. Foxon*, 125 Mass. 485, it appeared that F. employed H., a carpenter, to superintend the entire job of repairing a building, and directed him to erect a staging, which was solely for putting on the gutters. In doing so, H. insecurely fastened the brackets to the building. On the next day F. ordered copper gutters of a coppersmith, and directed him to send a man to put them on. K. was accordingly sent, and was directed by H. where to go on the staging. The staging fell and injured K. *Held*, that on proof of these facts, K. could not maintain an action against F. for the injury, the same being the result of the negligence of the carpenter, K.'s fellow-servant.

B. and S., agents for a religious society, contracted with N. to paint the inside of a church for a gross sum. The society undertook to erect a staging to be used by N., and selected, and through S. and D. employed, C., a carpenter, for a gross sum, and not subject to the society's control, to furnish the material and labor therefor. N. could not know, from examining the staging, whether it was or was not strong enough for his workmen to go upon. The staging, being defective, fell, injuring M., one of N.'s workmen. *Held*, (1) That the society was liable to M. for the injury, having accepted the staging and induced N.'s workmen to come thereon; (2) that M. could not maintain an action jointly with B. and S. for the injury. *Mulchey v. Methodist Religious Society*, 125 Mass. 487.

In an action by C. against his employer, for personal injuries caused by the fall of a staging, occasioned by the defective material of the putlog thereunder, where it appeared that the materials were selected by C.'s fellow-workmen from a mass furnished by the defendant, the jury were instructed that C. could not recover unless the jury were satisfied that the defendant did not exercise reasonable care in the selection of men and materials to erect the staging; or also, if suitable materials were furnished, and a fellow-workman, not

under the superintendence of the defendant or his agent, selected a defective putlog. *Held*, that C. had no ground of exception. *Colton v. Richards*, 123 Mass. 484.

A workman was injured by falling from a scaffold negligently and insecurely constructed by himself and his co-laborers in the erection of a bridge. *Held*, that the master was not liable. *Hogan v. Field*, 44 Hun (N. Y.), 72. To same effect see *McCormack v. Crawford*, 42 Hun (N. Y.), 657.

Plaintiff was injured by the falling of one of defendant's telegraph poles at a time when he was in the employ of defendant and at work upon the top of the pole. The performance of defendant's duty, to see that its poles were set deep enough to enable its employees to climb safely, was intrusted to a foreman, and plaintiff had nothing to do with that part of the work, except, when in particular instances, he was so directed by the foreman. *Held*, that the negligence of the foreman in the premises was, as between plaintiff and defendant, negligence of defendant. *Kelly v. Erie Tel., etc., Co.*, 34 Minn. 321.

A railroad company permitted its track to be encumbered with sticks and blocks of wood at places where plaintiff was called upon to perform his duties in coupling cars, by reason of which he was injured. *Held*, that the negligence in thus permitting the roadway to be obstructed was that of the company, and not merely that of a co-employee of plaintiff, who was charged with the duty of keeping the track clear. *Hullehan v. Green Bay, etc., R. Co.*, 68 Wis. 520; s. c., 31 Am. & Eng. R. R. Cas. 332.

Defendants were engaged in the manufacture of articles from wood. The lumber was planed on the first floor of their establishment and then passed up through an opening to the floor above. This opening was in a passageway where those employed on the second floor passed back and forth in the performance of their work; when not in use, it was closed by a heavy trap-door. Plaintiff, an employee of the defendants, was going along the passageway in the performance of his work, when the trap-door was suddenly raised from below by a workman in the planing-room, plaintiff fell through the opening and was injured. Plaintiff had been in defendant's employ for about twenty-two months, and was fully informed as to the location and use of the trap-door and the manner of its construction. Defendant had given instructions that the trap-door should not be opened from below, and the employee who

2. *To keep Machinery and Appliances in Repair.*—It is the duty of a master, not only in the first instance to make reasonable efforts to supply his employees safe and suitable machinery, tools, etc., but also thereafter to make like efforts to keep such machinery, etc., in safe and serviceable condition; and to that end he must make all needed inspections and examinations.¹

opened it had been so instructed by the foreman. *Held*, that the action was not maintainable, as the injury was caused by the negligence of a co-employee; that the location of the trap-door in the passageway was not *per se* a wrongful act; that defendants had a right to place it there, and were not bound to change the arrangement to secure greater safety to their employees, and that plaintiff took the risk of the obvious dangers connected with his employment. *Anthony v. Lee-ret*, 105 N. Y. 591.

1. The person performing this duty is not a fellow-servant. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; s. c., 24 Am. & Eng. R. R. Cas. 407; *Solomon R. Co. v. Jones*, 30 Kan. 601; s. c., 15 Am. & Eng. R. R. Cas. 201; *Gunter v. Graniteville Mfg. Co.*, 18 S. Car. 262; *Frazier v. Pennsylvania Co.*, 38 Pa. St. 104; *Warner v. Erie R. Co.*, 39 N. Y. 468; *Porter v. Hannibal & St. Jo. R. Co.*, 71 Mo. 66; s. c., 2 Am. & Eng. R. R. Cas. 44; *Long v. Pacific R. Co.*, 65 Mo. 225; *Dutzi v. Geisel*, 23 Mo. App. 676; *McMillan v. Union Pressed Brick Works*, 6 Mo. App. 434; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; *Shonny v. Androscoggin Mills*, 66 Me. 410; *Johnson v. Richmond, etc., R. Co.*, 81 N. Car. 446; *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa, 14; *Braun v. Rock Island R. Co.*, 53 Iowa, 595; s. c., 36 Am. Rep. 243; *Spicer v. South Boston Iron Co.*, 138 Mass. 426; *Moynihan v. Hills Co.*, 146 Mass. 586; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 441; *Ford v. Fitchburg R. Co.*, 110 Mass. 241; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492; *Brabbitts v. Chicago & N. W. R. Co.*, 38 Wis. 298.

In *Fuller v. Jewett*, 80 N. Y. 46; s. c., 1 Am. & Eng. R. R. Cas. 109, the point raised was whether the machinists of a railroad company, who are employed to manufacture and repair its engines, are properly to be considered coemployees of engineers employed to run those engines. The decision was that they were not.

If a railroad corporation suffers a derrick, not actually in use for the purposes of its business, to remain for an unreasonable length of time, on land within its

control, in such a position by the side of its track as to be in danger of being thrown down by ordinary natural causes so as to interfere with the safe passage of its trains, the corporation is liable to a brakeman for injuries resulting from its own neglect in not removing the derrick, or in not guarding against the danger of allowing it to remain, even if it was put up by other servants of the corporation, and independently of the question of their negligence. *Holden v. Fitchburg R. Co.*, 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94.

In *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St. 389, the plaintiff was conductor of the defendant's train, and was injured by reason of the defective construction of the sidetrack on which he was required to run out. The superintendent and foreman of the road had notice of the defect. The court charged the company with the negligence of the officer who had the care of the construction and maintenance of the sidetrack.

In *Atchison, etc., R. Co. v. Moore*, 31 Kan. 197; s. c., 15 Am. & Eng. R. R. Cas. 312, it was held that where the roadmaster of a railroad company, whose duty it is to direct repairs and keep the road in safe condition, is culpably negligent in the performance of his duty, even under the rule of the common law, is liable for the damages resulting from such negligence to one of its other servants or employees.

One charged with keeping machinery in safe condition is not a fellow-servant with him who operates it, in the sense which would relieve a corporation from liability, when the latter is injured by the negligent performance of his duties by the former. *Houston, etc., R. Co. v. Marcelles*, 59 Tex. 334; s. c., 12 Am. & Eng. R. R. Cas. 231.

If no one is appointed by a railway company to look after the condition of its cars and see that the machinery and appliances used to move and to stop them are kept in repair and in good working order, it is liable for the injuries caused thereby. If one is appointed by it, charged with that duty, and the injuries result from his negligence in its performance, the company is liable. He is, so

3. *Selection and Retention of Sufficient and Competent Servants.*—A master is bound to exercise like care in selecting and retaining sufficient careful and trustworthy servants to properly carry on the business in which the servant is employed.¹ (See INCOMPETENCY OF FELLOW-SERVANTS, *infra*).

far as that duty is concerned, the representative of the company. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; s. c., 24 Am. & Eng. R. R. Cas. 407.

An engineer, although aware that a locomotive had a leak in a valve, left it without using a certain means he knew of to prevent escape of steam into the cylinder, and the engine, being moved thereby, injured another employee of the company who was repairing a car on a side track. The superintendent had known of the defect for several months. *Held*, that the company was liable for the injury. *Cone v. Delaware, etc., R. Co.*, 15 Hun (N. Y.), 172.

In *Houston, etc., R. Co. v. Dunham*, 49 Tex. 181, a railroad company was held liable for an injury to a brakeman resulting from neglect of the roadmaster and section-men to replace rotten ties with sound ones.

But where a servant employed by a master to operate a machine assists other operatives of the master in repairing it, he is a fellow-servant of those who made the repairs, and if, upon the completion of the repairs, and after he has resumed the operation of the machine, he is injured by a defect therein due to the negligence of those who made the repairs, to which negligence he did not contribute, he cannot recover against the master. *Reading Iron Works v. Devine*, 109 Pa. St. 246.

And employers are not liable to an employee engaged in the repair of a machine, where some other workman in the same shop has so carelessly done his prior part of the work of repair as to leave the machine unfit to have any additional work done upon it, and in consequence thereof an employee is injured. *Murphy v. Boston & A. R. Co.*, 59 How. (N. Y.) Pr. 197.

In an action by an employee against a manufacturing corporation, for personal injuries received while endeavoring to escape from its mill, which was on fire, it appeared that the fire was caused by the heating of a bearing in one of the machines used in the mill, and that it might have been readily extinguished when first discovered; that the defendant had a cistern with pipes leading to each story of the mill, to which were attached lines of hose, but at the time of the fire the water did not run when attempt was

made to use it. *Held*, in the absence of any reason why the water did not run, that it must be attributed to the negligence of the fellow-servants of the plaintiff in failing to keep the apparatus in order, or in failing to keep it in operation; and that the defendant was not liable. *Jones v. Granite Mills*, 126 Mass. 84.

In *Seaver v. Boston, etc., R. Co.*, 14 Gray (Mass.), 486, it was held that a carpenter employed by the day by a railroad corporation, to work on the line of their road, and carried on their cars to the place of such work without paying fare, cannot maintain an action against the corporation for injuries occasioned to him, while being so carried, by the negligence of the engineer employed by them to manage and run a locomotive engine; or by a hidden defect in an axle, the failure to discover which, if discoverable, was occasioned by the negligence of servants of the corporation, whose duty it was to examine and keep in repair the cars and engine and axles.

A was employed in the blacksmith's shop of a locomotive works, and, on the direction of an officer of the company, repaired a chain used in raising locomotive driving-wheels, to be worked on by plaintiff, employed for that purpose. When repaired, the chain was again furnished to and used by plaintiff, who was injured by its breaking at the link which had been repaired. *Held*, that A and plaintiff were fellow-servants, and an instruction that A was the agent of the employer, who was responsible for any failure on A's part to exercise reasonable care and skill in making such repairs, was erroneous. *Rogers L. & M. Works v. Hand* (N. J.), 14 Atl. Rep. 766.

1. *Harper v. Indianapolis & St. L. R. Co.*, 44 Mo. 567; *Kersey v. Kansas City, etc., R. Co.*, 79 Mo. 362; s. c., 17 Am. & Eng. R. R. Cas. 638; *Moss v. Pacific R. Co.*, 49 Mo. 167; *Huffman v. Chicago, etc., R. Co.*, 78 Mo. 50; s. c., 17 Am. & Eng. R. R. Cas. 625; *Booth v. Boston, etc., R. Co.*, 73 N. Y. 38; *Mentzer v. Armour*, 18 Fed. Rep. 373; *Satterly v. Morgan*, 35 La. Ann. 1116; *East Tenn., etc., R. Co. v. Gurley*, 12 Lea (Tenn.), 46; s. c., 17 Am. & Eng. R. R. Cas. 568; *Indiana Mfg. Co. v. Milliken*, 87 Ind. 87; *Crandall v. McClrath*, 24 Minn. 127; *Delaware, etc., Canal Co. v. Carroll*, 89 Pa. St.

4. *Establishment of Proper Rules and Regulations.*—It is the duty of the master to make such regulations or provision for the safety of employees as will afford them reasonable protection against the dangers incident to the performance of their respective duties.¹

5. *As to Youthful and Inexperienced Servants.*—It is the duty of the master who knowingly employs a youthful or inexperienced servant, and subjects him to the control of another servant, to see

374; *Tyson v. North Alabama R. Co.*, 61 Ala. 554; *McDonald v. Hazeltine*, 53 Cal. 35; *Chicago, etc., R. Co. v. Doyle*, 18 Kan. 58; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Sizer v. Syracuse, etc., R. Co.*, 7 Lans. (N. Y.) 67.

It is the duty of a master to exercise due and reasonable care in the selection of careful, responsible, and trustworthy co-employees; he must, on engaging a man, make reasonable investigation into his character, skill, and habits of life. If they do not do this, they will be held liable for an injury to another employee occasioned either by his negligence, incapacity, or intemperance. *Baulec v. New York, etc., R. Co.*, 59 N. Y. 356; *Union Pac. R. Co. v. Young*, 19 Kan. 488; *Cooper v. Mil. & P. R. Co.*, 23 Wis. 668; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Mich. Cent. R. Co. v. Dolan*, 32 Mich. 510; *Howd v. Miss. Cent. R. Co.*, 50 Miss. 173; *Blake v. Me. Cent. R. Co.*, 70 Me. 60; *Jordan v. Wells*, 3 Woods (U. S.), 327; *Quincy Mining Co. v. Kitts (Mich.)*, 9 Rep. 86; *Columbus, etc., R. Co. v. Troesch*, 68 Ill. 545.

Sufficient Number of Servants.—In *Flike v. Boston & A. R. Co.*, 53 N. Y. 549, the defendant company had a person in their employ whose duty it was to dispatch the trains running over the road. On one occasion he dispatched a train, upon which the plaintiff was engaged as a brakeman, with only two brakemen, when the safety of the train and its employees required three. In consequence of this insufficiency of brakemen, the plaintiff was injured, and it was held that he could recover therefor, because the negligence of the train-dispatcher was the negligence of the company.

1. *Lake Shore & M. S. R. Co. v. Lavalley*, 36 Ohio St. 222; s. c., 5 Am. & Eng. R. R. Cas. 549; *Chicago, etc., R. Co. v. George*, 19 Ill. 510; *Pittsburg, etc., R. Co. v. Powers*, 74 Ill. 347; *Chicago, etc., R. Co. v. Taylor*, 69 Ill. 461; s. c., 18 Am. Rep. 626; *Chicago, etc., R. Co. v. McLallen*, 84 Ill. 109; *Crew v. St. Louis, etc., R. Co.*, 20 Fed. Rep. 87; *Flike v.*

Boston & A. R. Co., 53 N. Y. 549; *Besel v. New York Cent. & H. R. R. Co.*, 70 N. Y. 171; *Haskins v. Railroad Co.*, 65 Barb. (N. Y.) 129; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Rose v. Boston & A. R. Co.*, 58 N. Y. 217; *Vose v. Lancashire, etc., R. Co.*, 2 H. & N. 728; *Kansas Pac. R. Co. v. Solmon*, 14 Kan. 512; *Baltimore & Ohio R. Co. v. Woodward*, 41 Md. 268; *Cooper v. Iowa Cent. R. Co.*, 44 Iowa, 134.

Where an action is brought against a railroad company by one of its employees, to recover damages for personal injuries sustained by the enforcement of an order made by the superintendent of the company as to the management of a particular train, which order was unreasonable and the enforcement of the same was dangerous to such employee, the fact that the negligence of a fellow-servant of the injured person, while executing such order, contributed in producing the injury affords no defence to the action. *Pittsburg, etc., R. Co. v. Henderson*, 37 Ohio St. 549; s. c., 5 Am. & Eng. R. R. Cas. 529.

Notice of Change in Time-table.—A company or individual operating a railroad has the right, as regards employees, to vary from the regular time-table in the running of trains; all that is required is, due care and diligence in giving notice of the change and in running the train upon the changed time. It is not required that the master should see to it personally that notice of such a change comes to the knowledge of all those to be governed thereby. If there is due care and diligence in choosing competent persons to receive and transmit the necessary orders, a negligence by them in the performance of it is a risk of the employment that the co-employee takes when he enters the service. The duty of the master is performed when he provides beforehand, and makes known to his servants, rules explicit and efficient, which, if observed and followed by all concerned, will bring personal notice to every one entitled to it. *Slater v. Jewett*, 85 N. Y. 61; s. c., 39 Am. Rep. 627.

that he is not employed in a more hazardous position than that for which he was employed, and to give him such warning of his danger as his youth or inexperience demands.¹

1. *Fort v. Union Pac. R. Co.*, 2 Dill. (C. C.) 259; *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553; *Dowling v. Allen*, 74 Mo. 13; s. c., 41 Am. Rep. 298; *Allen v. Burlington, etc., R. Co.*, 57 Iowa, 623; *Grizzle v. Frost*, 3 F. & F. 622; *Hill v. Gust*, 55 Ind. 45; *Siegel v. Schautz*, 2 T. & C. (N. Y.) 353. Compare *O'Connell v. Adams*, 120 Mass. 427; *Anderson v. Morrison*, 22 Minn. 274; *Combs v. New Bedford Cordage Co.*, 102 Mass. 572; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Lalor v. Chicago, etc., R. Co.*, 52 Ill. 401.

A railway company contracted with a boy fifteen years old for his services as brakeman on its railway, without the consent of the mother, his only living parent. *Held*, unless the boy had sufficient discretion to comprehend and guard against the dangers of the employment when fully explained to him, as they should have been, the contract with him would not place him in the position of an employee or preclude a recovery for injuries suffered from the negligence of co-employees. *Hamilton v. Galveston, etc., R. Co.*, 54 Tex. 556; s. c., 4 Am. & Eng. R. R. Cas. 528.

The defendant's trackmaster, whose duty it was to keep its track clear from snow, and who was accustomed to do so with men hired temporarily for that purpose, employed the plaintiff with his team to scrape the tracks. The day was very stormy, and the plaintiff was the only man out with a team. He was ignorant of the time for the passage of trains and wholly unused to the work, and he objected to the employment upon these grounds; but the foreman agreed to advise him of the approach of the trains, and thereupon the plaintiff consented to do the work. While employed in the work, he was struck by a train, of whose coming the foreman failed to advise him. *Held*, that it was within the general authority of the foreman to use the necessary and proper means to have the work done, and that as the stipulation to protect the servant from danger was not an unreasonable one, as he was the only one he could employ to do the work, he was authorized to make the stipulation; and that the plaintiff had a right to rely upon his superior knowledge and judgment of the coming trains, and therefore was not required to be on the lookout for trains, and that the foreman, having failed to notify him of their approach,

the defendants were responsible for the injurious consequences.

Where an ignorant boy, seventeen years old, an apprentice in a machine shop, was directed by the foreman in charge to obey the call and direction of W., another employee, engaged in drilling an engine frame, which work required a skilled mechanic to safely handle; and W., being also an unskilled apprentice, negligently removed the clamp that was provided to hold the frame from falling, and in that position attempted to move the engine frame, and directed the boy to move the trestle farther under the frame, when it fell and killed the boy,—*held*, that W. and the boy were not fellow-servants, and that the negligence of W. was the negligence of the employer. *Missouri Pac. R. Co. v. Peregay*, 36 Kan. 424.

Defendants ordered the porter in their store to run an elevator, and, as he had never run one before, furnished him an instructor to teach him how to do so. *Held*, that they were answerable for any injury to him in the use of the elevator arising from the incompetency or negligence of the instructor; for in such a case, the instructor does not stand to the injured party in the relation of a co-servant, but as a representative of the master. *Brennan v. Gordon*, 13 Daly (N. Y.), 208.

Where it is unusual and dangerous to clean the machinery of a mill before the stoppage of the mill, the master is responsible for the negligence of his foreman in requiring a minor in his employ to clean the machinery before the stoppage of the mill, although such work was within the scope of his employment. *Robertson v. Cornelson*, 34 Fed. Rep. 716.

But if a boy, between fourteen and fifteen years of age, while cleaning machinery in a mill, is injured by the negligence of a fellow-servant in starting the machinery, he cannot maintain an action against his employer if it appears that he has done such work for two years and a half. *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374; s. c., 39 Am. Rep. 457. And the person injured is no less a fellow-servant merely because he might have avoided the contract, under which he was working, on the ground of infancy. *North Chicago, etc., Co. v. Benson*, 18 Ill. App. 194.

Plaintiff, a boy twelve years of age, was employed by the foreman of defendant's boiler shops to work in the toolroom, and was directed to obey the boss of that

V. Criterion of Fellow-service.—The true rule for determining who are fellow-servants is to be determined, not from the grade or rank of the offending or injured servant, but is to be determined by the character of the act being performed by the offending servant. If it is an act that the law implies a contract duty upon the part of the employer to perform, then the offending employee is not a servant, but an agent; but as to all other acts they are fellow-servants.¹

room. Subsequently he was sent by such boss to see if there was any work for him to do in the shop, and while there he was set to work by one of the employees on dangerous machinery, and was injured. *Held*, that the instruction to plaintiff to obey the boss would be construed to apply to employment in the toolroom alone, and that, the boss not being authorized to send plaintiff to the shop in quest of employment, defendant was not responsible for the injuries received through the carelessness of its employees. *Fisk v. Cent. Pac. R. Co.*, 72 Cal. 38.

1. *Crispin v. Babbitt*, 81 N. Y. 520; *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 244; *Slater v. Jewett*, 85 N. Y. 74; *Willis v. Oregon R. Co.*, 11 Oreg. 257; s. c., 17 Am. & Eng. R. R. Cas. 543; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305; s. c., 21 Am. & Eng. R. R. Cas. 525; *Indiana Car Co. v. Parker*, 100 Ind. 191; *Fuller v. Jewett*, 80 N. Y. 52.

The rule is ably discussed by Justice Folger, in *Laning v. N. Y. Central R. Co.* 49 N. Y. 521, where he says that "The duty of the master to the servant, and the implied contract between them, is to the effect that the master shall furnish proper and adequate machinery and appliances for his work, and shall employ skilful and competent fellow-servants, and shall use due and reasonable care to that end. This duty is to be affirmatively and positively fulfilled and performed."

The same view was expressed by Chief Justice Church, in delivering the opinion of the court in *Flike v. Boston & Albany R. Co.*, 53 N. Y. 549, 553: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge, as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and, consequently, liable for the manner in which they are performed. If an

agent, whose duty it is to employ servants or provide materials for the company, acts negligently in that capacity his fault is that of the company, because it occurred in the performance of the principal's duty, although only an agent himself."

In *Brickner v. N. Y. Central R. Co.*, 2 Lans. 506, after full review of the cases the rule was declared to be that "Where a corporation, through its directors, commits the charge of its business to the hands of an agent, exercising no superintendence over him, the corporation will be liable to a subordinate employee for the negligence of such agent in employing coservants, or in providing suitable appliances for the work." Affirmed in 49 N. Y. 672.

Malone v. Hathaway, 64 N. Y. 5, makes the distinction between natural and artificial persons, that it is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant, or where, as in case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus placed in his stead. Under this rule, a foreman who had no delegation of power or control, but who was merely charged with special duties, was held to be a fellow-servant.

The doctrine of the case last cited is declared by Mr. Wharton, in his work on Negligence, § 229, to be in harmony with the American cases. The English courts have not asserted to this rule. *Howells v. Landore Steel Co.*, L. R. 10 Q. B. 63; *Wilson v. Merry*, L. R. 1 H. L. Sc. & Div. App. 326; *Feltham v. England*, L. R. 2 Q. B. 33.

Other Rules.—Cooley states that "persons are fellow-servants when they engage in the same common pursuit under the same general control." Cooley on Torts, p. 541, note 1.

Judge Thompson, in his work on Negligence (2 Thompson on Neg. p. 1026.

§ 31), announces as a general rule "that all who serve the same master, work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants, who take the risk of each other's negligence."

Wood says: "The true test of fellow-service is the community in that which is the test of service—which is, subjection to control and direction by the same common master in the same common pursuit." 3 Wood's Railway Law, § 338.

Beach on Contributory Negligence, p. 338, § 115, gives the following definition or description: "It is generally held that all servants in the employ of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object, are to be held fellow-servants in a common employment."

These rules are stated so broadly that they are too general to be of much service. Most of the rules laid down in the decisions are of the same character.

Texas.—Where two servants are employed by the same master, labor under the same control, derive their authority and receive their compensation from a common source, and are engaged in the same business, though in different departments of the common service, they are fellow-servants. *Texas & P. R. Co. v. Harrington*, 62 Tex. 597; s. c., 21 Am. & Eng. R. R. Cas. 571; *Houston, etc., R. Co. v. Rider*, 62 Tex. 267.

Massachusetts.—The rule of law, that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of a fellow-servant, is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the injury is a submanager or foreman, of higher grade or greater authority than the plaintiff. *Holden v. Fitchburg R. Co.*, 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94.

Maine.—Persons who are employed under the same master, derive authority and compensation from the same common source, and are engaged in the same general business, although one is a foreman of the work and the other a common

laborer, are fellow-servants, and take the risk of each other's negligence, the principal not being liable to the injured servant therefor. An exception to the rule exists if the master has delegated to the foreman or superintendent the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master. *Doughty v. Penobscot Log-Driving Co.*, 76 Me. 143.

Power to Employ and Discharge Servants.—Whether or not the servant or officer in question has the power to employ and discharge servants, has frequently been considered as an important point in determining whether or not he is to be deemed a vice-principal. *Chicago & A. R. Co. v. May*, 108 Ill. 288; s. c., 15 Am. & Eng. R. R. Cas. 320; *Malone v. Hathaway*, 64 N. Y. 5; *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Hofnagle v. New York, etc., R. Co.*, 55 N. Y. 608; *Kansas Pac. R. Co. v. Little*, 19 Kan. 267; *Kansas Pac. R. Co. v. Solomon*, 11 Kan. 83; *Brothers v. Carter*, 52 Mo. 372; *Stoddard v. St. Louis, etc., R. Co.*, 65 Mo. 514; *Cook v. Hannibal, etc., R. Co.*, 63 Mo. 397; *Cumberland & P. R. Co. v. State*, 44 Md. 283; *Huntingdon, etc., R. Co. v. Decker*, 82 Pa. St. 119; *Walker v. Bolling*, 22 Ala. 214; *Smith v. Sioux City, etc., R. Co.*, 15 Neb. 58; s. c., 17 Am. & Eng. R. R. Cas. 561; *Peschel v. Chicago, etc., R. Co.*, 63 Wis. 338; s. c., 17 Am. & Eng. R. R. Cas. 545.

Compare Slater v. Jewett, 85 N. Y. 61.

But where two servants are at work in the same employment, neither having authority over the other, the mere fact that one of them has power to employ and discharge other servants does not change his character of fellow-servant to that of representative of their employer. *Lincoln Coal-Mining Co. v. McNally*, 15 Ill. App. 181; *Hamilton v. Iron Mountain Co.*, 4 Mo. App. 564.

Who are Fellow-servants is a Question of Fact.—In *Illinois*, it is held that the definition of negligence is a question of law, but it is a question of fact whether a particular case falls within that definition; and the same rule may be applied to the question of who are fellow-servants of the same master. As to whether negligence in fact is shown, and whether the party killed thereby was a fellow-servant, and received the injury from another servant of the same master in the same line of duty, bringing them often together, co-operating in the

same work, this court is precluded from determining. *Indianapolis, etc., R. Co. v. Morgenstein*, 106 Ill. 216; s. c., 12 Am. & Eng. R. R. Cas. 228; *Chicago & N. W. R. Co. v. Maranda*, 108 Ill. 576; s. c., 17 Am. & Eng. R. R. Cas. 564; *Shedd v. Moran*, 10 Ill. App. 618; *Holton v. Daly*, 4 Ill. App. 25. See also *Devine v. Tarrytown, etc., Co.*, 22 Hun (N. Y.), 26; *Haas v. Pennsylvania, etc., S. S. Co.*, 88 Pa. St. 269.

Leased Road.—Employees of lessee company are not co-servants of employees of lessor company, although subject to the orders of the latter while running on the lessor company's road. *Phillips v. Chicago, etc., R. Co.*, 64 Wis. 475; s. c., 23 Am. & Eng. R. R. Cas. 453. But in *Chicago, etc., R. Co. v. Clark*, 2 Ill. App. 596, it was held that, where one railroad company leases to another its track, the lessee's trains running subject to the control of the lessor, the employees of the two companies are to be regarded as the fellow-servants of the lessor.

Servants of Different Masters.—The rule, that the common master of several servants, employed in the same service, is not responsible for an injury to one of said servants caused by the negligence of another, while engaged in a common employment has no application to a case of common employment alone, without proof of a common master. *Svenson v. Atlantic, etc., S. S. Co.*, 33 N. Y. Supr. Ct. 277. Whatever effect an agreement between the several companies owning connecting lines of railroad may have upon the parties thereto, it cannot have the effect of making those who were employed and paid wages by either of the contracting parties, the co-employees of the agents and workmen of the other parties, or make the others liable either severally or jointly for any loss or damage caused by the neglect of any one of them, even were the agreement silent in this respect.

Thus, where an injury to the employee of one of said companies occurs on the road of another of said companies, and is caused by the imperfect condition of said road, the principle that every employee assumes the risk of the negligence of his co-employees, is not applicable to him. *Philadelphia, etc., R. Co. v. State*, 58 Md. 372; s. c., 10 Am. & Eng. R. R. Cas. 792. And where the servant of one railroad company, running its trains over the track of another is injured by reason of the negligence of the servants of such other company, he is not debarred from bringing his action against the company employing him. The servant occasioning the injury is not to be regarded as a fellow-servant.

Catawissa R. Co. v. Armstrong, 49 Pa. St. 186.

To the same general effect are other authorities. In *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497, it was decided that a railroad company, running its trains on the tracks of another company, was liable to its employees for an injury occasioned by a defect in the track, and the doctrine of "fellow-servants" was not mentioned, the court evidently considering it to have no application. But in *Clark v. Chicago, B. & Q. R. Co.*, 92 Ill. 43, it was decided that where an engineer-driver of one company, running upon the road of another, was injured in a collision occasioned by the negligence of the servants of such other company, he was not entitled to recover damages from the company employing him, the collision having been one of the risks of his employment, which he undertook to run.

Where actions are brought by the servants of the company using the track, against the owners thereof, the same principles apply. In *Voce v. Lancashire & Yorkshire R. Co.*, 2 H. & N. 728, where a station was jointly occupied by two railroad companies, a servant of one, injured by the negligence of the servants of the other, was held entitled to recover damages from the company the employees of which were in fault. Said employees, it was said, were not fellow-servants. To the same effect is *Warburton R. Co., L. R. 2 Exch. 30*, where the porter of a railroad company using the station of another company was allowed to recover damages for an injury occasioned by the negligence of the servants of the latter.

In the recent case of *Swainson v. North Eastern R. Co.*, L. R. 3 Exch. Div. 341, this doctrine was carried to its furthest extent. It appeared that the stations of two railroad companies closely abutted. The plaintiff was a signalman, employed by but one of the companies, and in its uniform. He discharged his duties, however, in connection with the trains of both roads, and was injured by the negligence of the employees of the other company. He brought an action against said company, and it was strenuously argued that the negligence in question was that of a fellow-servant. The court, however, decided the contrary, and the plaintiff recovered.

In this country the cases are not decisive. Dicta, following the English authorities, will be found in *Smith v. New York & Harlem R. Co.*, 6 Duer (N. Y.), 225; and *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 441. A dictum to a contrary effect is contained in *Cruty v. Erie*

R. Co., 3 Thomp. & C. (N. Y.) 244. These cases all, however, turn on another point, involving the duty of the company owning the track, to the servants of another company using it with regard to the condition of the road. It is liable, it seems, in such case for any defect therein.

Where there is any partnership agreement between two roads, or other arrangement in the nature thereof, the servants of either road will become co-employees, and cannot of course recover for the negligent acts of each other. *Swainson v. North Eastern R. Co.*, L. R. 3 Exch. Div. 341. As to what constitutes such a partnership agreement as to produce this effect, there is a lack of decided cases. An agreement between two roads, to connect at their respective termini, and to sell through tickets and charge through rates, is not such an arrangement, at least where the fare and freight remain distinct on each line. In such case the servants of the respective companies are not to be considered as co-employees. *Carroll v. Minnesota Valley R. Co.*, 13 Minn. 18.

Where a fireman on a railroad train is injured by a collision at a crossing of two roads, brought about by the concurring negligence of the engineer on his train and of the employees of the other road, his right to recover damages for such injury from the other road will not be defeated by reason of the negligence of the engineer. *Gray v. Philadelphia & R. R. Co.*, 24 Fed. Rep. 168; s. c., 22 Am. & Eng. R. R. Cas. 351.

Plaintiff, while employed upon a barge which was engaged in lightening a steamship, was injured through the negligence of one engaged upon the steamship in discharging her cargo. In an action to recover for the injury, defendant's answer admitted that, at the time of the accident, defendant owned and had the control and management of the steamer; the barge was not owned by defendant, and plaintiff was employed and paid by its master. *Held*, that the proof, together with the admission in the answer, was sufficient to authorize the jury to find that the man who caused the injury was a servant of defendant and working for it at the time; and that he and the plaintiffs were not fellow-servants. *Svenson v. Atlantic Mail S. S. Co.*, 57 N. Y. 108.

The D. & N. and the S. railroads connected, forming a continuous line. By an arrangement between the two companies, a train owned and run by the S. company went over both roads to a certain point and back daily, the D. & N. company pay-

ing the S. company monthly an agreed price for the service upon its road. The train, when on the road of the D. & N. company, was under its general control and governed by its rules, and it had entire control of the hands upon it; but the S. company was at liberty to use what engine and employ what hands it pleased. The plaintiff was a brakeman on this train and was injured by a collision with a train of the D. & N. company on its own road, caused by the negligence of the conductor of that train. *Held*, that the plaintiff was not an employee of the D. & N. company, and that the conductor of the other train was therefore not his fellow-servant. *Zeigler v. Danbury & Norwalk R. Co.*, 52 Conn. 543.

While two Steamers were near each other the boiler of one exploded, thereby injuring a deck-hand on the other. *Held*, that the rule that the master is not liable to one of his servants for injuries sustained by him through the negligence of a fellow-servant did not apply, though the defendant was a partner in the business of running both boats. *Connolly v. Davidson*, 15 Minn. 428.

A Command accompanied by a Threat is a command to which an employee is not bound to submit; under the contract of service, such command does not take the plaintiff out of the general line of his employment. Thus, where one employed by a railroad company to work in a tunnel was ordered by the superintendent of the work, under threat of dismissal, to get on a freight train for transportation to another tunnel, and in doing so he was violently cast on the ground and injured by the negligence of the engineer in starting the train, the company is not liable, the employee having received his injury through the negligence of his fellow-servant engaged in the same general employment, the master is not liable. *Capper v. Louisville, etc., R. Co.*; 103 Ind. 305; s. c., 21 Am. & Eng. R. R. Cas. 524.

Sunday Work.—Persons who are fellow-servants of a railway company do not, in view of the rule which affects the liability of the company to one of them who may be injured by another one, cease to be such because the work on which they were employed at the time of the injury was being done on the Sabbath. The fact that the work was not of that character allowed by law to be done on the Sabbath, does not affect the question. *Houston, etc., R. Co. v. Rider*, 62 Tex. 267.

Injury to Servant's Wife.—Damages resulting to a servant from an injury to his wife, occasioned by the negligence of his fellow-servants, may be recovered by him

VI. Limitations on the Rule.—1. Vice-principal Limitations.—The principal limitation contended for is, that there is such a servant as a *vice-principal*, who stands in the shoes of the principal, and is not a fellow-servant with those beneath him; and upon this there is the variation that every superior servant is a vice-principal as to those beneath him.¹ This idea, that the master is respon-

from his master. *Gannon v. Housatonic R. Co.*, 112 Mass. 234. Compare *Abraham v. Reynolds*, 5 H. & N. 148.

Injury to Tenant's Servant by Negligence of Owner's Servant.—The rule has been held not applicable to a case where a servant of a tenant has been injured by the negligence of a servant of the owner of a building, employed in the same room to manage an engine working an elevator upon which the injury occurred. *Stewart v. Harvard College*, 12 Allen (Mass.), 58.

Compulsory Service.—A pilot was engaged by defendants, under the compulsory clauses of the Merchants' Shipping Act, for a voyage in a vessel of which they were owners. While giving directions on board, before the voyage commenced, the pilot was killed by the fall of a boat in consequence of the neglect of defendant's servants. In an action by the personal representatives of the deceased, it was held that there was no implied contract that the pilot should take upon himself the risk of injury by the shipowners servants, and that the defendants were liable. *Smith v. Steele*, 32 L. T. (N. S.) 95.

Negligence of Co-servants Prior to Employment of Injured Servant.—In an action by a workman against his employer for personal injuries caused by the fall of a staging upon which the plaintiff was at work repairing a building, the evidence tended to show that the plaintiff went onto the staging by the defendant's directions; that the staging was insecure in consequence of being constructed of unsuitable materials, or by neglect to fasten it together sufficiently; that the staging was built, before the plaintiff began work, by persons who were afterward his fellow-workmen; and that the defendant directed what lumber was to be used therefor. It was not contended that the staging was built under the direct personal supervision of the defendant, but there was evidence that he superintended the work generally. Held, that a jury would be warranted in finding a verdict for the plaintiff. *Arkerston v. Dennison*, 117 Mass. 407.

Volunteers.—A person who voluntarily, and without any employment, undertakes to perform a service for another, stands in the same relation as a servant for the time being, and is regarded as assuming all the

risks incident to the business, and the rule applies to such persons. *Wood M. & S.* (2d Ed.), § 435; *Degg v. Midland R. Co.*, 1 H. & N. 773; *Potter v. Faulkner*, L. J. Q. B. 30; *Mayton v. Texas*, etc., R. Co., 63 Tex. 77; s. c., 51 Am. Rep. 637; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210; *Osborne v. Knox & L. R. Co.*, 68 Me. 49; s. c., 28 Am. Rep. 16.

In an action for injuries to a child seven years of age, who was riding on an engine contrary to the rules of the company, and, while the engine was in motion, was told by the engineer to get off, and did so and was injured, it is proper to refuse to charge that if plaintiff went on the engine to ring the bell by request of the engineer, and under the engineer's promise to pay him therefor, without defendant's authority, and if plaintiff was injured by the negligence of the engineer or fireman, plaintiff, the engineer, and fireman were co-employees, and the company was not liable, the doctrine having no application to the case. *Chicago, M. & St. P. R. Co. v. West* (Ill.), 17 N. E. Rep. 788.

See MASTER AND SERVANT.

1. Origin of the Vice-principal Limitation.—In the early South Carolina case *Judge Evans* speaks as follows upon this subject: "The engineer no more represents the company than the plaintiff. Each in his several department represents his principal. The regular movement of the train of cars to its destination is the result of the ordinary performance, by each, of his several duties. If the fireman neglects his part, the engine stands still for want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems to me, it is, on the part of the several agents, a joint undertaking, where each one stipulates for the performance of his several part." *Murray v. South Carolina R. Co.* 1 McMullan (S. Car.), 385.

It was in Ohio in 1851 that the doctrine was first recognized. There the engineer of a railway train was injured by the negligence of the conductor, under whose orders he was placed. The court held that the company was liable. *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415. They carefully limit the rule (p. 435) to cases where such superiority and

sible to inferior servants for the acts of superiors, has produced endless confusion in decisions. In general, the doctrine has been favored by the text-writers and adopted by the Southern and Western courts.¹ On the other hand, the entire doctrine of vice-

inferiority of servants are involved. The Supreme Court of Ohio took the same view again in 1854 (*The Cleveland, C. & C. R. R. Co. v. Keary*, 3 Ohio St. 201). Judge Ranney carefully specifying that the doctrine applied to corporations, which could not act in person, but also going the full length of denying the doctrine of *Priestley v. Fowler* and *Farwell v. Railroad Co.*, and bringing forward in support of this view the Scots case of *Dixon v. Rankin*, decided in 1852 (1854), regularly published in 14 Sec. Ser. 420, by which they claimed that the Scots law was shown to be at variance with that of England. That was a case of injury in a coal-pit by the breaking of a rope, but the Scots court went the full length claimed for them by Judge Ranney. In *Whaalan v. The Mad River, etc.*, R. R. Co., 8 Ohio St. 249 (see also *Mad River, etc. v. Barber*, 5 Ohio St. 561, and *Pittsburg, etc., R. R. Co. v. Deviney*, 17 Ohio St. 197), the same court recognized and applied the ordinary rule, and expressly stated that the earlier cases turned upon the subordination of the injured servant.

In *Brown v. Maxwell*, 6 Hill (N. Y.), 592, the old Supreme Court of New York in 1844, seven years before the Ohio idea was conceived, expressly decided that, though the act complained of was done under the superintendence of the foreman appointed by the master, there could be no recovery. The point was raised on appeal in *Coon v. The Syracuse, etc., R. R. Co.*, 1 Seld. (N. Y.) 492 (1851), but, not having been urged at the trial, the court declined to consider it. It is worthy of note that in 1856, intervening between Judge Ranney's decision and the case affirming it, and establishing it as an exception to the general rule in Ohio, the House of Lords, on a Scots appeal, distinguished the case of *Dixon v. Rankin* (relied on by Judge Ranney) as a case of defective machinery, and overruled it in so far as it was inconsistent with *Priestley v. Fowler*; *Bartonshill Coal Co. v. Reid*, 3 Macqueen, 266; and that in the same case the House of Lords, per Lord Cranworth, cited with marked approval Judge Shaw's decision in the *Farwell* case. In concluding, Lord Cranworth said: "The whole judgment is well worth attentive consideration. It is sufficient for me to say that it recognizes,

and in the fullest manner adopts, the English doctrine, resting, as it does, on principles of universal application."

This Scots decision came to the notice of the Supreme Court of Wisconsin through the medium of Judge Ranney's statement, and that court proceeded to overrule its own former decision (*Chamberlain v. Milwaukee, etc., R. Co.* 11 Wis. 248, overruling s. c. 7 Wis. 425). In the following year, the decision was overruled and the general rule reaffirmed (*Moseley v. Chamberlain*, 18 Wis. 700), and in 1875 the court came round to the doctrine of vice-principal, holding that a foreman of repair shops is a vice-principal as to a brakeman injured by his negligence. *Brabbitts v. Chicago & N. W. R. Co.*, 38 Wis. 289.

1. *Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 567; *Gormley v. Vulcan Iron Works*, 61 Mo. 492 (the negligent employe in this case was a superintendent having entire supervision and control over the work, with power to employ, direct, and discharge laborers); *Hoke v. St. Louis, etc., R. Co.*, 88 Mo. 360; *Condon v. Missouri Pac. R. Co.*, 18 Mo. 568; s. c., 17 Am. & Eng. R. R. Cas. 583; *Dowling v. Allen*, 74 Mo. 13; s. c., 41 Am. Rep. 298; *Lewis v. St. Louis, etc., R. Co.*, 59 Mo., 495; *Cook v. Hannibal, etc., R. Co.*, 63 Mo. 397; *East Tenn., etc., R. Co. v. Collins*, 85 Tenn. 227; *Nashville, etc., R. Co. v. Jones*, 9 Heisk. (Tenn.) 27; *Washburn v. Nashville, etc., R. Co.*, 3 Head (Tenn.), 638; *Nashville, etc., R. Co. v. Wheelless*, 10 Lea (Tenn.), 741; s. c., 15 Am. & Eng. R. R. Cas. 315; *Cowles v. Richmond, etc., R. Co.*, 84 N. Car. 309; s. c., 2 Am. & Eng. R. R. Cas. 90; *Dobbin v. Richmond, etc., R. Co.*, 81 N. Car. 446; *Criswell v. Pittsburg, etc., R. Co.* (W. Va.), 33 Am. & Eng. R. R. Cas. 232; *Lake Shore, etc., R. Co. v. La Valley*, 36 Ohio St. 221; s. c., 5 Am. & Eng. R. R. Cas. 549; *Berea Stone Co. v. Kraft*, 31 Ohio St. 387; *Kansas, etc., R. Co. v. Little*, 19 Kan. 267; *Walker v. Balling*, 22 Ala. 294; *Moon v. Richmond, etc., R. Co.*, 78 Va. 745; s. c., 17 Am. & Eng. R. R. Cas. 531; *Atlanta Cotton Factory v. Speer*, 69 Ga. 137; *Cooper v. Iowa Central R. Co.*, 44 Iowa, 134; *Chicago & A. R. Co. v. May*, 108 Ill. 288; s. c., 15 Am. & Eng. R. R. Cas. 320; *Mason v. Edison Mach. Works*, 28 Fed. Rep. 228,

Gravelle v. Minneapolis & St. L. R. Co., 3 McCrary (C. C.), 352.

Chicago, M. & St. P. R. Co. v. Ross.—In 1884 the United States Supreme Court declared in favor of a modification of the rule by deciding the case of Chicago, Milwaukee & St. Paul R. Co. v. Ross, 112 U. S. 377; s. c., 17 Am. & Eng. R. R. Cas. 501. In this case they hold that a railroad corporation is responsible to its train servants and employees for injuries received by them in consequence of neglect of duty by a train conductor in charge of the train, with the right to command its movements and control the persons employed upon it; that a conductor of a railroad train, who has the right to command the movements of the train and to control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow-servant to the engineer and other employees of the corporation on the train.

This decision obtained a bare majority of the court, being reached by a vote of five to four, Justices Bradley, Mathews, Gray, and Blatchford dissenting. It has been severely criticized by eminent writers, and it will not be strange, in view of recent changes in the court, if, when this question next comes before it, the dissenting justices will be in the majority.

To constitute a servant the vice-principal, so as to hold a railroad company liable for his negligence toward another servant, it is not sufficient to show that the duties of the former were to direct and control assistant brakeman in the service of the company at a particular yard, and that the latter was one of the assistant brakemen at that yard. *Rains v. St. Louis, etc., R. Co.*, 71 Mo. 164; s. c., 5 Am. & Eng. R. R. Cas. 610, following *McGowan v. St. Louis & I. Mountain R. R.*, 61 Mo. 528; *Marshall v. Schricker*, 63 Mo. 308.

In *Gilmore v. Northern Pac. R. Co.*, 15 Am. & Eng. R. R. Cas. 304; s. c., 18 Fed. Rep. 866, Judge Deady holds that rule first suggested in *Priestley v. Fowler* (3 Mees. & W. 1), that a master who has exercised due care and skill in the employment and retention of his servants is not responsible for an injury sustained by one of them in the course of his employment, by the negligence of another, however distinct the grade or different the labor of such servants, or how widely separated the locality of their several employments, is being modified by the course of judicial opinion and decision so as to meet the ends of justice in cases since arising of corporations and others

engaged in varied and widely extended operations under one nominal and invisible head, but in reality divided into separate parts or divisions under the direction and control of local bosses, superintendents, or heads of departments who, to all intents and purposes, represent and stand for the corporation with practically unqualified power to employ, direct, and discharge workmen, and to provide the necessary material and appliances for their convenient and safe employment.

It seems, he says, well established that a master is responsible to his servant for an injury sustained by him, without his fault, in consequence of the negligence of a fellow-servant, (1) when the latter, having authority over the former, orders him to do an act not within the scope of his employment, whereby he is exposed to a danger not contemplated in his contract of service, and he is injured in so doing; (2) where the master has charged the latter with the duty of providing proper material and appliances for carrying on a work in which he is personally engaged with the former or not, and by the neglect to do so he is injured.

If a yardman is killed while coupling cars by request of the engineer, and by the negligence of the engineer, it not being a part of the duty of the yardman to couple the cars, a recovery cannot be had against the railroad. To entitle to a recovery, it must be shown that deceased was in the line of his employment, and met his death by the negligence of a fellow-servant having control of him. *Bradley v. Nashville, etc., R. Co.*, 14 Lea (Tenn.), 374.

Where a servant is injured through the negligence of a foreman who has control and superior authority over him, with respect to the business in which they are employed, and who has authority to employ and discharge men, and give directions to their movements and their work, then such foreman is to be considered as a "superior servant" or vice-principal, and the company will be held responsible for the injury. *Smith v. Sioux City, etc., R. Co.*, 15 Neb. 284; s. c., 17 Am. & Eng. R. R. Cas. 561; *Miller v. Union Pac. R. Co.*, 17 Fed. Rep. 67.

Where the liability of a railroad company, for injury to one of its track repairers by the careless manner of running a train, is in issue, evidence tending to show that the train causing the injury was in charge of a conductor and engineer, and was at the time engaged in a race, at a high and dangerous rate of speed, with a train on a parallel road,

over several public crossings, on a curve on which the track repairer was at work, in a city limits—and where trains should be run with care corresponding with the circumstances—without sound of bell or whistle, or slack of speed, or any other precaution to warn the men engaged at work on the track, of approaching danger, is competent to go to the jury, and should be submitted to it under proper instructions upon the issue joined; and it was error in the court to grant a nonsuit on the assumption that the negligence and carelessness causing the injury was that of a co-employee, in the same service, and not that of the company. *Dick v. Indianapolis, etc., R. Co.*, 38 Ohio St. 389; s. c., 8 Am. & Eng. R. R. Cas. 101.

The fellow-servant rule does not apply where one servant, employed to perform his duties under the orders of another superior servant, is directed by the latter to do an act not in the usual course of his duties, and, while so engaged, is injured by the negligence of the superior. *R. Co. v. Fort*, 17 Wall. (U. S.) 553.

A city employed a person to superintend the construction of a cistern, and he, in turn, employed laborers for excavation etc. *Held*, that such person was not in any sense a fellow-servant of the laborers, but the agent of the city, which was liable for his negligence. *Mulcairns v. Janesville*, 67 Wis. 24.

Plaintiff, an employee of the State, while engaged under the direction of the captain of a State boat, in digging clay from a bank and loading it onto the boat, was directed by the captain to work under the bank after he had loosened the overhanging earth, in consequence of which it fell upon and injured plaintiff. *Held*, that the State was not liable, as the injury was through the negligence of plaintiff's fellow-servant. *Loughlin v. State*, 105 N. Y. 159.

While an employee is presumed, on entering service, to assume all risks materially incident thereto, yet no such presumption arises as to such risks as those which grow out of the possible negligence of one who, while a servant to a common master, stands, as to such employee, in the light of a superior, whose commands and directions he is bound to obey. *Cowles v. Richmond, etc., R. Co.*, 84 N. Car. 309; s. c., 2 Am. & Eng. R. R. Cas. 90.

One servant of a corporation, to whom is delegated the power of hiring and discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may be ordi-

narily required to do, is, as to such servants whom he so hires, discharges, and controls, the representative of the master when exercising such power or control, and is not a fellow-servant, nor is he in the same line of employment as the servants he so controls. The mere fact that one of a number of servants, who are in the habit of working together in the same line of employment for a common master, has power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. Each case must depend upon its own circumstances. If the negligence complained of consists of some act done or omitted by the servant having such authority, which relates to his duty as a co-laborer with those under his control, and which might as readily happen with one of them having no such authority, the common master will not be liable. But where the negligent act arises out of and is the direct result of the exercise of the authority conferred upon him by the master, over his co-laborers, the master will be liable. In such case the governing servant is not the fellow-servant of those under his charge, with respect to the exercise of such powers. *Chicago & A. R. Co. v. May*, 108 Ill. 288; s. c., 15 Am. & Eng. R. R. Cas. 320.

If a party is employed by a railroad company, to look after stock which has been killed, and to look after any litigation against the company, he has no authority, by virtue of such employment, to command other servants and employees of the company. If he does thus command such employee, and in discharge of his command the employee is injured, the company would not be liable. The order of a party having no authority over the injured employee, will not serve as a basis on which to fix the relation of employer and employee. *Nashville & C. R. Co. v. McDaniel*, 12 Lea (Tenn.). 386; 17 Am. & Eng. R. R. Cas. 604.

Where, by the rules of a railroad company, brakemen on a train of cars are placed under the control and direction of the conductor, the relation of superior and subordinate, as between the engineer and a brakeman, is not created by a rule of the company requiring the engineer to give certain signals for setting or relieving brakes, which also requires brakemen to work the brakes accordingly. *Pittsburg, etc., R. Co. v. Ramsey*, 37 Ohio St. 665; s. c., 5 Am. & Eng. R. R. Cas. 553.

principal, *as such*, in and of itself, and of liability for a superior's tort to an inferior, is unequivocally repudiated by courts whose authority outweighs that of those favoring the doctrine.¹

2. *Different Department Limitations.*—Another limitation upon the rule is contended for by some courts, viz.: That, as the division of labor has led to such growth in industrial enterprises as to divide them into distinct and separate departments, a laborer in one department of a great enterprise is not a fellow-servant with

In an action against an express company, for injuries received while in its employment, an allegation in the complaint that such injuries were caused by the negligence of one who was the "agent and manager of the said company's office" in the city where the plaintiff was employed, does not, in the absence of further allegations showing what the duties and powers of such agent were, create the presumption that he was a *vice-principal*, for whose negligent acts, resulting in injury to its employees, the express company would be liable. And especially does not such presumption arise where the complaint further shows that the acts from which the injury resulted were done by such agent while engaged as driver of the team drawing goods between the company's office and the depots, and while defendant was riding to and fro, assisting in loading and unloading such goods? *Dwyer v. American Exp. Co.*, 55 Wis. 453.

That one is a *vice-principal* for a certain purpose, does not make him an *alter ego* of the master when acting in another capacity. *Hoke v. St. Louis, etc., R. Co.*, 11 Mo. App. 574.

1. *Brick v. Rochester, etc., R. Co.*, 98 N. Y. 511; s. c., 21 Am. & Eng. R. R. Cas. 605; *Malone v. Hathaway*, 64 N. Y. 5; *Sherman v. Rochester, etc., R. Co.*, 17 N. Y. 153; *Hofnagle v. New York, etc., R. Co.*, 55 N. Y. 608; *Blake v. Maine Central R. Co.*, 70 Me. 60; *Lawler v. Androscoggin R. Co.*, 62 Me. 463; *Conley v. Portland*, 78 Me. 217; *Key-stone Bridge Co. v. Newberry*, 96 Pa. St. 246; s. c., 42 Am. Rep. 543; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Reese v. Biddle*, 112 Pa. St. 72; *New York, etc., R. Co. v. Bell (Pa.)*, 28 Am. & Eng. R. R. Cas. 338; *Dummersell v. Fish*, 117 Mass. 312; *Holden v. Fitchburg R. Co.*, 120 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94; *Zeigler v. Day*, 123 Mass. 152; *O'Connor v. Roberts*, 120 Mass. 227; *Peterson v. White Breast Coal, etc., Co.*, 50 Iowa, 673; *O'Connell v. Baltimore, etc., R. Co.*, 20 Md. 212; *Brazil, etc., Co. v. Cain*, 98 Ind. 282; *Columbus, etc., R. Co. v. Arnold*, 31 Ind.

174; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Fraker v. St. Paul, etc., R. Co.*, 32 Minn. 54; s. c., 15 Am. & Eng. R. R. Cas. 256; *Foster v. Minnesota Cent. R. Co.*, 14 Minn. 360; *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162; s. c., 38 Am. Rep. 285; *Murphy v. Smith*, 19 C. B. N. S. 361; *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Blue Point Min. Gravel Co.*, 51 Cal. 255; *Howells v. Landore Seimens Steel Co., L. R.* 10 Q. B. 62; *Allen v. New Gas Co.*, 1 Exch. Div. 254; *Feltham v. England*, L. R. 2 Q. B. 33, reversing s. c., 4 Fast. & Fin. 460; *Wilson v. Merry*, L. R. 1 H. L. Sc. App. 326.

In *Zeigler v. Day*, 123 Mass. 152, a superintendent, although receiving a portion of the profits of the business for his services, was held to be a fellow-servant with a laborer.

Vice principal Doing Co-servant's Work.

—Although a servant may be considered a *vice-principal*, yet the employer is not liable to an employee for his negligence in doing the duty of a co-employee of the person injured. *Quinn v. New Jersey Lighterage Co.*, 23 Fed. Rep. 363; compare *Berea Stone Co. v. Croft*, 31 Ohio St. 287. It was held, in *Hoke v. St. Louis, etc., R. Co.*, 11 Mo. App. 574, that where a roadmaster of a railroad company, having superintendence of the road department, was negligent in an act which he assumed to do as a mere boss of a gang, and a workman was injured, the company was not liable as for the negligence of a *vice-principal*. The court said: "But just as the tortious act of a servant, to make the employer liable, must pertain to the particular duties of that employment, so the wrongful act of a *vice-principal*, or *alter ego*, must be an act done by him as *vice-principal*. The fact that he is *vice-principal* in one department of the business does not make all his acts the acts of a *vice-principal*."

And, on the contrary, one may be a fellow-servant concerning a certain employment, although he has other duties, in exercising which he is *alter ego* of the master. *Brick v. Rochester, etc., R. Co.*, 98 N. Y. 211.

a laborer in another and separate department. The different department distinction has been called the doctrine of Georgia, Kentucky, Tennessee, and Illinois, and has been recognized in all of those States.¹

1. *Cooper v. Mullins*, 30 Ga. 150; *Nashville, etc., R. Co. v. Jones*, 9 Heisk. (Tenn.) 37; *Nashville, etc., R. Co. v. Carrol*, 6 Heisk. (Tenn.) 347; *Toledo, etc., R. Co. v. O'Connor* 77 Ill. 391, holding that a day-laborer on the track of a railway company may recover for an injury caused by the gross negligence of an engine-driver if he is free from negligence on his part. *Toledo, etc., R. Co. v. Ingraham*, 77 Ill. 309; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171;

To constitute servants of the same master "fellow-servants," within the rule *respondeat superior*, it is not enough that they are engaged in doing parts of the same work, or in the promotion of the same enterprise carried on by the master, not requiring co-operation or bringing them together, or in such relations as that they may have an influence upon each other; but it is essential that, at the time it is claimed such relation exists, they shall be directly co-operating with each other in the particular business in hand, or that their usual duties shall bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution. *Chicago, etc., R. Co. v. Moranda*, 108 Ill. 576; s. c., 17 Am. & Eng. R. R. Cas. 564. But in this State, it has been held that, though servants work under different overseers, if engaged in the same line of employment such as necessarily brings them into frequent contract with each other in the prosecution of their work, they are co-servants. *Chicago, etc., R. Co. v. O'Bryan*, 15 Ill. App. 134.

Contra.—The following cases have denied the doctrine: *Texas & P. R. Co. v. Harrington*, 62 Tex. 597; s. c., 21 Am. & Eng. R. R. Cas. 571; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94; *New York, L. E. & W. R. Co. v. Bell*, 112 Pa. St. 400; s. c., 28 Am. & Eng. R. R. Cas. 338; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; s. c., 42 Am. Rep. 543; *Kirk v. Atlanta & C. Air Line R. Co.*, 94 N. Car. 625; s. c., 25 Am. & Eng. R. R. Cas. 507; *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Wonder v. Baltimore, etc., R. Co.*, 32 Md. 411; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Foster v. Minnesota Cent. R. Co.*, 14 Minn. 360.

Where J., one of several workmen employed by T., in blasting for a sewer, was injured by a caving-in occasioned by the negligence of other persons at work under the city superintendent of sewers, *held*, that J. was a fellow-servant of the negligent servants of the city, and could not recover of the city for the injury. *Johnson v. City of Boston*, 118 Mass. 114.

Shaw, J., in *Farwell v. Boston & W. R. Co.*, says: "It was strongly pressed in the argument, that, although this might be so when two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, How near or how distant must they be to be in the same or different departments? In a blacksmith's shop, persons working in the same building at different fires may be quite independent of each other, though only a few feet distant. In a rope-walk, several may be at work on the same piece of cordage at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

"Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master in the case supposed is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from

VII. The Incompetency of Fellow-servants.—1. *General Rule.*—An employer who knowingly employs and retains an incompetent servant, is liable for injuries to a fellow-servant sustained through the incompetency of the servant so employed and retained, when it appears that the injured servant did not know, and had not the means of knowing, of the incompetency of his fellow-servant.¹ But a master is not chargeable for injuries to one servant, by the negligence of another, on the ground of the unskilfulness of the latter, unless the injuries resulted from such unskilfulness.²

whose negligence he might suffer, but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable to tort as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence, the separation of the employment into different departments cannot create that liability when it does not arise from express or implied contract, or from a responsibility created by law, to third persons and strangers for the negligence of servants." *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49.

1. This proposition is but the converse of the universally accepted rule, that where an employer uses due care and diligence in selecting and retaining only competent and trustworthy servants, he is not answerable to one of them for injuries resulting from the negligence of a fellow-servant in the same service.

"If the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of the want of requisite skill to discharge the duties which he is employed to perform, or for any other cause is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant." 2 *Thomp. Neg.* 974, approved in *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261; s. c., 5 Am. & Eng. R. R. Cas. 554. To same effect see *Chicago & G. E. R. Co. v. Harney*, 28 Ind. 28; *Indiana Mfg. Co. v. Millican*, 87

Ind. 87; *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26; *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261; *Texas M. R. Co. v. Whitmore*, 58 Tex. 276; s. c., 11 Am. & Eng. R. R. Cas. 195; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Alabama, etc., R. Co. v. Waller*, 48 Ala. 459; *New Orleans, etc., R. Co., v. Hughes*, 49 Miss. 258; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197; *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642; *Union Pac. R. Co. v. Young*, 19 Kan. 488; *Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512; *Colton v. Richards*, 123 Mass. 484; *Cayzer v. Taylor*, 10 Gray (Mass.) 274; *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.), 49; *Curran v. Merchants' Manuf. Co.*, 130 Mass. 374; s. c., 39 Am. Rep. 457; *Rohback v. Pacific R. Co.*, 43 Mo. 187; *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567; *Moss v. Pacific R. Co.*, 49 Mo. 167; *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 7 Am. & Eng. R. R. Cas. 628; *Cheasapeake, etc., R. Co. v. McMannon (Ky.)*, 33 Am. & Eng. R. R. Cas. 308.

A railroad company is not liable to an employee who is injured by the negligence of a co-employee, of whose negligent character it had been notified, provided the accident which occasioned the injury occurred before the expiration of a reasonable time for the company to take proper action in the premises after such notice had been given. Four weeks would not be an unreasonable time under the circumstances of this case. *Ross v. Chicago, etc., R. Co.*, 8 Fed. Rep. 544.

2. *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Murphy v. St. Louis, etc., R. Co.*, 71 Mo. 202; s. c., Am. & Eng. R. R. Cas. 83.

To enable a servant to recover of his master, for injuries sustained through the instrumentality of a fellow-servant, it is not sufficient to show that the fellow-servant was incompetent, and that the master was guilty of negligence in employing him; it must also appear that

2. *Degree of Care Required in Selection of Servants.*—A master does not warrant the competency of his servants, but he contracts to use all ordinary care and diligence in their selection and retention.¹

the fellow-servant was guilty of some act of negligence or unskilfulness directly contributing to the injury. *Kersey v. Kansas City, etc., R. Co.*, 79 Mo. 362; s. c., 17 Am. & Eng. R. R. Cas. 638.

1. *Union Pac. R. Co. v. Millikin*, 8 Kan. 647; *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545; *Illinois, etc., R. Co. v. Cox*, 21 Ill. 20; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Beaulieu v. Portland Co.*, 48 Me. 291; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105; *Michigan, etc., R. Co. v. Leahy*, 10 Mich. 193; *Sizer v. Syracuse, B. & N. Y. R. Co.*, 7 Lans. (N. Y.) 67; *Wright v. New York, etc., R. Co.*, 25 N. Y. 562; *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Banlec v. N. Y. & H. R. Co.*, 59 N. Y. 336; *Tarrant v. Webb*, 18 C. B. 797; *Alabama & F. R. Co. v. Waller*, 48 Ala. 459; *Rohback v. Pacific R. Co.*, 43 Mo. 187; *Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 567; *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Fox v. Sanford*, 4 Sneed (Tenn.), 36; *Sullivan v. Mississippi, etc., R. Co.*, 11 Iowa, 421; *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa, 281; *Hunt v. Chicago, etc., R. Co.*, 26 Iowa, 363; *Farwell v. Boston, etc., R. Co.*, 4 Metc. (Mass.) 49; *Columbus, etc., R. Co. v. Webb*, 12 Ohio St. 475; *Cooper v. Mullins*, 30 Ga. 146; *Ponton v. Wilmington, etc., R. Co.*, 6 Jones (N. Car.), 245; *Noyes v. Smith*, 28 Vt. 59; *Hard v. Vermont, etc., R. Co.*, 32 Vt. 472.

In *Wabash R. Co. v. McDaniels*, 107 U. S. 454; s. c., 11 Am. & Eng. R. R. Cas. 158, the question was fully discussed, and the correct rule stated. "The discussion in the adjudged cases discloses no serious conflicts in the courts as to the general rule, but only as to the words to be used in defining the precise nature and degree of care to be observed by the employer. The decisions, with few exceptions not important to be mentioned, are to the effect that the corporation must exercise ordinary care. But, according to the best considered adjudications, and upon the clearest grounds of necessity and good faith, ordinary care in the selection of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the conse-

quences that may result from negligence on the part of the employer, is fairly commensurate with the perils or danger likely to be encountered. . . . These observations meet in part the suggestion made by counsel, that ordinary care in the employment and retention of railroad employees means only that degree of diligence which is customary or is sanctioned by the general practice and usage which obtain among those intrusted with the management and control of railroad property and railroad employees. To this view we cannot give our assent. There are general expressions in adjudged cases which apparently sustain the position taken by counsel; but the reasoning upon which those cases are based is not satisfactory, nor, as we think, consistent with that good faith which at all times should characterize the intercourse between officers of railroad corporations and their employees. It should not be presumed that the employee sought or accepted service upon the implied understanding that they would exercise less care than that which prudent and humane managers of railroads ought to observe. To charge a brakeman, when entering the service of a railroad company, with knowledge of the degree of care generally or usually observed by agents of railroad corporations in the selection and retention of telegraphic operators along the line traversed by trains of cars,—a branch of the company's service of which he can have little knowledge, and with the employee specially engaged therein he can ordinarily have little intercourse,—is unwarranted by common experience. And to say, as matter of law, that a railroad corporation discharged its obligation to an employee—in respect of the fitness of co-employees, whose negligence has caused him to be injured—by exercising, not that degree of care which ought to have been exercised, but only such as like corporations are accustomed to observe, would go far toward relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations, in the appointment of servants, is evidence which a jury may consider in determining whether in the particular case the requisite degree of care was observed, such practice cannot

be taken as conclusive, upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law." See also *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628.

In *Jordan v. Wells*, 3 Woods (U. S.), 527, the court held that, in order to entitle one servant to recover for an injury received through the negligence of a fellow-servant, it must be shown, not only was the servant incompetent, but also that the master was *wilfully* negligent in employing him. But this is not the law. *Wood's M. & S.* (2d Ed.) 819; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Tyson v. South & N. Ala. R. Co.*, 61 Ala. 554; *Delaware, etc., Canal Co. v. Carroll*, 89 Pa. St. 374; *McDonald v. Hazeltine*, 53 Cal. 35.

A railroad company placing one of its brakemen in a position where peculiar fitness is required, without being assured of his competency by instituting special inquiries, or from previous like service, is liable for any injuries which may happen to a fellow-servant, without notice, the proximate cause of which was the incompetency of such brakeman. Thus, a conductor, having been but recently promoted from the position of brakeman, but without test as to his qualifications by any special examination, who is placed in charge of a "wild train," a service demanding special skill, and who causes a collision owing to his neglect of an order, in which a brakeman on the train was injured, is incompetent for the position in which he was placed, and the company is remiss in its duty in selecting him, and is liable to the brakeman for the injuries he received. *Evansville & T. H. R. Co. v. Guyton (Ind.)*, 33 Am. & Eng. R. R. Cas. 311.

The conductor of a train was injured in consequence of the mismanagement of a locomotive by a fireman, who had been placed in charge of the engine by the agents of the company. In an action for damages against the company, it was held that it was responsible, on the ground that its agents were negligent or unmindful of their duty in employing competent and skilful servants in the execution of the company's business. *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567; s. c., 4 Am. Rep. 352.

In *Illinois Central R. Co. v. Jewell*, 46 Ill. 99, it appeared that the defendant employed an engineer who was given to fast running, addicted to drinking, and

inattentive to his watch and time-card. It was held that the defendant was bound to know the qualifications of its employees in such responsible positions, and that where a brakeman was thrown from a car and killed by reason of the engineer's incompetency, his representatives could recover for his death. Doubtless this case states the rule of responsibility too strictly. See cases *supra*.

Where a railroad company, whose road formed a junction with another road, intrusted a person employed and paid by such other road with the business of attending to trains at such junction, and such person was incompetent, whereby death resulted to one of its engineers, it was held liable to his representatives in damages. *Taylor v. West. Pac. R. Co.*, 45 Cal. 323.

In *Wabash R. Co. v. McDaniels*, 107 U. S. 454; s. c., 11 Am. & Eng. R. R. Cas. 158, a brakeman sought damages for an injury alleged to have resulted from the employment by the company of an incompetent train-despatcher. It appears that the latter was a bright, industrious boy seventeen years of age, but that his whole knowledge of telegraphy had been acquired during one year's service as a messenger boy, during which he received instruction in the art; and that he had not been considered competent for some parts of the business. A judgment for damages was sustained.

In an action against a railroad company by an engineer, for an injury caused by the negligence of a freight conductor, evidence that he was put on the list of conductors some eight months before the accident, after having been employed as brakeman for a somewhat longer period, and that he had once by mistake carried a passenger by his stopping-place, and had for that reason spoken disparagingly of himself to his employer, but where it appears that he had nevertheless maintained a good standing, and that no fault had been found with him except by himself for this single blunder, does not make out a case of incompetence. *Mich. Cent. R. Co. v. Dolan*, 32 Mich. 510.

In *Texas & N. O. R. Co. v. Berry*, 67 Tex. 238, the personal representatives of a brakeman sought damages, on the ground that his death had been caused by the incompetence of the engineer. The latter had been a fireman on other roads, and also on the defendant's road for a year previous to his promotion as engineer, and had borne a good reputation as to his knowledge of his work and the performance of his duty. It was held that the defendant was not guilty of neg-

ligence in employing him in the latter capacity.

Promoting to the post of conductor a person who has served seven years as car coupler and shower, the duties of which place made him acquainted with the modes of making up trains, the dangers incurred by those employed in the work, and by others, and the precautions necessary to guard against accidents, is not negligence, nor evidence of negligence; it not appearing that such person had ever shown himself incompetent or unfaithful prior to the happening of the injury sued for. *Haskin v. N. Y. Cent. & H. R. R. Co.*, 65 Barb. (N. Y.) 129.

Gibson v. North Cent. R. Co., 22 Hun (N. Y.), 289, was an action against a railroad company by an employee for an injury resulting from a defective car-bumper. It was alleged that the car-inspector was negligent in not having sent the car to the shops for repairs. It appeared that the inspector was sober and intelligent, but that he had no knowledge of machinery except that obtained by working one or two years in the defendant's carpenter shop, bolting, putting in brasses and boxes, and assisting in the shop. The court held that the defendant was not negligent in appointing him a car-inspector.

B., an engineer in the employ of a railroad company, was going through the yards of the company to his work; a locomotive of the company was backing slowly on one of the tracks; it struck B. and killed him. Whether he was walking on the track, or stepped suddenly upon it and in the road of the approaching engine, was not clearly shown. In an action against the company for damages, based on the negligence of the company, alleged to consist in placing the engine in charge of an engineer whose left eye was so badly diseased as to require the keeping of it bandaged, and whose right eye was defective in vision owing to sympathetic causes, *held*, that plaintiff was properly nonsuited. *Keys v. Pennsylvania R. Co.* (Penn.), 3 East. Rep. 830.

M., plaintiff's intestate, who was an engineer in defendant's employ, was killed by the collision of the train he was running with freight cars standing on the track of defendant's road at O. The accident occurred on a dark and foggy night. A freight train was being made up at O., and the main track and switch were both occupied. The usual signal to stop a train was the swinging of a red lantern. In addition, the rules of the company requires its flagman on foggy nights to use torpedoes, which were pro-

vided for that purpose. There were three brakemen upon the freight train, two of them regular brakemen, and one, T., an extra man; it was defendant's custom to keep extra men at O. to supply the place of regular brakemen, sick or absent. T., about a week before the accident, applied to defendant's general train-dispatcher for a position as brakeman, and was advised that he might get a job at O., to which place he went and reported to the yardmaster, and he had, prior to the accident, made two or three trips as brakeman. He was selected, by the conductor of the freight train, to take the place of a regular brakeman. The yardmaster requested the conductor to send out a flagman to flag the expected train. One of the regular brakemen started to do this, but the conductor ordered him to remain, and sent T. The latter did not take or use a torpedo, and had not been informed of, and did not know of, the rule requiring such use. He had never flagged a train in the night, except the second night before, on which occasion the conductor found fault with and discharged him for not obeying orders. T. failed to properly signal the approaching train, and this omission occasioned the accident. *Held*, that the evidence justified the submission to the jury of the question as to the negligent performance, by defendant, of the duty it owed to its servants, to use due care in the selection of competent co-servants. *Mann v. Delaware & H. Canal Co.*, 91 N. Y. 495; s. c., 12 Am. & Eng. R. R. Cas 199.

Where a servant is generally known to be incompetent, the master is chargeable with negligence for not knowing what his reputation is. *Wood M. & S.* (2d Ed.), § 421; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105. Thus, in *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 233, it appeared that the plaintiff, a carpenter, was employed by the defendant railroad company as a car-repairer. By the terms of his contract he was transported to and from the place of work, on the defendant's trains. On one occasion, while so riding on the train, through the negligence of a switch-tender, while making what is called a "flying switch," he was severely injured. In order to establish negligence on the part of the master, the plaintiff offered to show that the switchman had been in the employ of the defendant two years, and was grossly intemperate and an habitual drunkard, and that when first employed by the defendant he had the reputation of so being in East Boston, where he lived, and was drunk every night while in their employment,

3. *Negligence in the Retention of Servants.*—Although an employer may have used due care and diligence in selecting his servants, if subsequently he obtains knowledge of a servant's incompetence or unfitness for his position, and retains him in his employment, he is liable to a fellow-servant for any injury resulting from such unfitness.¹ But the employer must have notice of

and was drunk when the accident occurred; also that he (the plaintiff) had no knowledge of the switchman's habits. The plaintiff lived in North Chelsea, and the switchman four miles away, at East Boston, where he was employed. The court below held that upon these facts, if proved, no recovery could be had, but upon appeal the ruling was reversed. Gray, J., remarking: "The evidence offered by the plaintiff at the trial was competent to show that the defendants knowingly, or in ignorance caused by their own negligence, employed an habitual drunkard as a switchman, and thereby occasioned the accident. Of the sufficiency of this evidence, a jury must judge. If the plaintiff can satisfy them that such misconduct or negligence in the defendants caused the injury, and that he himself used due care, he may maintain the action." See also NEGLIGENCE IN THE RETENTION OF SERVANTS, *post*.

1. *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567; *Pittsburg, Ft. Wayne & C. R. Co. v. Ruby*, 38 Ind. 294; *Gilman v. Eastern R. Co.*, 13 Allen (Mass.), 433; s. c., 10 Allen (Mass.), 233; *Ohio & Miss. R. Co. v. Collarn*, 73 Ind. 261; s. c., 6 Am. & Eng. R. R. Cas. 554; *Texas-Mexican R. Co. v. Whitmore*, 58 Tex. 276; s. c., 11 Am. & Eng. R. R. Cas. 195, *Mobile & Montgomery R. Co. v. Smith*, 59 Ala. 245; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Little Rock & Ft. S. R. Co. v. Duffy*, 35 Ark. 602; s. c., 4 Am. & Eng. R. R. Cas. 637; *Houston & T. C. R. Co. v. Myers*, 55 Tex. 110; *McDermott v. Hannibal & St. Joe R. Co.*, 73 Mo. 516; s. c., 2 Am. & Eng. R. R. Cas. 85; *Baulec v. New York & Harlem R. Co.*, 59 N. Y. 356; *Huntingdon & Broad Top R. Co. v. Decker*, 82 Pa. St. 119; s. c., 84 Pa. St. 419; *Union Pacific R. Co. v. Young*, 19 Kan. 488; *Cleghorn v. New York Central, etc., R. Co.*, 56 N. Y. 44; *Beems v. Chicago, R. I. & P. R. Co.*, 10 Am. & Eng. R. R. Cas. 658; *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 243.

Where the officers of a railroad company have had their attention directed to the intemperate habits of an employee, it is their duty to make careful and fre-

quent investigation as to the fact if they retain him in their service. *Mich. Cent. R. Co. v. Gilbert*, 46 Mich. 176; s. c., 2 Am. and Eng. R. R. Cas. 230.

In an action for personal injuries alleged to have been caused by the negligence of the employer in retaining the services of a fellow-servant who was careless, and whose carelessness caused the injury, a witness testified that he considered the fellow-servant slow and lazy, and not fit for the service, he was so slow, and witness had so informed the agent of the employer; and in answer to a question, if the fellow-servant was competent and careful in the performance of his duties, witness testified, "Yes, he was always careful about his work." *Held*, that this evidence was not sufficient to establish the negligence of the employer. *Carson v. Maine Cent. R. Co.*, 76 Me. 244; s. c., 17 Am. & Eng. R. R. Cas. 634.

In *Harper v. Ind. & St. L. R. Co.*, 47 Mo. 567, a conductor of a train was injured by reason of the incompetency of a fireman whom the engineer permitted to manage the engine. It was held that, if the company knew of such a practice on the part of the engineers on its road, and did not forbid it, and the conductor did not know that the engine was in charge of the fireman at the time, the company was liable for damages for the injury sustained.

In *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261; s. c., 5 Am. & Eng. R. R. Cas. 554, the plaintiff was a track-repairer, and had been injured by an engine run by a fireman. It was held that the defendant was liable, although it had given orders to its engineers not to permit firemen to control its engines, because, having had notice of disobedience of such orders, it retained the disobedient engineers in its employ.

Sizer v. Syracuse, B. & N. Y. R. Co., 7 Lans. (N. Y.) 67, was an action by an employee, whose business it was to make up freight trains, for an injury occasioned by the incompetency of an engineer. The court said: "The company owe it to those engaged in coupling and uncoupling cars, to exercise the highest care in the selection of engineers to manage en-

the unfitness of the servant.¹ Yet, though the employer had no

gines used in making up trains. Men of strictly temperate habits, men who are careful, cool, discreet, and obedient only should be employed; and if men wanting these qualities are knowingly employed, and injury results therefrom, the company is as liable to the employee injured as if the engineer was unskilful." It appeared that the engineer in the case was habitually disobedient to orders, and was not a regular engineer, of which facts the superintendent had knowledge; and the company was held liable for damages.

It is no excuse to the company, whose negligence in retaining an incompetent servant occasioned a collision, that the party injured in the excitement of the moment lost his presence of mind and adopted the wrong mode of self-preservation. *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576; s. c., 17 Am. & Eng. R. R. Cas. 564.

In an action by a brakeman against a railway company, for injuries alleged to have been caused by negligence of defendant's engineer, there was evidence that the engineer was careless in handling his engine, in making couplings, and in running the train, and that he had been reported to the conductor for this; also that his engines habitually came into the shop out of repair, with defects that would not have occurred had he exercised proper care. *Held*, that there was sufficient evidence to support findings of the jury that the engineer was negligent, and that the company had notice of that fact, although there was testimony on the part of the defendant that he was a safe and careful engineer. *Houston, etc., R. Co. v. Patton (Tex.)*, 9 S. W. Rep. 175.

Sick or Worn out Employee.—The rule is not changed by reason of the co-employee being sick or worn out with continuous service, if the negligence which caused the injury did not arise from his sickness or worn-out condition. *Johnston v. Pittsburg & W. R. Co.*, 114 Pa. St. 443.

1. *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484.

Good and proper qualifications once possessed may be presumed to continue, and the master may rely on that presumption until notice of a change. *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Blake v. Maine Cent. R. Co.*, 70 Me. 60.

In *United States Rolling-stock Co. v. Wilder*, 116 Ill. 100; s. c., 25 Am. & Eng. R. R. Cas. 414, the plaintiff sued for the loss of a hand, resulting from the alleged

negligence of a fellow-servant. The court said: "The defendant, it will be perceived, is charged with negligence in the selection and hiring of an incompetent engineer, and also in suffering and submitting such incompetent engineer to manage, control, and operate its cars and engine. . . . Whatever may be said in respect to the first branch of the subject, the decided weight of evidence shows that Guernsey, the defendant's engineer, was incompetent, and that the defendant had, at the time of and during plaintiff's employment, notice of this fact. Guernsey was first employed by the defendant in the capacity of truck-repairer, and was promoted from that position to the more responsible one of engineer, upon his own recommendation. He entered the defendant's service in May or June, 1880, and the attention of the company was frequently called to his incompetency. It is true, Cary, foreman, and Stagg, superintendent of the company, thought him competent for the position he occupied. As they were probably responsible to the company both for his employment and retention, it is not a matter of surprise that they should so consider him. So far as Cary is concerned, he might safely say this, for he evidently thought his position required little or no skill; for, in answer to the inquiry if it did not require as much skill to run the company's engine as any other, he says: 'No, sir; I will say that it does not require any but an ordinary man. A very ordinary man can do it in our yard. . . . A man that is competent to keep the water up and his pumps going can do our work.' Without dwelling upon the facts, we will add, in general terms, that the witnesses for the plaintiff make out a strong case of inexcusable negligence against the defendant in retaining Guernsey as engineer of the company."

Mere Proof of Specific Acts of carelessness on the part of a servant, without evidence of actual or reasonably chargeable knowledge thereof, on the part of the master, is insufficient to warrant a jury in inferring negligence on the part of the master in retaining such servant in his employ. *Huffman v. Chicago, etc., R. Co.*, 78 Mo. 50; s. c., 17 Am. & Eng. R. R. Cas. 625. But in *Poirier v. Carroll*, 35 La. Ann. 699, it was held that in an action by A, a servant hired only for a limited time, to recover of B, his employer, for injuries caused by the incompetence of C, a fellow-servant, A need not prove that B had notice of C's incompetence and had promised to remove him.

actual notice of the incompetence of the servant, if it was notorious and of such a character that with proper care he would have known of it, he will be liable for an injury to another servant resulting from such incompetence.¹

On the other hand, if a person knowing of the hazards of his employment as it is conducted, voluntarily continues therein without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may

1. Chicago, etc., R. Co. v. Doyle, 18 Kan. 58; Michigan Cent. R. Co. v. Gilbert (Mich.), 2 Am. & Eng. R. R. Cas. 230.

This rule has been applied frequently where the incompetent servant has been addicted to the excessive use of intoxicants. *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 233; s. c., 13 Allen (Mass.), 433; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628; *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293; *Chicago, R. I. & P. R. Co. v. Doyle*, 18 Kan. 58. *Contra*, *Chapman v. Erie R. Co.*, 55 N. Y. 579.

No definite rule can be laid down as to what length of time must elapse; where actual notice is not shown, to charge a railroad company with negligence in failing or neglecting to ascertain the habits of its employees with reference to drinking intoxicating liquors to excess. If they exercise due care and diligence in seeing that their employees are competent, careful, and sober, and fail to discover any vicious habits, they cannot be held liable for negligently retaining incompetent men. Thus, where it is shown that an accident occurred through the negligent act of an engineer who was in an intoxicated condition, and that he had been in the habit of drinking to excess for a period of nine months while in the employment of the railroad company, and no actual notice or knowledge ever reached any superior officer of the engineer, a jury will be justified in finding that the company was negligent in failing to learn such habits, and in retaining the engineer in their employment. *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628.

According to some cases, it would seem that, if the injured servant had the same means of knowing the incompetence of his fellow-servant as the master possessed, he cannot recover for an injury resulting from such incompetence. Especially would this rule obtain in cases where the injured servant held an intermediate position between the employer and the incom-

petent servant. *Davis v. Detroit & Mil. R. Co.*, 20 Mich. 105; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75; *Haskin v. New York Cent. & H. R. R. Co.*, 65 Barb. (N. Y.) 129.

Under the statutory rules governing English collieries, the rope by which pitmen descend should be tested every day. The requirement was habitually disregarded, to the knowledge of a mine-owner, by those whose duty it was to test the rope. A pitman who knew of the rule and its habitual violation, refused, though advised by the banksmen, to examine the rope (which had been injured the night before, and not since tested) before descending by it into the pit. The rope broke, and the pitman was killed. It was considered by the court that, had the pitman been guilty of no negligence, his representative might have recovered damages for his death; but that, having been guilty of contributory negligence, they could not. *Senior v. Ward*, 1 El. & El. 385; s. c., 5 Jur. (N. S.) 172; 28 L. J. Q. B. 137; 7 Week. Rep. 261.

In *Keen v. Detroit Copper and Brass Rolling-Mills (Mich.)*, 33 N. W. Rep. 395, it appeared that a foreman, under whose directions the plaintiff claimed to have been injured, was in the habit of getting intoxicated, and that the master knew of such habit. The court said: "There can be no question, I apprehend, at this late day, but that it must be regarded as negligence and a want of ordinary care in any of our large manufacturing institutions to place men, who are accustomed to the habitual use to excess of intoxicating liquor, in charge of business requiring the control and direction of persons operating dangerous machinery, and that for any injury arising to the employed under the charge of an intoxicated foreman, arising from such cause, when the company has knowledge of such intemperate habits, it must and should make reasonable compensation." The case seems to have gone against the plaintiff because the danger was as apparent to him as to the foreman, and it was said that he should not have obeyed the order in question.

sustain therein, unless, indeed, it may be caused by the wilful act of the master.¹ Still less is a servant entitled to damages for injuries resulting from the incompetence of a fellow-servant when he knew of such incompetence and made no complaint about it to his employer.²

4. *Burden of Proof.*—Where it is alleged that a master has been guilty of negligence in selecting or retaining an incompetent servant, the burden is on the plaintiff to prove it.³ Incompetency or

1. *Stafford v. Chicago, etc., R. Co.*, 114 Ill. 244; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Kansas Pac. R. Co. v. Peavy*, 34 Kan. 472; s. c., 29 Kan. 169; s. c., 11 Am. & Eng. R. R. Cas. 260; *Dillon v. Union Pac. R. Co.*, 3 Dill. (U. S. C. C.) 319. See MASTER AND SERVANT.

2. *Hatt v. Noy*, 144 Mass. 186; *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 75; *Wright v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 80; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Lake Shore, etc., R. Co. v. Knittal*, 33 Ohio St. 468; *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 474; *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104; *Texas M. R. Co. v. Whitmore*, 58 Tex. 276; s. c., 11 Am. & Eng. R. R. Cas. 195; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105; *Kroy v. Chicago, etc., R. Co.*, 32 Iowa, 357.

But a servant is warranted in assuming that the master has used reasonable care and prudence in the selection of those already employed in the same branch of service; and until notice to the contrary is brought home to the employee, he may safely act upon that hypothesis.

"All that the law demands of one thus employed (a fellow-servant) is, that he keep his eyes open to what is passing before him, and avail himself of such information as he may receive with respect to the habits and characteristics of his fellow-servants; and if from either of these sources of information he finds one of them, from incompetency or other cause, renders his own position extra hazardous, it is his duty to notify the master, and if the latter refuses to discharge the incompetent or otherwise unfit fellow-servant, the complaining servant will have no other alternative but to quit the master's employ. If he does not, he will be deemed to have assumed the extra hazard of his position thus occasioned." *U. S. Rolling-stock Co. v. Wilder*, 116 Ill. 100; s. c., 25 Am. & Eng. R. R. Cas. 414.

Where a servant has knowledge of the incompetence of a fellow-servant, and, continuing in the master's employment, is injured by reason of such incompetence, the fact that he had made complaint, and

was told the incompetent servant would be changed, is to be considered in arriving at a conclusion as to whether the injured servant was guilty of contributory negligence. *Laning v. New York Cent. R. Co.*, 45 N. Y. 521.

Where plaintiff, a blacksmith in employ of defendant, was assigned an incompetent helper, and the latter was changed on plaintiff's complaint, but reassigned May 4th, and plaintiff again complained on the 6th and was promised another helper, and was injured on the 10th, a verdict of the jury holding plaintiff free from negligence will be sustained. *Lyberg v. Northern Pac. R. Co. (Minn.)*, 38 N. W. Rep. 632.

Where the employer and employee have equal knowledge of the unfitness of the incompetent employee, and the latter continues in the service, each party takes the risk, unless the employer undertakes to give special directions. *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105; *Haskins v. New York, etc., R. Co.*, 65 Barb. (N. Y.) 129.

3. *Stafford v. C., B. & O. R. Co.*, 114 Ill. 244; *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545; *Chicago & E. I. R. Co. v. Geary*, 110 Ill. 383; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Murphy v. St. Louis & I. M. R. Co.*, 71 Mo. 202; s. c., 2 Am. & Eng. R. R. Cas. 83; *Catlin v. Mich. Cent. R. Co.*, 33 N. W. Rep. (Mich.) 515; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411; *Mad River, etc., R. Co. v. Barber*, 5 Ohio St. 541; *Indianapolis, etc., R. Co. v. Love*, 10 Ind. 554; *Faulkner v. Erie, etc., R. Co.*, 49 Barb. (N. Y.) 324; *McMillan v. Saratoga, etc., R. Co.*, 20 Barb. (N. Y.) 449; *Baulec v. New York, etc., R. Co.*, 59 N. Y. 356; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 557; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Moss v. Pacific R. Co.*, 49 Mo. 167.

In an action against a railroad company by one employee thereof, to recover damages for an injury caused by the alleged

unskilfulness will not be presumed; in order to make either available as a ground of action, they must be proved; and merely showing, the manner in which he did the particular act complained of, is not generally of itself sufficient to warrant such an inference. The burden is upon the servant to show negligence or unskilfulness in the co-servant through whose act the injury was inflicted.¹

5. *Evidence*.—Evidence of general reputation is admissible to prove the unfitness of a fellow-servant, and ignorance of such general reputation on the part of the master is itself negligence in a case in which proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative.²

negligence or unskilfulness of another employee, the company will be presumed to have exercised due care in the employment of the latter, and to have had no knowledge of the defects of capacity or character imputed to him. But such presumption may be rebutted by evidence of his general reputation for unfitness, without proof that such reputation was known to the officers of the company. *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105.

It is not enough that the servant show that a similar accident occurred during his employment, unless it is also shown that it occurred through his fault or that the master was negligent in investigating and ascertaining where the fault lay. *Baulec v. New York, etc., R. Co.*, 59 N. Y. 356.

No Presumption of Negligence on the Part of the Master.—Wood on Master and Servant (2d Ed.), 819, says: "*Prima facie*, where the law imposes a duty upon another, the law presumes that such duty was properly performed; hence, from the mere circumstances that the servant is in fact incompetent, and that injury has resulted to other servants therefrom, the law will not presume want of care on the part of the master, although such facts are material circumstances, in connection with other facts, to establish want of care. Therefore, the mere fact that a fellow-servant is incompetent, that materials have proved defective, or that the appliances or machinery used in the prosecution of the business have proved insufficient, does not tend even *prima facie* to establish negligence on his part; but the burden in all such cases is upon the servant seeking a recovery, to establish the fact that the injury resulted to him because the master did not exercise reasonable and proper care in these respects, or either of them; and this must be established as a fact in the case, and cannot result as an inference from the circumstance that the servant causing the injury was in fact incompetent,

or that the materials or resources of the business were in fact defective."

1. *Wood on Master and Servant* (2d Ed.), § 419; *Summersell v. Fish*, 117 Mass. 312; *Thayer v. St. Louis, etc., R. Co.*, 22 Ind. 26; *Indianapolis, etc., R. Co. v. Love*, 10 Ind. 554; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 557; *Mad River R. Co. v. Barber*, 5 Ohio St. 541; *McMillan v. Saratoga, etc., R. Co.*, 20 Barb. (N. Y.) 449; *Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324.

2. *Davis v. Detroit & Mil. R. Co.*, 20 Mich. 105; see also *Summersell v. Fish*, 117 Mass. 312; *Gilman v. Eastern R. Co.*, 13 Allen (Mass.), 433; *Hatt v. Nay*, 144 Mass. 186; *Tarrant v. Webb*, 18 C. B. 797; *Edwards v. Railroad*, 4 C. & F. 530; *Mad River R. Co. v. Barber*, 5 Ohio St. 541; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 557.

In an action by an employee against a railroad company, to recover damages for an injury sustained while in its service, the complaint alleged negligence in the employment of plaintiff's co-laborers. *Held*, that evidence of the quality of such co-laborers was admissible as a link in a chain of evidence, and, as such, could not be objected to at the time when offered, even though it afterwards appeared that the injury had not resulted from any unfitness on the part of such co-laborers. *Altee v. South Carolina R. Co.*, 21 S. Car. 550.

In an action against a railway company for the death of an engineer in consequence of a collision resulting from the yardmaster's negligence in sending him out when a coming train was past due, it was held that, as bearing upon the competency of the yardmaster, questions as to the number of tracks in the depot yard, the number of engines ordinarily employed in switching, the average number of freight trains in the yard, and similar questions were relevant, as tending to

While evidence of single acts may be admissible to prove the incompetence of a servant, such evidence is not necessarily conclusive.¹

show the character and importance of the work the yardmaster had charge of, and the need of experience and skill. *Mich. Cent. R. Co. v. Gilbert*, 46 Mich. 176; s. c., 2 Am. & Eng. R. R. Cas. 230.

1. *Lee v. Detroit Bridge & Iron Works*, 62 Mo. 565; *Cooper v. Milwaukee & P. R. Co.*, 23 Wis. 668; *Couch v. Watson Coal Co.*, 46 Iowa, 17.

In *Frazier v. Pa. R. Co.*, 38 Pa. St. 105, the court refused to permit the introduction of specific acts of negligence on the part of a servant alleged to be incompetent, for the purpose of charging the defendant company with knowledge of the servant's incompetence. See also *Hatt v. Nay*, 141 Mass. 186; *contra*, *Pittsburg, F. W. & C. R. Co. v. Ruby*, 38 Ind. 294.

Negligence, such as unfits a person for service, or such as renders it negligent in a master to retain him in his employ, must be habitual rather than occasional, or of such a character as renders it imprudent to retain him in service. A single exceptional act of negligence will not prove a servant to be incapable or negligent,—*Baltimore Elevator Co. v. Neal*, 65 Md. 438,—and is insufficient to warrant the jury in inferring negligence on the part of the master in retaining such servant. *Huffman v. Chicago, etc.*, R. Co., 78 Mo. 50; s. c., 17 Am. & Eng. R. R. Cas. 625.

It is believed that *Baulec v. New York & H. R. Co.*, 59 N. Y. 356, contains a statement of the correct rule: "When, as here, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence, with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect, of servants or employees whose acts and omissions of duty are the subject of investigation, have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion by showing similar acts of negligence on other occasions. This class of cases does not bear upon the case in hand, and may be laid out of view. Proof of specific acts of negligence of a servant or agent on one or more occasions does not tend to prove negligence on the particular occasion which is the subject of inquiry. Where character, as distinguished from reputa-

tion, is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation, or want of adaptation, to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts that individuals acquire a general reputation, and by which their characters are known and described; and the actual qualities, the true characteristics, of individuals—those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust and responsibility,—are learned and known. A principal would be without excuse should he employ for a responsible position, on the proper performance of the duties of which the lives of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent, or careless man. He would be held liable to the fellow-servants of the employee for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more would he be chargeable if he had knowledge of specific acts showing that he possessed characteristics incompatible with the duties assigned him, and which might expose his fellow-servants and others to peril and harm. . . . An individual who by years of faithful service has shown himself trustworthy, vigilant, and competent, is not disqualified for further employment and proved either incompetent, or careless and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show, what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case as to all employees of corporations until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust or any particular service; as, when such act is intentional, and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular

service. But a single act of casual neglect does not, *per se*, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act. An engineer might from inattention omit to sound the whistle or ring the bell at a road-crossing, but such fact would not tend to prove him a careless and negligent servant of the company. The company is only charged with the duty of employing those who have acquired a good character in respect to the qualifications called for by the particular service; and no one would say that a good character acquired by long service was destroyed or seriously impaired by a single involuntary and unintentional fault. *Murphy v. Pollock*, 15 Ir. C. L. 224. But this appeal does not necessarily depend upon the correctness of this view of the effect to be given to a single instance of neglect. All that the corporation defendant was bound to do, after the occurrence, was to inquire into and ascertain the facts, and act in the discharge or retention of the switchman, with reference to the facts as ascertained, as reasonable prudence and care would dictate; and, if such care and caution were exercised, the company is not liable, although its general agent erred in judgment in retaining the switchman in the same service. Ordinary care and reasonable exercise of discretion and judgment is all that is necessary to absolve the corporation from the charge of neglect of duty in such a case."

In a suit for damages for personal injuries, brought by a brakeman against a railroad company, in which the unskillfulness and incompetency of the engineer were charged as causes of the injury, evidence of the declarations of the engineer to the plaintiff, to the effect that he would as soon run over him as not, was held admissible to prove that the company did not use proper care in selecting the engineer, if supported by other satisfactory evidence. *Houston & T. C. R. Co. v. Willie*, 53 Tex. 318; s. c., 5 Am. & Eng. R. R. Cas. 551.

Evidence that an engineer, alleged to have been incompetent, was discharged after the accident for which damages are sought occurred, and that he has since been guilty of similar acts of negligence, is not admissible to prove that the employer was guilty of negligence in employing him. *Couch v. Watson Coal Co.*, 46 Iowa, 17.

An engine attached to a train on defendant's road was thrown from the track

by a misplaced switch which B., the switchman, had neglected to close, he being engaged at the time in conversation with another. Plaintiff's intestate, who was a fireman upon the engine, was killed. In an action to recover damages, plaintiff claimed that B. was inexperienced and incompetent, and that, by a reduction of the force employed, duties too numerous, various, and distracting had been imposed upon B. It appeared that B. had been in defendant's employ for seven years, until three months before the accident, as baggageman at the station, occasionally acting as switchman. Three out of six men formerly employed were discharged, and the duties of switchman devolved upon B., which he had performed for three months. *Held*, that the question of B.'s competency must relate to the time of the injury; and, as he had performed the duties of switchman for three months, so far as appeared, without fault or neglect, and was a man of ordinary intelligence, it appeared that he was clearly competent to perform those duties; that it was immaterial what fault defendant had committed in respect to the number of men employed or the duties imposed upon B., unless such fault contributed to the injury; that it appeared that his failure to close the switch did not arise from inability to perform the duties, but was the result of inattention and carelessness; that therefore the injury was caused by the negligence of a co-servant, for which defendant was not liable, and a verdict for plaintiff was error. *Harvey v. New York Cent. & H. R. R. Co.*, 88 N.Y. 481; s. c., 8 Am. & Eng. R. R. Cas. 515.

A recovery being sought against a railroad company, on the grounds only that it employed an engineer who was old, near-sighted, and unacquainted with the road, and, by reason of such defects, incompetent, and that a brake upon one of its cars was defective, which incompetency and defect are alleged to have caused the injury complained of, it was error to have allowed proof of the fact that, after the accident complained of had occurred, such engineer ran his train (freight) without a brakeman a distance of several miles, and ran his engine off the track. *Ransier v. Minneapolis & St. L. R. Co.*, 32 Minn. 331; s. c., 11 Am. & Eng. R. R. Cas. 647.

A locomotive engineer's opinion that if he had obeyed the order of the yardmaster to place his engine on the main track when a coming train was past due, he would have gotten into trouble, is not admissible to show that the railroad company was negligent in keeping the yardmaster in its employment unless the case had

6. *Acts of General Agents.*—Though a master has employed skillful and competent general servants, agents, or superintendents, he is liable for injuries received by inferior servants through the negligence of those employed by such general servants, agents, or superintendents without due care or inquiry, or retained by them after knowledge of their incompetency.¹

7. *Pleading.*—Where the servant shows, in his complaint, that the injury for which he sues the master was caused or occasioned by the negligence of his fellow-servant, he must also allege in his complaint either that the master had not exercised ordinary care and prudence in the employment of such fellow-servant, or that he had retained him in its service after he had received notice that he was negligent in the discharge of the duties of his position. This much must be stated in relation to the negligence of the master; and with respect to himself, in such a case, the injured

been brought to the knowledge of the company's officers. Mich. Cent. R. Co. v. Gilbert, 46 Mich. 176; s. c., 2 Am. & Eng. R. R. Cas. 230.

The fact that a yardmaster sent an engine upon the track when a coming train was overdue, does not conclusively show that the company was negligent in keeping him in its service, since he might have had information showing that the train would not arrive for some time. Mich. Cent. R. Co. v. Gilbert, 46 Mich. 176; s. c., 2 Am. & Eng. R. R. Cas. 230.

Causing Collision.—But it has been held that the bringing of two railroad trains into collision is such a negligent act that evidence of that act alone will suffice to show the incompetency of the conductor who caused it. Evansville & T. H. R. Co. v. Guyton (Ind.), 33 Am. & Eng. R. R. Cas. 311.

Book of Accidents.—The *gravamen* of an action being the negligence and incompetency of the engineer in charge of the train at the time of the accident, a book kept by defendant's agents, containing an account of accidents on the road, showing that said engineer had once been suspended for allowing a non-employee and an incompetent person to run his engine, during which time an accident occurred, is admissible as evidence to prove the incompetency and carelessness of the engineer, and defendant's knowledge thereof. O'Hare v. Chicago & A. R. Co. (Mo.), 9 S. W. Rep. 23.

1. A master who delegates his power to another, to employ, discharge, manage, and control servants in a given work, is responsible to a servant for an injury received by him through the incompetency of a servant so employed, when such incompetency was known to the

person so authorized to make the employment, and was not known, and by the exercise of due care could not have been known, to the person injured. Texas, etc., R. Co. v. Whitmore, 58 Tex. 276; s. c., 11 Am. v. Eng. R. R. Cas. 195; Lanning v. New York Cent. R. Co., 49 N. Y. 521; Baulec v. New York & H. R. Co., 59 N. Y. 356; Pittsburg, F. W. & C. R. Co. v. Ruby, 38 Ind. 294; Gilman v. Eastern R. Co., 13 Allen (Mass.), 433; Tyson v. South & N. Ala. R. Co., 61 Ala. 554; Walker v. Bolling, 22 Ala. 294; Quincey Mining Co. v. Kitts, 42 Mich. 34; Henry v. Brady, 9 Daly (N. Y.), 142; Huntingdon, etc., R. Co. v. Decker, 84 Pa. St. 419.

In Frazier v. Pennsylvania R. Co., 38 Pa. St. 104, the suit was by a brakeman, for personal injury caused by the negligence of a conductor. The plaintiff rested his right to recover upon the alleged carelessness of the superintendent of the company, whose duty it was to employ conductors, in the selection of this conductor. Chief Justice Lowrie delivered the opinion of the court, declaring that the superintendent stood for the company in this respect, and that his negligence was the negligence of the company.

Notice of the incompetency of a fellow-servant to one whose duty is confined to notifying trainmen when they are expected to be on duty, is not notice to a railroad corporation. Michigan Cent. R. Co. v. Dolan, 32 Mich. 510.

Notice to the master mechanic of a railroad company, whose duty it was to employ and discharge engineers and firemen, of their practice in violating its orders, is notice to the company. Ohio & M. R. Co. v. Collarn, 73 Ind. 261; s. c., 5 Am. & Eng. R. R. Cas. 554.

servant must aver, in his complaint, that, at the time he entered the master's service, he had no knowledge of the negligent habits of the fellow-servant through whose negligence he has alleged that he was injured.¹

8. *Questions for Jury.*—The incompetency of a fellow-servant, and the master's negligence in employing or retaining an incompetent servant, are questions of fact for the jury.²

VIII. Statutes.—1. *Employers' Liability Act.*—The English Employers' Liability Act, of 1880,³ makes the master liable for accidents happening (1) by reason of any defect in the ways, works, machinery or plant; (2) by the negligence of persons in superintendence; (3) by the negligence of superiors; (4) by acts or omissions done in obedience to orders to which the servant was bound to conform; (5) by acts or omissions in obedience to by-laws or particular instructions given by persons delegated with authority in that behalf; (6) by reason of the negligence of any person in the service of the employer, who has the charge or control of any signal points, locomotive engine, or train upon a railway.⁴

1. *Lake Shore, etc., R. Co. v. Stupak*, 108 Ind. 1; s. c., 28 Am. & Eng. R. R. Cas. 323; see also *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 78.

Undoubtedly the negligence of an employer in selecting or retaining incompetent servants must be distinctly charged. *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Lawler v. Androscoggin R. Co.*, Me. 463; *Moss v. Pacific R. Co.*, 49 Mo. 167; s. c., 8 Am. Rep. 126. But it would seem that the want of knowledge on the part of an injured servant, of his fellow-servant's incompetence, should be presumed. *U. S. Rolling-Stock Co. v. Wilder* 116 Ill. 100; s. c., 25 Am. & Eng. R. R. Cas. 414.

In an action against a railroad company, by a widow of an engineer in charge of a train, who was killed by reason of a collision occasioned by a misplaced switch, the declaration contained two counts—one count based upon the ground that the switch was dangerous for want of a target, and the other upon the incompetency of the switch-tender negligently retained by the company. The jury found the issues joined on both counts in favor of the plaintiff, and it was held that even if there was no testimony to sustain the first count, the verdict on the second count would be good. *East Tenn., Va. & Ga. R. Co. v. Gurley*, 12 Lea (Tenn.), 46; s. c., 17 Am. & Eng. R. R. Cas. 568.

2. *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 233; *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176; s. c., 2 Am. & Eng. R. R. Cas. 230; *Mares v. Northern Pac. R. Co. (Dak.)*, 17 Am. & Eng. R. R. Cas.

620; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628; *Mann v. Delaware & H. Canal Co.*, 91 N.Y. 495; s. c., 12 Am. & Eng. R. R. Cas. 199; *Indianapolis, etc., R. Co. v. Love*, 10 Ind. 554; *Columbus, etc., R. Co. v. Webb*, 12 Ohio St. 475; *Hard v. Vermont, etc., R. Co.*, 32 Vt. 473; *Tarrant v. Webb*, 18 C. B. 797; *Merry v. Wilson*, 1 S. & D. 326; *Ormond v. Holland, El. Bl. & El.* 102.

But the jury is not authorized to decide that a person is unfit to be employed as a brakeman on a railroad on account of what they saw, or supposed they saw, or could read in his face and manner, while testifying before them as a witness, and determine from that alone that the railroad company was negligent in employing such a person. *Corson v. Maine Cent. R. Co.*, 76 Me. 244; s. c., 17 Am. & Eng. R. R. Cas. 634.

Filling Vacancies by Promotion.—The wisdom of a policy of a railroad company of filling all vacancies by promotion from lower positions is a question of fact for the jury. *Evansville & T. H. R. Co. v. Guyton (Ind.)*, 33 Am. & Eng. R. R. Cas. 311.

3. *L. R. 15 & 16 Gen. Sts.* 258 (43 & 44 Vict. c. 42).

4. There are certain salutary restrictions attached to the statute. Notice must be given to the company, of the character and nature of the injury within six weeks after it occurs. Suit must be brought to enforce the statutory liability, in case of injury, within six months of the accident, and, in case of death, within twelve months from the time when the

death takes place. The damages recoverable are in all cases limited to a sum equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade of employment as the deceased, in the same locality.

Many cases have since been decided on the construction of this act. See, as to the requisites of the notice to be given to the company: *Stone v. Hyde*, L. R. 10 Q. B. Div. 76; *Moyle v. Jenkins*, L. R. 9 Q. B. Div. 116; *Keen v. Millwall Dock Co.*, L. R. 9 Q. B. Div. 482; *Franks v. Siever & Co.*, 72 L. T. 69, and all as to other miscellaneous points. *Clarkson v. Musgrave*, L. R. 10 Q. B. Div. 386; *Harrington v. Westthrop*, 72 L. T. 338; *Banks v. Murrill*, 72 L. T. 125; *Bolton v. Midland R. Co.*, 72 L. T. 184; *Smith v. Lofens*, 72 L. T. 220; *Batchelor v. Tilbury*, 72 L. T. 271; *Schaffers v. General Steam Navigation Co.*, 27 L. T. 283; *Harrison v. Dawson*, 72 L. T. 399; *Warren v. Bates*, 72 L. T. 400; *Spinks v. Alexander*, 72 L. T. 413; *Clowes v. Atlantic Fuse Co.*, 72 L. T. 432; *Topham v. Goodwin*, 71 L. T. 10; *Owen v. Maudsley*, 21 L. T. 50, 299; *Adams v. Nightingale*, 71 L. T. 139; *Marcy v. Hodson*, 71 L. T. 140; *McGinn v. Pilling & Co.*, 71 L. T. 156; *Etherington v. Harrison*, 71 L. T. 157; *Hatfreed v. Enthoven*, 71 L. T. 157, 211; *Huxam v. Thorns*, 71 L. T. 227; *Pitman v. Bennett*, 71 L. T. 229; *Laming v. Webb*, 71 L. T. 247; *Harrington v. Westropp*, 71 L. T. 338; *Lovell v. Cherrington*, 71 L. T. 356; *Hunter v. Dickinson*, 71 L. T. 338; *Boatswright v. Downing*, 71 L. T. 424.

In regard to railway companies, it has been decided that a "capstan-man," propelling trucks at a station, is to be considered as "a person in control of a train upon a railway," within the meaning of the act. An employee injured by the negligence of such "capstan-man" may therefore recover against the company. *Cox v. Great Western R. Co.*, L. R. 10 Q. B. Div. 106; s. c., 6 Am. & Eng. R. R. Cas. 485.

An engine-fitter, acting under the orders of a foreman or superintendent, may also recover for an injury done him in the course of his employment. *Tuvitt v. Midland R. Co.*, 72 L. T. 87; see *Hayslor v. Great Western R. Co.*, 71 L. T. 120.

In an action for compensation under the Employers' Liability Act, 1880, the evidence showed that it was the duty of F., a workman employed in the signal department of the defendant's railway, to clean, oil, and adjust the points and wires of the locking apparatus at various

places along a portion of the line, and to do slight repairs; that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal-boxes, being kept in proper condition; and that F., having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line, whereby injury was caused to a fellow-workman. *Held*, that there was no evidence for the jury, that F. had "charge or control" of the points, within the meaning of §. 1. sub-sec. 5, of the Employers' Liability Act, 1880, so as to make the defendant liable for his negligence. *Gibbs v. Great Western R. Co.*, L. R. 11 Q. B. Div. 52; 12 Ib. 208; s. c., 11 Am. & Eng. R. R. Cas. 235; 15 Ib. 336.

The first section of the Employers' Liability Act, 1880, provides that, where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform,—where such injury resulted from his having so conformed, the workman, or, in case the injury results in death, his legal personal representatives, shall have the same right of compensation against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

The plaintiff, a boy employed by the defendants, a railway company, was assisting a carman of the defendants, under whose directions he was, in unloading from a van three large iron window frames. The frames were standing upright in the van, secured at each end to the hoops of the van by a string. The carman untied the string at one end of the frames, and the plaintiff untied the string at the other end. The carman did not expressly order the plaintiff to untie the string, but the plaintiff stated that he did so without orders because he had done so on previous occasions, and that the carman saw him untie the string and made no objection. The carman then removed one of the frames without retying the two remaining frames, leaving them standing unsecured. They directly afterwards fell on the plaintiff, causing him injuries, in respect of which he sued for compensation under the Employers' Liability Act. *Held*, that there was, on the above facts, evidence of an injury to the plaintiff by reason of the

2. *American Statutes.*—Similar statutes, changing the common-law rule, are in force in a number of the States of this country;¹ but no statutes have been passed of so sweeping a character as the English act. A cause of action occurring in one of these

negligence of a fellow-workman to whose orders he was bound to conform, and did conform, and which resulted from his having so conformed. *Milward v. Midland R. Co.*, L. R. 14 Q. B. Div. 68.

1. Statutes are now in force in:

California. Codes, 6970-71, §§ 1970, 1971.

Dakota. Code 1877, p. 396, art. 2, following that of California.

Georgia. Code 1873, p. 521, § 3036; *Central R. v. Mitchell*, 63 Ga. 173; s. c., 1 Am. & Eng. R. R. Cas. 145.

Iowa. Code 1880, vol. 1, p. 342, § 1307.

Kansas. R. L. 1879, p. 784, ch. 84, § 4914 (enacted 1874).

Kentucky. Gen. Stats. ch. 57, § 3; *McLeod v. Ginther*, 80 Ky. 399; s. c., 15 Am. & Eng. R. R. Cas. 291; *Louisville, etc., R. Co. v. Brook*, 7 Ky. Law Rep. 110.

Mississippi. Code 1880, p. 309, § 1054.

Montana. R. S. 1879, p. 471, § 318.

Rhode Island. Public Stats. 1882, p. 553, ch. 204, § 15.

Wisconsin. L. 1875; *Gumz v. Chicago, etc., R. Co.*, 52 Wis. 583; s. c., 5 Am. & Eng. R. R. Cas. 583.

Wyoming. Compiled Laws 1876, p. 512, ch. 97, § 1.

Missouri. R. S. 1879, p. 349, ch. 25, § 2121.

Examples of Such Statutes.—The following are examples of such statutes:

In Iowa, it is provided that "every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railroad on or about which they shall be employed; and no contract which restricts such liability shall be legal and binding." *Iowa Code*, §§ 12-78, § 1307.

In Kansas (Comp. Laws, 1878, ch. 84, § 29), it is provided that "every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its

agents or by any mismanagement of its engineers or other employees, to any person sustaining such damage."

In Wisconsin, every railroad corporation is made liable for all damages sustained by any agent or servant thereof, by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, for injuries sustained within that State." The Revised Statutes of Wisconsin, §§ 8-16.

Colorado.—The rule of the common law, that the servant assumes all the ordinary risks of the service upon which he enters, including those risks which arise from the negligence of other servants of the same master in the same employment, is not abrogated by the statute (General Laws, p. 342); and the words, "any person" do not include servants of the same master injured by the negligence of a fellow-servant while acting in the common employment. *Atchison, etc., R. Co. v. Farrow*, 6 Colo. 498; s. c., 11 Am. & Eng. R. R. Cas. 239.

In Pennsylvania, an act has been passed making railroad companies liable to persons "engaged or employed on or about the roads, etc.," of the company only in cases where the company would be liable to its employees. As to the construction of this act, see the following cases: *Kirby v. Pennsylvania R. Co.*, 76 Pa. St. 506; *Mulherrin v. D. L. & W. R. Co.*, 81 Pa. St. 366; *Ricard v. Penn. R. Co.*, 89 Pa. St. 193; *Gerard v. Penn. R. Co.* (Pa.), 5 Weekly Notes, 251; *Penn. R. Co. v. Price*, 69 Pa. St. 256; s. c., 1 Am. & Eng. R. R. Cas. 234; *Cummings v. Pittsburgh, etc., R. Co.*, 92 Pa. St. 82; s. c., 4 Am. & Eng. R. R. Cas. 524.

Maine and Missouri.—The broad provisions of the statutes of Maine and Missouri, in regard to liability for death caused by negligence, were at one time supposed to refer to the case of injuries received from the negligence of fellow-servants. It has now been decided, however, that they have no such application. *Carle v. Bangor, etc., R. Co.*, 43 Me. 269; *Proctor v. Hannibal & St. Jo. R. Co.*, 64 Mo. 112.

Tennessee.—An action for damages, for a personal injury caused by collision with the moving train of a railroad company, under the provisions of the Code, § 1166 *et seq.*, will not lie in behalf of a servant or employee of the company

whose negligence caused, or contributed to cause, the accident or collision occasioning the injury. *East Tenn., etc., R. Co. v. Rush*, 15 Lea (Tenn.), 145; s. c., 25 Am. & Eng. R. R. Cas. 502.

Rhode Island.—With one exception, the American acts are all confined in their operation to railroad companies. The single exception—the Rhode Island act—embraces only the cases of common carriers. The act provides substantially that where the death of any person, passenger, or otherwise, is caused by the negligence of a common carrier, or by the unfitness, or negligence, or carelessness of any of his servants or agents, the carrier shall be liable in damages. *Rev. Stat. R. I. 1882, p. 553, § 15.*

The act applies generally to all common carriers, whether by rail, steamboat, or coach. It extends to carriers by water, as well as by land. *Chase v. American Steamboat Co.*, 10 R. I. 79.

The Dakota Statute, which enacts that "an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed in the same general business," does not apply to losses suffered by an employee in consequence of the negligence of another person, employed by the same employer in another, and not in the same, general business. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 142; s. c., 24 Am. & Eng. R. R. Cas. 407.

What Employees and Employers Come Within the Provisions of such Statute.—**Iowa.**—The statute of Iowa renders railroad companies liable for all injuries to their servants occasioned by the wilful wrongs of other servants "when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed." A workman in the company's shops is not within the statute. *Potter v. Chicago, etc., R. Co.*, 46 Iowa, 399. A person engaged in working on a bridge, and obliged to ride on the company's train, is within the statute. *Schroeder v. Chicago, etc., R. Co.*, 41 Iowa, 344. A section-hand is within the statute (*Fransden v. Chicago, etc., R. Co.*, 36 Iowa, 372), and a hand engaged on a gravel or dirt train (*McKnight v. I. & M. R. Const. Co.*, 43 Iowa, 406; *Deppe v. Chicago, etc., R. Co.*, 36 Iowa, 52. See *Locke v. Sioux City R. Co.*, 46 Iowa, 109), but where nothing more is shown than that plaintiff was a section-hand, and, when injured, was engaged in loading a car, this service

did not pertain to the operation of the railway. *Smith v. Burlington, etc., R. Co.*, 59 Iowa, 73; s. c., 6 Am. & Eng. R. R. Cas. 149. But a section hand was held to be within the statute in *Fransden v. Chicago, etc., R. Co.*, 36 Iowa, 372.

An employee of a railway company, whose duties consist in wiping off the engines and in opening and shutting the doors of the round-house, is not such an employee "connected with the use and operation of the railway" as can recover for the negligence of a fellow-servant in shutting such doors. *Malone v. Burlington, etc., R. Co.*, 61 Iowa, 326; s. c., 11 Am. & Eng. R. R. Cas. 165; s. c., 17 Am. & Eng. R. R. Cas. 644.

Where the regular brakeman is absent, and the proper and safe management of the train so requires, the conductor has authority to supply the place of the absent brakeman; and for the time being such person is an employee of the railroad, and entitled to recover for an injury caused by the negligence of a co-employee. *Sloan v. Central Iowa R. Co.*, 11 Am. & Eng. R. R. Cas. 145; s. c., 62 Iowa, 728.

Plaintiff, a section-hand in the employ of defendant, was directed to get on a loaded moving train, by the conductor and others in charge of the train, to go to another place to help to unload it, and on attempting to do so was thrown down, and received personal injuries. *Held*, that such injuries occurred in the "use and operation" of the train, within the meaning of the statute. *Rayburn v. Central Iowa R. Co. (Iowa)*, 35 N. W. Rep. 605.

If the employee is injured while riding on a hand-car, through the negligence of the boss in charge, the company is liable. *Hoben v. Burlington R. Co.*, 20 Iowa, 562.

A private detective, injured in walking along the track, in accordance with directions of the company, and negligently run over, is within the protection of the statutory provision. *Pyne v. Chicago, etc., R. Co.*, 50 Iowa, 223.

A person injured in operating a ditching-machine, which is carried on a car and worked by the movement of the car on the railroad track, comes within the provision; and evidence tending to show that the injury was caused by the negligence of co-employees should be submitted to the jury. *Nelson v. Chicago, M. & St. P. R. Co. (Iowa)*, 35 N. W. Rep. 611.

A laborer employed by a railway company, on a train used for hauling sand, to assist in loading and unloading the cars, rode upon the train in passing between

the pit and the points on the track where the sand was deposited. *Held*, that as, in the performance of his duties, he was exposed to all the ordinary risks arising from the operation of the train, he was within the class of employees to whom the statute gives a remedy. *Handelun v. Burlington, etc.*, R. Co. 32 N. W. Rep. (Iowa), 4.

But where an employee was injured by appliances connected with the round-house, *held*, that it was not error to instruct the jury that, if they found that it was a part of plaintiff's duty to keep such appliances in a safe condition, or that it was the duty of another employee of the same kind to do so, and that they both, or either of them, neglected to do so, then the plaintiff could not recover, the employees not being engaged in the operation of the road. *Manning v. Burlington, etc.*, R. Co., 64 Iowa, 240; s. c., 15 Am. & Eng. R. R. Cas. 171.

And where employees are engaged in elevating coal to a platform, to supply the engine, their duties are not so connected with the use and operation of the railroad, as that one of them could recover for injuries received from the negligence of the other. *Stroble v. Chicago, etc.*, R. Co., 70 Iowa, 555; s. c., 28 Am. & Eng. R. R. Cas. 510; and see *Luce v. Chicago, etc.*, R. Co., 67 Iowa, 75.

Injuries to an employee by reason of the negligence of another, both engaged in the work of repairing a track, such injury not resulting from the operation of the railroad, *held*, not within the provision of the statute. *Matson v. Chicago, etc.*, R. Co., 68 Iowa, 22.

An employee whose duty is to repair cars while standing upon the track, and who was sometimes required to ride on the trains of the company from place to place, is not employed in the operation of the road in such sense as to bring him within the protection of the provision. *Foley v. Chicago, etc.*, R. Co., 64 Iowa, 644.

Where a member of a gang engaged in the construction of a railroad is injured by the negligence of a fellow-servant, in allowing a large stone to fall on his hand, he is not injured while engaged in the use and operation of the railroad, within the meaning of Code, and the company is not liable. *Matson v. Chicago, etc.*, R. Co. (Iowa), 25 N. W. Rep. 911.

Where an accident, by which an employee is injured, is caused by the act of an inferior employee acting under the direction of such superior, the latter cannot recover for an injury received. *Dewey v. Chicago, etc.*, R. Co., 31 Iowa, 373.

This statute does not exonerate the injured party from the necessity of exercising reasonable care, in order that he may recover. *Murphy v. Chicago, etc.*, R. Co., 45 Iowa, 661.

An employee who stands in the relation of vice-principal to the men under his control is an employee, within the meaning of section 1307 of the Code, and can recover of a railroad company by reason of the negligence of the men selected by himself, and whom he may discharge or retain in his employment (or the employment of the company) as he sees fit. It is not provided that the negligent and the injured employee shall be co-employees in the same general employment, in the sense that they must be equal in power and authority; all that is required is, that both shall be employees of the corporation. *Houser v. Chicago, R. I. & P. R. Co.*, 60 Iowa, 230; s. c., 8 Am. & Eng. R. R. Cas. 500.

A receiver, who is managing a railway under the direction of a court, is within this section, and may be charged and a recovery obtained against him, as person operating a railway. *Sloan v. Central Iowa R. Co.*, 62 Iowa, 722; s. c., 11 Am. & Eng. R. R. Cas. 145.

The fact that a lessee may be held liable under this section, does not prevent recovery against the owner of the road. *Bower v. Burlington, etc.*, R. Co., 42 Iowa, 546.

The running of special trains over the railway by a construction company, in constructing it, is operating a railway, within the meaning of the statute. *McKnight v. Iowa & M. R. Co.*, 43 Iowa, 406.

Mining Companies.—A mining company is not liable for injuries caused to one of its employees by the negligence of a co-employee. *Peterson v. Whitebreast Coal & Mining Co.*, 50 Iowa, 673; *Troughear v. Lower Vein Coal Co.*, 62 Iowa, 576.

Kansas.—This act was adopted by the Legislature of Kansas from the statute of Iowa, and the judicial construction given to the statute in that State follows it to this State; therefore, within the Iowa decisions it embraces only those persons engaged in the hazardous business of railroading. The care or diligence the statute exacts toward the employee, is that degree of diligence which men in general exercise in respect to their own concerns; and contributory negligence of the injured employee bars a recovery under the statute, as in other cases.

A person employed upon a construction train to carry water for the men working

with the train, and to gather up tools and put them in the caboose or tool-car, is within the statute making railroad companies liable to their employees for injuries resulting from the negligence of co-employees. *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; s. c., 5 Am. & Eng. R. R. Cas. 594.

The plaintiff was in the employment of the Union Trust Company, then operating and controlling the Missouri, Kansas & Texas Railway, as a trackman, whose principal duty consisted in repairing the track of the railway. To facilitate the work, the trackmen, or "section gang," were furnished by the company with a hand-car, operated by the men of the "gang," which enabled them to rapidly transport themselves and their tools from one portion of the track to another. A place was appointed at Station S., in which, when not in use, the hand-car and tools were kept; and at the close of the day's labor on the track, it was the duty of the men to transport the hand-car and tools to this station, and there properly dispose of them until required the next day. On April 30, 1878, the plaintiff at the close of his work on the track, was ordered by his foreman to put his tools on the hand-car, and to get on himself, which order he obeyed—the employees occupying three hand-cars, and the plaintiff riding upon the middle car. On the way to the station the rear car was propelled so fast by the men upon it that it, by the culpable negligence of the men operating it, was thrown against the middle car, which could not escape in consequence of the nearness of the forward car, and thereby the middle car was thrown from the track and the plaintiff seriously hurt. *Held*, the plaintiff was injured while in the line of his duty, and that he was within the provisions of the act of February 26, 1874, defining the liability of railroad companies in certain cases (Comp. Laws 1879, p. 784, § 4914), and was entitled to recover for all damages received by him in consequence of the culpable negligence or mismanagement of his co-employees. *Union Trust Co. v. Thomason*, 22 Kan. 1; s. c., 5 Am. & Eng. R. R. Cas. 589.

A section-man employed by a railway company to repair its road-bed, and to take up old rails out of its track, and put in new ones, who is injured, without his fault, by the negligence of his co-employee in permitting an iron rail, intended to be placed in the track, to fall upon him while he is assisting in removing the rail from a push-car on the track, is within the terms of § 1,

ch. 98, Session Laws of 1874; § 4914, ch. 84, Comp. Laws of 1879; *Union Pac. R. Co. v. Harris*, 33 Kan. 416. See also *Atchison, etc., R. Co. v. Koehler*, 37 Kan. 463; s. c., 31 Am. & Eng. R. R. Cas. 315, where the Kansas act was applied to a section-hand and another employee who let a rail drop on him.

Notwithstanding the statute provides that every railroad company shall be liable for all damages done to any employee in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees, the knowledge or notice, act or omission, for which the company is responsible must be that of some agent or employee having authority or duty in the premises. *Solomon R. Co. v. Jones*, 30 Kan. 601; s. c., 15 Am. & Eng. R. R. Cas. 201.

A foreman of a railroad company, with power to hire and discharge hands, is a co-employee with the men under him, within a statute authorizing employees to recover from the employer for injuries by the negligence of other employees. *Houser v. Chicago, etc., R. Co.*, 60 Iowa, 230; s. c., 46 Am. Rep. 65.

Statute Imposing Duties at Crossings Does not Affect Fellow-servant Rule.—A statute which provides that a bell or whistle shall be placed on every locomotive engine, and shall be rung or sounded by the engine-man or fireman 60 rods from any highway crossing, and until the highway is reached, and that the "corporation owning the railroad shall be liable, to any person injured, for all damages sustained" by reason of neglect so to do, does not make the corporation liable for an injury caused by negligence of the fireman in this respect, to a fellow-servant. *Randall v. Baltimore & O. R. Co.*, 15 Am. & Eng. R. R. Cas. 243; s. c., 109 U. S. 478.

Statute as to "Mining Bosses."—The fact that "mining bosses" are appointed under a statute which prescribes their duties, does not change their relation of fellow-servants to the miners if the statute has been complied with as to their selection and it does not appear that they were incompetent or the mine owner negligent in employing them. *Delaware & H. Canal Co. v. Carroll*, 89 Pa. St. 374.

Negligence is not to be presumed, but must be proven; and where the evidence in an action for damages against a railroad company, under the statute of February 26, 1874, shows that all the co-employees exercised toward the injured employee the degree and care of diligence which prudent persons would ordinarily exercise under like circumstances, no liability is

States may be enforced in another State where the common-law rule prevails.¹

3. *Constitutionality of Statutes.*—Some of these statutes are directed especially against railroad companies, but they are not unconstitutional on that account. Thus, a statute which provides that "every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage," does not deprive a railroad company of its property without due process of law, and does not deny to it the equal protection of the laws, and is not in conflict with the Fourteenth Amendment to the Constitution of the United States in either of these respects.²

established against the company. *Missouri Pac. R. Co. v. Haley*, 25 Kan. 36; s. c., 5 Am. & Eng. R. R. Cal. 594.

Contributory Negligence.—To entitle the servant to recover under these statutes he must be free from negligence himself; but in an action against a railroad company by one of its employees to recover for personal injury occasioned by the negligence of co-employees, the plaintiff is held only to the exercise of ordinary care to entitle him to recover,—such care as men of ordinary judgment, intelligence, and prudence would exercise under like circumstances; and an instruction that any negligence, or slight negligence, on the part of the plaintiff, would prevent a recovery would imply and hold the plaintiff to a higher degree of care than is by the law required of him, and was properly refused. *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298; s. c., 22 Am. & Eng. R. R. Cas. 306.

In an action against a railway company for personal injuries, brought by an employee of the company, in a case where the company is liable only for ordinary negligence, and not for slight negligence if the plaintiff himself is guilty of ordinary negligence contributing to the injury, he cannot recover if the negligence of the railway company or a fellow-employee is merely greater than his; for in this class of cases the plaintiff must have exercised ordinary care, and not have been guilty of ordinary negligence, to sustain his action. *Kansas Pac. R. Co. v. Peavy*, 29 Kan. 122; s. c., 11 Am. & Eng. R. R. Cas. 260. See also *McDade v. Georgia R. Co.*, 60 Ga. 119.

1. Thus, a cause of action which occurred in the State of Iowa, under a statute of that State which makes every corporation operating a railroad in that State liable for all damages sustained by its employees in

consequence of the negligence of other employees of such corporation, when such wrongs are in any manner connected with the use or operation of any railway on or about which they shall be employed, may be maintained and enforced in the State of *Minnesota*. *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11; s. c., 11 Am. & Eng. R. R. Cas. 256. But compare *Anderson v. Milwaukee, etc., R. Co.*, 37 Wis. 321.

But where the injury occurred in *Texas*, where the common-law rule prevails, an injured servant who sues in *Kansas*, where there is a statutory liability imposed, cannot recover under such statute. *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 243.

Enforcement in Admiralty.—The remedy which the statute of *Maryland* furnishes to an employee for injuries caused by the fault of a co-employee, against his employer, may be enforced by process in a United States court of admiralty. *The Highland Light*, Chase's Dec. 150.

2. *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; s. c., 33 Am. & Eng. R. R. Cas. 390, sustaining the validity of the statute of *Kansas* of 1874, ch. 93, § 1, p. 143, Comp. Laws *Kansas*, 1881, p. 784; *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298; s. c., 22 Am. & Eng. R. R. Cas. 306; *Missouri Pac. R. Co. v. Haley*, 25 Kan. 594; s. c., 5 Am. & Eng. R. R. Cas. 594.

An objection to the *Iowa* statute on the same ground has been held unavailing. *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11; s. c., 11 Am. & Eng. R. R. Cas. 256; *McAunich v. Mississippi & M. R. Co.*, 20 Iowa, 333; *Deppe v. Chicago, etc., R. Co.*, 36 Iowa, 52; *Bucklew v. Central Iowa R. Co.*, 64 Iowa, 603.

And to the *Wisconsin* statute. *Ditberner v. Chicago, etc., R. Co.*, 47 Wis. 138.

4. *Contracts in Contravention.*—A railroad company cannot contract in advance with its employees for the waiver and release of the statutory liability imposed upon it; and a contract in contravention of such a statute is void and no defence to an action brought by an employee of a railroad company for damages done to him in consequence of the negligence or mismanagement of a co-employee.¹

IX. Pleading.—In an action for damages for negligently causing the death of an employee, if the complaint alleges that the acts and omissions constituting the negligence were done or omitted by the defendant itself, as employer, the court cannot presume that they were those of a fellow-employee of the deceased; and consequently the question of the liability of a common employer, for a co-employee's negligence, cannot arise on demurrer to the complaint.² A complaint, however, by a servant against his master for personal injuries caused by the negligence of another, must state facts to show the master's liability.³

1. *Kansas Pac. R. Co. v. Peavy*, 29 Kan. 122; s. c., 11 Am. & Eng. R. R. Cas. 260; s. c., 44 Am. Rep. 630.

The statutes of *Iowa*, *Wisconsin*, and *Wyoming* specially invalidate any contract omitting the company's liability. A similar provision exists in *Massachusetts*, prohibiting the limitation, by contract, of the common-law liability: "No person or corporation shall, by special contract with persons in its employ, exempt him or itself from any liability which he or it might otherwise be under to such persons, for injuries suffered by them in their employment, and which result from the employer's own negligence or from the negligence of other persons in his or its employ." Pub. Laws Mass. 422, § 3, ch. 74.

But in *Georgia*, it has been held that an express stipulation in a contract of service, such as between a railroad company and a brakeman, that the servant takes all risk incident to his employment, and will not hold his employer liable for injury sustained through negligence, etc., of a fellow-servant, is valid (with the limitation that no one can protect himself, by stipulation, from the consequences of criminal negligence), and will be enforced as a bar to an action for damages for an injury sustained through negligence. *Western, etc., R. Co. v. Bishop*, 50 Ga. 465.

2. *Brown v. Central Pac. R. Co.*, 68 Cal. 171.

A complaint against a railroad company, for damages to the person of an employee, charging the negligence by which the plaintiff was injured directly upon the defendant, and not merely upon its em-

ployees, is sufficient on demurrer; and proof may be given thereunder of any acts or circumstances of negligence, on the part of such defendant, in the running of the locomotive causing the injury. *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261; s. c., 5 Am. & Eng. R. R. Cas. 554.

Where, in an action by a servant against the master, for injuries resulting from the negligence of co-servants, the petition stated that the injury occurred in a particular way, *held*, that a request to charge that to entitle plaintiff to recover they should be satisfied that the injury occurred in the manner stated in the petition, should have been given. *Manuel v. Chicago, R. I. & P. R. Co.*, 56 Iowa, 655; s. c., 5 Am. & Eng. R. R. Cas. 588.

Special Questions.—Where an employee sues a railroad company for the alleged negligence of his co-employee, and special questions with reference to facts tending to show the negligence of such co-employee are submitted to the jury, and the court instructs the jury that, if there is no sufficient evidence to warrant a finding upon any of these special questions, the jury may answer "Don't know," and the jury answer some of the special questions upon this subject in that manner, *held*, that as the burden of proving the negligence of such co-employee rests upon the plaintiff, the answers "Don't know" to such questions are favorable to the railroad company, and not to the plaintiff, although the jury may have intended them otherwise. *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 474.

3. *Helfrich v. Williams*, 84 Ind. 553.

X. Who Are and Who Are Not Fellow-servants—Alphabetical List of Occupations.—In the note will be found every authority, it is believed, determining who are and who are not fellow-servants, alphabetically arranged according to various occupations or employments.¹

1. Acting Manager.—*Employee in iron-works* and acting manager working together are. *Crispin v. Babbitt*, 89 N. Y. 516.

Agent.—*Workman* whom agent has power to dismiss at his pleasure, and such agent, are not. *Miller v. Union Pac. R. Co.*, 17 Fed. Rep. 67.

Agent to Hire Hands.—*Foreman* hired by him, and agent to hire hands, are not. *Laning v. New York, etc., R. Co.*, 49 N. Y. 521; s. c., 10 Am. Rep. 417.

Agent to Purchase Locomotive, and those using it, are not. *Cumberland & P. R. Co. v. State*, 44 Md. 283.

Apprentice.—*Foreman* in machine-shop and boy apprentice are not. *Missouri Pac. R. Co. v. Pregory*, 36 Kan. 424.

Architect.—*Laborer* and architect are not. *Whalen v. Centenary Church*, 62 Mo. 326.

Baggage-master.—*Conductor* and baggage-master are. *Colorado, etc., R. Co. v. Martin*, 5 Colo. 562; s. c., 17 Am. & Eng. R. R. Cas. 592.

Car-inspector and baggage-master are not. *Indianapolis, etc., R. Co. v. Morganstern*, 106 Ill. 216; s. c., 12 Am. & Eng. R. R. Cas. 228.

Employees on freight train and baggage-man on passenger train are not. *Central Trust Co. v. Wabash, etc., R. Co.*, 34 Fed. Rep. 616.

Switchman and baggage-master are. *Roberts v. Chicago, etc., R. Co.*, 33 Minn. 218.

Trainmen and baggage-man are. *Moseley v. Chamberlain*, 18 Wis. 700.

Blacksmith.—*Assistant blacksmith* and blacksmith are. *Melville v. Missouri River, etc., R. Co.*, 4 McCrary (U. S. C. C.), 194.

Blaster.—*Rock-hauler* and blaster are. *Bogard v. Louisville, etc., R. Co.*, 100 Ind. 491.

Miners and blasters are. *Keilley v. Belcher, etc., Co.*, 3 Sawy. (U. S. C. C.) 500.

Boat-rower.—*Laborer* and boat-rower are. *Lovell v. Howell*, L. R. 1 C. P. Div. 161.

Boatswain.—*Stevedore* and boatswain engaged to perform a single operation are. *The Furnessia*, 30 Fed. Rep. 878.

Boiler-maker.—*Boiler-tester* and boiler-maker are fellow-servants. *Murphy v.*

Boston, etc., 88 N. Y. 146; s. c., 8 Am. & Eng. R. R. Cas. 146.

Engineer and boiler-maker are not. *Nashville, etc., R. Co. v. Jones*, 9 Heisk. (Tenn.) 27; *Pennsylvania, etc., R. Co. v. Mason*, 109 Pa. St. 296; s. c., 5 Am. Rep. 722.

Fireman and boiler-maker are not. *Nashville, etc., R. Co. v. Jones*, 9 Heisk. (Tenn.) 27.

Mechanic in repair shop and boiler-maker are. *Murphy v. Boston & A. R. Co.*, 88 N. Y. 146; s. c., 8 Am. & Eng. R. R. Cas. 510.

Boy not in Service.—*Conductor* and boy not in service are not fellow servants. *New Orleans, etc., R. Co. v. Harrison*, 48 Miss. 112; s. c., 12 Am. Rep. 356.

Brakeman.—*Brakeman*: One brakeman is a fellow-servant of another brakeman. *Youll v. Sioux City, etc., R. Co. (Iowa)*, 21 Am. & Eng. R. R. Cas. 589; *Chicago, etc., R. Co. v. Rust*, 84 Ill. 570; *Hayes v. Western R. Corp.*, 3 Cush. (Mass) 270; *Atchinson, etc., R. Co. v. Plunkett*, 25 Kan. 188; s. c., 2 Am. & Eng. R. R. Cas. 127; *Chicago, etc., R. Co. v. Rust*, 84 Ill. 570; *Besel v. New York, etc., R. Co.*, 70 N. Y. 171; *Nashville, etc., R. Co. v. Foster*, 11 Am. & Eng. R. R. Cas. 180; *Nashville, etc., R. Co. v. Wheelless*, 10 Lea (Tenn.), 741; s. c., 4 Am. & Eng. R. R. Cas. 633; *Houston, etc., R. Co. v. Gilmore*, 62 Tex. 361.

Brake-repairer and brakeman are. *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.), 351; s. c., 11 Am. & Eng. R. R. Cas. 180.

Car-coupler and brakeman are. See CAR-COUPLER.

Car-inspector and brakeman are. *Kidwell v. Houston, etc., R. Co.*, 3 Woods (C. C.), 313; *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.), 35; s. c., 11 Am. & Eng. R. R. Cas. 180; *Smith v. Potter (Mich.)*, 2 Am. & Eng. R. R. Cas. 140; *Mackin v. Boston, etc., R. Co.*, 135 Mass. 201; s. c., 15 Am. & Eng. R. R. Cas. 196; *Columbus, etc., R. R. Co. v. Webb*, 12 Ohio St. 475; *St. Louis, etc., R. Co. v. Gaines*, 46 Ark. 555; *Smith v. Flint*, 46 Mich. 248; s. c., 41 Am. Rep. 161; *Besel v. New York, etc., R. Co.*, 70 N. Y. 171; *Smoot v. Mobile, etc. R. Co.*, 67 Ala. 13; *Little Miami, etc., R. Co. v. Fitzpatrick*, 42 Ohio St. 318; s. c., 17 Am. & Eng. R. R. Cas. 578; *Columbus, etc., R. Co. v.*

Webb, 12 Ohio St. 475. See also Chicago, etc., R. Co. v. Bragonier, 11 Ill. App. 516; Wonder v. Baltimore, etc., R. Co., 32 Md. 411; s. c., 3 Am. Rep. 143. *Contra*, see King v. Ohio, etc., R. Co. (C. C. of Ind.), 8 Am. & Eng. R. R. Cas. 119, where it was held by Gresham, J., that a car-inspector is not the fellow-servant in common employment of a brakeman in any such sense as to relieve the railroad company from liability for injury to the latter, caused by the defective condition of the coupling apparatus of a car, which the car, inspector had failed to note. The court say: "The master's immunity is limited to cases where the servants are engaged in the same common employment; that is to say, in the same department of duty. Such immunity does not extend to cases where the servants are engaged in departments essentially foreign to each other. A servant cannot be held to have contemplated, in the adjustment of his wages, those dangers which arise from the carelessness of fellow-servants, without any reference whatever to the nature of their employment or duties. . . . The master is bound to protect the servant, not against all risks, but against risks which could be avoided by the exercise of reasonable care on the part of the master. The brakeman's employment exposes him to constant peril under the most favorable conditions. He is expected and required to act with despatch in coupling and uncoupling cars; and, when he is negligently required by the proper officer or agents to handle cars out of repair, unfit for use and dangerous, and in doing so is injured, perhaps for life, without fault on his part, he should in justice have a remedy against his employer." This doctrine was also followed in Fay v. Minneapolis, etc., R. Co., 30 Minn. 231; s. c., 11 Am. & Eng. R. R. Cas. 193, where the company was held liable for an injury to a brakeman, in consequence of the defective condition of the coupling attachment of a car which he was attempting to couple. The car did not belong to the company, but was a foreign one in its possession and use, and the plaintiff had no knowledge of its defective condition. Missouri, etc., R. Co. v. Condon, 78 Mo. 567; s. c., 17 Am. & Eng. R. R. Cas. 583; Brann v. Chicago, etc., R. Co., 53 Iowa, 595; s. c., 36 Am. Rep. 243; Chicago, etc., R. Co. v. Jackson, 55 Ill. 492; s. c., 8 Am. Rep. 661; Missouri Pac. R. Co. v. Dwyer, 26 Kan. 58.

Car-repairer and brakeman are. Campbell v. Pennsylvania R. Co. (Pa.), 24 Am. & Eng. R. R. Cas. 427; Besel v. New York, etc., R. Co., 70 N. Y. 171. *Contra*, Mis-

souri Pac. R. Co. v. Dwyer, 28 Kan. 58.

Conductor and brakeman are. Wilson v. Madison, etc., R. Co., 18 Ind. 226; Thayer v. St. Louis, etc., R. Co., 22 Ind. 26; Smith v. Potter, 46 Mich. 158; s. c., 2 Am. & Eng. R. R. Cas. 140; Dow v. Kansas Pac. R. Co., 8 Kan. 432; Sherman v. Rochester, etc., R. Co. 17 N. Y. 153; 15 Barb. (N. Y.) 574; Robinson v. Houston, etc., R. Co., 46 Tex. 540; Pilkenton v. Gulf, etc., R. Co., 7 S. W. Rep. 805; Atchison, etc., R. Co. v. Moore (Kansas), 11 Am. & Eng. R. R. Cas. 243; Smith v. Flint, etc., R. Co. 46 Mich. 258; Pease v. Chicago, etc., R. Co. (Wis.), 17 Am. & Eng. R. R. Cas. 527; Rodman v. Mich. Cent., etc., R. Co., 55 Mich. 57; s. c., 17 Am. & Eng. R. R. Cas. 521; Hayes v. Western, etc., R. Co., 3 Cush. (Mass.) 270; Chicago, etc., R. Co. v. Doyle, 60 Miss. 977; s. c., 8 Am. & Eng. R. R. Cas. 171; Connor v. Chicago, etc., R. Co., 59 Mo. 285; Pease v. Chicago, etc., R. Co., 61 Wis. 168; s. c., 17 Am. & Eng. R. R. Cas. 527; Pittsburg, etc., R. Co. v. Devinney, 17 Ohio St. 197; Frazier v. Pennsylvania R. Co., 38 Pa. St. 104; s. c., 80 Am. Dec. 467. *Compare* Zeigler v. Danbury & Norwalk R. Co., 52 Conn. 543; 23 Am. & Eng. R. R. Cas. 400. In this case the D. & N. and the S. railroads connected, forming a continuous line. By an arrangement between the two companies, a train owned and run by the S. company went over both roads to a certain point and back daily, the D. & N. company paying the S. company an agreed price for the service upon its road. The train, when on the road of the D. & N. company, was under its general control and governed by its rules, and it had entire control of the hands upon it, but the S. company was at liberty to use what engine and employ what hands it pleased. The plaintiff was a brakeman on this train, and was injured by a collision with a train of the D. & N. company on its own road, caused by the negligence of the conductor of that train. *Held*, that the plaintiff was not an employee of the D. & N. company, and that the conductor of the train was therefore not his fellow-servant. Louisville, etc., R. v. Moore (Ky.), 24; Am. & Eng. R. R. Cas. 448; Au v. New York, etc., R. Co., 29 Fed. Rep. 72.

Conductor, acting as engineer, and brakeman are. Rodman v. Michigan Cent. R. Co., 55 Mich. 57; s. c., 54 Am. Rep. 348; 17 Am. & Eng. R. R. Cas. 521.

Employee putting defective car on track and brakeman are not. Toledo, etc., R. Co. v. Ingraham, 77 Ill. 309.

Employees on another train and brake-

man are. *McMaster v. Ill. Cent. R. Co.* (Miss.) 4 So. Rep. 79.

Engineer and brakeman are. *Hutchinson v. York, etc., R. Co.*, 5 Ex. 343; *Bartonshill, etc., R. Co. v. Reid*, 3 Macq. 266; *Bartonshill, etc., R. Co. v. McGuire*, 3 Macq. 300; *Wilson v. Murray*, L. R. 1 App. Cas. 326; *Morgan v. Vale of Neath, etc., R. Co.*, 5 B. & S. 570; s. c., L. R. 1 C. P. 291; *Charles v. Taylor*, L. R. 3 C. P. Div. 491; *Conway v. Belfast, etc., R. Co.*, Ir. 9 C. L. 498; *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 498; s. c., 15 Am. & Eng. R. R. Cas. 243; *Keilley v. Belchre, etc., R. Co.*, 3 Sawy. (U. S.) 500; *Jordon v. Wells*, 3 Woods (U. S.), 527; *Abell v. Western Md. R. Co. (Md.)*, 21 Am. & Eng. R. R. Cas. 503; *McAndrews v. Burns*, 39 N. J. L. 117; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467; *Mann v. Delaware & H. Canal Co.*, 91 N. Y. 495; s. c., 12 Am. & Eng. R. R. Cas. 199; *Wright v. New York, etc., R. Co.*, 25 N. Y. 562; *Sherman v. Rochester, etc., R. Co.*, 17 N. Y. 153; *Moran v. New York, etc., R. Co.*, 67 Barb. (N. Y.) 96; *Pittsburg, etc., R. Co. v. Lewis*, 33 Ohio St. 196; *Pittsburg, etc., R. Co. v. Ranney*, 37 Ohio St. 665; s. c., 5 Am. & Eng. R. R. Cas. 533; *Pittsburg, etc., R. Co. v. Devinney*, 17 Ohio St. 197; *Ponton v. Wilmington & W. R. Co.*, 6 Jones (N. Car.), 245; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 482; *Nashville, etc., R. Co. v. Wheelless*, 10 Lea (Tenn.), 741; s. c., 15 Am. & Eng. R. R. Cas. 315; 43 Am. Rep. 317; *East Tenn., etc., R. Co. v. Rush*, 15 Lea (Tenn.), 145; s. c., 25 Am. & Eng. R. R. Cas. 502; *Houston, etc., R. Co. v. Gilmore*, 62 Tex. 361; *Houston, etc., R. Co. v. Myers*, 55 Tex. 110; s. c., 8 Am. & Eng. R. R. Cas. 114; *Houston, etc., R. Co. v. Willie*, 53 Tex. 318; *Hamilton v. Galveston, etc., R. Co.*, 54 Tex. 556; *Kansas, etc., R. Co. v. Peavey*, 29 Kan. 169; s. c., 11 Am. & Eng. R. R. Cas. 260; *Illinois Cent. R. Co. v. Keen*, 72 Ill. 512; *St. Louis, etc., R. Co. v. Britz*, 72 Ill. 256; *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Sloan v. Central Iowa R. Co.*, 62 Iowa, 728; s. c., 11 Am. & Eng. R. R. Cas. 145; *Summerhays v. Kansas, etc., R. Co.*, 2 Colo. 484; *Jeffery v. Keokuk, etc., R. Co.*, 56 Iowa, 546; s. c., 5 Am. & Eng. R. R. Cas. 568; *Connor v. Chicago, etc., R. Co.*, 59 Mo. 285; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Missouri Pac. R. Co. v. Texas & Pac. R. Co.*, 31 Fed. Rep. 527; *Wallis v. Morgan's La. & Tex. R. Co.*, 38 La. Am. 156. See *contra*, *Cowles v. Richmond, etc., R. Co.*, 84 N. Car. 309; s. c., 2 Am. & Eng. R. R. Cas. 90; *Louisville, etc., R. Co. v. Brook*, 7 Ky. L. Rep. 110; *Louisville, etc., R. Co.*

v. Moore (Ky.), 24 Am. & Eng. R. R. Cas. 443; *East Tennessee, etc., R. Co. v. Collins*, 85 Tenn. 227.

Engine-repairers and brakeman are. *Shauck v. Northern Cent. R. Co.*, 25 Md. 462.

Fireman and brakeman are. *Kersey v. Kansas City, etc., R. Co.*, 79 Mo. 362; s. c., 17 Am. & Eng. R. R. Cas. 638; *Greenwald v. Marquette, etc., R. Co.*, 49 Mich. 197; s. c., 8 Am. & Eng. R. R. Cas. 133; *Galveston, etc., R. Co. v. Faber*, 63 Tex. 347; s. c., 8 S. W. Rep. 64.

Flagman and brakeman are. *Cooper v. Milwaukee, etc., R. Co.*, 23 Wis. 668.

Foreman in yard and brakeman are. *Rains v. St. Louis, etc., R. Co.*, 71 Mo. 164; s. c., 5 Am. & Eng. R. R. Cas. 610; *Fraker v. St. Paul, M. & M. R. Co.*, 32 Minn. 54.

General manager and brakeman are not. *Phillips v. Chicago, etc., R. Co.*, 64 Wis. 475; s. c., 23 Am. & Eng. R. R. Cas. 453.

Laborer loading dirt and brakeman are. *Henry v. Staten Island R. Co.*, 81 N. Y. 373; s. c., 2 Am. & Eng. R. R. Cas. 60; *St. Louis, etc., R. Co. v. Britz*, 72 Ill. 256.

Laborer setting up derricks and brakeman are. *Holden v. Pittsburgh R. Co.*, 2 Am. & Eng. R. R. Cas. 94; s. c., 129 Mass. 268.

Laborer on construction train and brakeman are. *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; s. c., 5 Am. & Eng. R. R. Cas. 594.

Master-mechanic and brakemen are not. *Cooper v. Pittsburg, etc., R. Co.*, 24 W. Va. 39; *Gottlieb v. New York, etc., R. Co.*, 100 N. Y. 462; s. c., 2 Am. & Eng. R. R. Cas. 421.

Roadmaster and brakeman are not. *Dunham v. Houston, etc., R. Co.*, 49 Tex. 181; *Atchison, etc., R. Co. v. Moore*, 31 Kan. 197; s. c., 11 Am. & Eng. R. R. Cas. 243.

Section-master or section boss and brakeman are. *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245; *Slatterly v. Toledo, etc., R. Co.*, 23 Ind. 81; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419; s. c., 9 Am. Ry. Rep. 271; *Hardy v. Carolina Cent. R. Co.*, 76 N. Car. 5. *Contra*, *Hullehan v. Green Bay, etc., R. Co. (Wis.)*, 31 Am. & Eng. R. R. Cas. 322; *Shanny v. Androscoggin Mills Co.*, 66 Me. 420; *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; s. c., 21 Am. Rep. 385; *Houston, etc., R. Co. v. Dunham*, 49 Tex. 181.

Section-hand and brakeman are not. *Morris v. Richmond, etc., R. Co.*, 8 Va. L. J. 540. See *TRACK-REPAIRER*.

Shovellers and brakeman are. *St. Louis, etc., R. Co. v. Britz*, 72 Ill. 256;

Louisville, etc., R. Co. v. Robinson, 4 Bush (Ky.), 507.

Station agent and brakeman are. Toner v. Chicago, etc., R. Co., 69 Wis. 188; Hodgkins v. Eastern R. Co., 119 Mass. 419.

The plaintiff, a brakeman in defendant's employ, jumped upon a moving train, and, while climbing up the ladder on the side of the car, was struck by a pile of lumber near the track. The plaintiff knew that the lumber was piled there. It was unloaded and piled there by the direction of the station agent. In an action against the company for damages, *held*: (1) That plaintiff had assumed the risk incident to his employment, and cannot recover for the voluntary assumption of a known risk; (2) That the station agent was plaintiff's fellow-servant, and plaintiff cannot recover for his negligence. Gaffney v. New York, etc., R. Co. (R. I.), 31 Am. & Eng. R. R. Cas. 265.

Supervisor of roads and brakeman are. Mobile, etc., R. Co. v. Smith, 59 Ala. 245.

Switchman and brakeman are. Robertson v. Terre Haute, etc., R. Co., 78 Ind. 77; s. c., 8 Am. & Eng. R. R. Cas. 175; Tenney v. Boston, etc., R. Co., 52 N. Y. 632; Harvey v. New York, etc., R. Co., 88 N. Y. 481; s. c., 8 Am. & Eng. R. R. Cas. 515; Slattery v. Toledo, etc., R. Co., 23 Ind. 81.

Trackman and brakeman are. Connelly v. Minneapolis E. R. Co. (Minn.), 35 Mo. Rep. 582. *Contra*, Torians v. Richmond, etc., R. Co. (Va.), 4 S. East. Rep. 339.

Train-dispatcher and brakeman are. Robertson v. Terre Haute, etc., R. Co., 78 Ind. 77; s. c., 41 Am. Rep. 552; s. c., 8 Am. & Eng. R. R. Cas. 175; Rose v. Boston, etc., R. Co., 8 N. Y. 217. *Contra*, Phillips v. Chicago, M. & St. P. R. Co. (Wis.), 23 Am. & Eng. R. R. Cas. 453.

Train-hands.—A brakeman on one train of a railroad company is the fellow-servant of the employees in charge of and operating another train of the same company, and cannot recover for injuries caused by the negligence of the employees operating such other train. McMaster v. Illinois Cent. R. Co. (Miss.), 4 So. Rep. 59.

Yardmaster and brakeman are. Besel v. New York, etc., R. Co., 70 N. Y. 171.

Brakeman Acting as Conductor.—*Brakeman* and brakeman acting as conductor are. Robinson v. Houston, etc., R. Co., 46 Tex. 540.

Brakeman Going to Work.—*Signal-man* and brakeman going to work are. Moran v. New York, etc., R. Co., 67 Barb. (N. Y.) 96.

Brake-repairer.—*Brakeman* and brake-repairer are. Nashville, etc., R. Co. v. Foster, 10 Lea (Tenn.), 351; s. c., 11 Am. & Eng. R. R. Cas. 180.

Car-inspector and brake-repairer are. Nashville, etc. R. Co. v. Foster, 10 Lea (Tenn.), 351; s. c., 11 Am. & Eng. R. R. Cas. 180.

Bridge-builder.—(See CARPENTER.)—*Carpenter* and bridge-builder are. Yager v. Atlantic, etc., R. Co., 4 Hughes (U. S. C. C.), 182.

Fireman and bridge-builder are not. Davis v. Central Vermont R. Co. 55 Vt. 84; s. c., 11 Am. & Eng. R. R. Cas. 173.

Captain.—(See MASTER).

Clay-digger.—Plaintiff, an employee of the State, was engaged under the direction of W.; the captain of the State boat, in digging clay from a bank and loading it onto the boat. While digging under the bank, the overhanging earth, which had been loosened by W., fell upon and injured him. *Held*, that the injury was caused by the negligence of a co-servant, and the State was not liable. Laughlin v. State, 105 N. Y. 159.

Car-coupler.—*Car-inspector* and car-coupler are. Smith v. Potter, 46 Mich. 258; s. c., 2 Am. & Eng. R. R. Cas. 140. *Contra*, Tierney v. Minneapolis, etc., R. Co., 33 Minn. 311; s. c., 21 Am. & Eng. R. R. Cas. 545; King v. Ohio, etc., R. Co. (U. S. C. C.), 8 Am. & Eng. R. R. Cas. 119.

Car-loader and car-coupler are. Indianapolis, etc., R. Co. v. Johnson, 102 Ind. 352.

Conductor and car-coupler are. Wilson v. Madison, etc., R. Co., 18 Ind. 226; Whitman v. Wisconsin & M. R. Co. (Wis.), 12 Am. & Eng. R. R. Cas. 214; Lawless v. Connecticut River R. Co., 136 Mass. 1; 18 Am. & Eng. R. R. Cas. 96. *Contra*, Louisville, etc., R. Co. v. Moore (Ky.), 24 Am. & Eng. R. R. Cas. 443.

Engineer and car-coupler are. Kroy v. Chicago, etc., R. Co., 32 Iowa, 357; Wilson v. Madison, etc., R. Co., 18 Ind. 226; Summerhays v. Kansas, etc., R. Co., 2 Colo. 484; St. Louis, etc., R. Co. v. Britz, 72 Ill. 256; Smith v. Potter, 46 Mich. 258; s. c., 2 Am. & Eng. R. R. Cas. 140; Nashville, etc., R. Co. v. Wheeler, 10 Lea (Tenn.), 741; s. c., 4 Am. & Eng. R. R. Cas. 633; Fowler v. Chicago & N. W. R. Co. (Wis.), 17 Am. & Eng. R. R. Cas. 536; Hayes v. Western R. Co., 3 Cush. (Mass.) 270; Bradley v. Nashville, etc., R. Co., 14 Lea (Tenn.), 374. *Contra*, in Louisville, etc., R. Co. v. Moore (Ky.), 24 Am. & Eng. R. R. Cas. 443, a freight train was uncoupled at a highway crossing to allow travellers to

pass, both the engineer and the conductor going to the telegraph, leaving the fireman, an inexperienced boy of twenty years, in charge of the engine, and directing Moore, the head brakeman, to make the coupling. The fireman backed the engine and the cars together with unusual force, and Moore was injured. *Held*, that the company was liable, the engineer and conductor occupying toward Moore the position of vice-principals of the company. And see *Eason v. Sabine & E. T. R. Co.*, 65 Tex. 577; s. c., 57 Am. Rep. 606, where a volunteer coupling cars at the request of the conductor was injured by the negligence of the engineer and the company was held liable.

Foreman in repair-shops and car-coupler are not. In a *Wisconsin* case *Brobbitts v. Chicago, etc., R. Co.*, 38 Wis. 289, a railroad brakeman was injured in the course of his employment while coupling two sections of a railroad train; and there was evidence tending to show that the injury was caused by the use of a defective switch engine. The engineer whose duty it was had several times previously notified the foreman of one of the company's repair-shops of the defective condition of said engine. Such foreman had charge of all the men in said repair-shop, and was the person to whom, by the rules of the company, such defect should have been reported; and it was his duty to see it repaired. Another person, known as the master mechanic, had general supervision of all repairs of the motive power, tools, and machinery of the company, and general charge of all the men employed in the locomotive department, including the power to employ men in or discharge them from service in that department; while said foreman had no power to employ or discharge men without the master mechanic's consent. *Held*, that an instruction, to the effect that notice to such foreman of the defect was notice to the company, was correct. The court held that the company owed a duty to its employee to keep in proper repair the engine used to propel the train on which the latter was employed; and said foreman, being the person designated by it to whom notice of any defect in the engine was to be given, and whose duty it was to repair it on receiving such notice, his negligence in that behalf was the negligence of the company, and not that of a fellow-servant, and the company was liable for the injury caused thereby. And see, for similar cases in which same conclusion is reached. *Chicago, etc., R. Co. v. Rung*, 104 Ill. 641.

Yardmaster and car-coupler. *Graville v. Minneapolis, etc., R. Co.*, 3 McCrary (C.

C.), 352. The fact that a yardmaster of a railroad company has authority to discharge a car-coupler, does not make him any the less a fellow-servant of the car-coupler. *Webb v. Richmond, etc., R. Co.* (N. Car.), 2 S. East. Rep. 440.

Car-inspector.—*Brakeman* and car-inspector are. See BRAKEMAN.

Brake-repairer and car-inspector are. *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.), 351; s. c., 11 Am. & Eng. R. R. Cas. 180.

Baggage-master and car-inspector are not. *Indianapolis, etc., R. Co. v. Morganstern*, 106 Ill. 216; s. c., 12 Am. & Eng. R. R. Cas. 228.

Car-coupler and car-inspector are not. *Tierney v. Minneapolis & St. L. R. Co.*, 33 Minn. 311; s. c., 21 Am. & Eng. R. R. Cas. 545; *King v. Ohio, etc., R. Co.* (U. S. C. C.), 8 Am. & Eng. R. R. Cas. 119. *Contra*, *Smith v. Potter*, 46 Mich. 258; s. c., 2 Am. & Eng. R. R. Cas. 140.

Engineer and car-inspector are not. *Chicago & A. R. Co. v. Hoyt* (Ill.), 31 Am. & Eng. R. R. Cas. 309.

Switchman and car-inspector are. *Gibson v. Northern Cent. R. Co.*, 22 Hun (N. Y.), 289.

Yardmaster and car-inspector are not. *Macy v. St. Paul, etc., R. Co.*, 35 Minn. 200.

Car-repairer.—*Brakeman* and car-repairer are. *Campbell v. Pennsylvania R. Co.* (Pa.), 24 Ain. & Eng. R. R. Cas. 427; *Besel v. New York, etc., R. Co.*, 70 N. Y. 171. *Contra*, *Missouri Pac. R. Co. v. Dwyer*, 26 Kan. 58.

Engineer and car-repairer are. *Chicago, etc., R. Co. v. Murphy*, 53 Ill. 336; *Valtz v. Ohio, etc., R. Co.*, 85 Ill. 56; *Cone v. Delaware, L. & W. R. Co.*, 81 N. Y. 207; s. c., 2 Am. & Eng. R. R. Cas. 57; *Texas & Pac. R. Co. v. Harrington*, 62 Tex. 571; s. c., 21 Am. & Eng. R. R. Cas. 571; *Richmond, etc., R. Co. v. Norment* (Va.), 4 S. E. Rep. 211.

Foreman and car-repairer are. *Peterson v. Chicago, etc., R. Co.* (Mich.), 31 Am. & Eng. R. R. Cas. 292. *Contra*, *Moore v. Chicago, etc., R. Co.*, 84 Mo. 481; s. c., 21 Am. & Eng. R. R. Cas. 509.

Subordinate car-reporter and boss car-repairer are not. *Hannibal, etc., R. Co. v. Fox*, 31 Kan. 586; s. c., 15 Am. & Eng. R. R. Cas. 325.

Switchman and car-repairer are. *Gilmore v. Eastern R. Co.*, 10 Allen (Mass.), 233; s. c., 87 Am. Dec. 635.

Yardmaster and car-repairer are. *Kirk v. Atlanta, etc., R. Co.*, 94 N. Car. 625; s. c., 25 Am. & Eng. R. R. Cas. 507; *Dobbin v. Railroad Co.*, 81 N. Car. 446; *Ritt v. Louisville & N. R. Co.* (Ky.), 31 Am. &

Eng. R. R. Cas. 289; *Bessl v. New York, etc., R. Co.*, 70 N. Y. 171.

Carpenter.—*Draftsman* and carpenter are not. *Baird v. Pettit*, 70 Pa. St. 477.

Engineer and carpenter are not. *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171; s. c., 14 Am. Rep. 32. In this case, plaintiff was employed by a railroad company as a laborer in their carpenter shop, and, while returning home after his day's work was done, he had occasion to cross the company's tracks, when he was struck and injured by one of their engines. *Held*, that the company was liable for the negligence of the enginemen, the employment of those in charge of the engine and of plaintiff as laborer in the carpenter shop being dissimilar and separate. This decision, however, based upon the *Illinois* doctrine of "consociation," would scarcely be an authority outside of that State.

Flagman and carpenter in repair are. *Gilmore v. Eastern R. Co.*, 13 Allen (Mass.), 433.

Foreman carpenter and carpenter are. *Newbar v. New York, etc., R. Co.*, 101 N. Y. 607; *Yager v. Atlantic, etc., R. Co.*, 4 Hughes (C. C.), 192; *Louisville & N. R. v. Lahr* (Tenn.), 6 S. W. Rep. 663.

Laborer and carpenter are. Plaintiff's intestate was killed while in defendant's service, by the fall of a wash-tub. The evidence showed that defendant superintended his business; that he employed a competent carpenter, who had charge of the repairs; that the fall of the tub was occasioned by the decay of the timbers on which it rested, owing to constant dampness; that this decay was not apparent, but could have been easily detected by proper tests. *Held*, that defendant was not liable for plaintiff's death. *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep. 573. And see *Morgan v. Vale of Neath*, 5 B. & S. 736; *L. R.* 1 Q. B. 149. Compare *Mulchey v. Methodist etc., Soc.*, 125 Mass. 486.

Mason and carpenter. The owner of a building employed a carpenter to do carpenter work and a mason to do mason work thereon, and, while one of the men employed by the mason, in the performance of his duties in the line of his employment, was ascending a ladder which had been erected by the carpenter, the ladder gave way by reason of its defective construction, and the man fell to the ground, receiving injuries from which he died. *Held*, in an action against the owner, by the father of the person injured, to recover damages for his death, alleged to have been occasioned by the negligence of the carpenter in the construction of the ladder, there was no cause of action shown, it not appearing that it was the duty

of the carpenter, in the course of his employment as such, to build this ladder for the mason's use, or that he was specifically employed by the owner to build it. *Mercer v. Jackson*, 54 Ill. 397. A corporation building a structure of brick and wood is not responsible for the fall of the masonry upon the carpenter, whereby he was killed, when guilty of no negligence, and the mason being competent, although his judgment in the particular case was at fault. *Keith v. Walker Iron & Coal Co. (Ga.)*, 7 S. E. Rep. 166.

Millwright and carpenter are. A manufacturing company had leased a rolling-mill, which was out of repair. J. was the general manager and superintendent of the company. E., a millwright and machinist, was in the employ of the company under daily pay. J. sent him to take charge of the repairs, and, as an inducement to hasten the work, was to pay him an extra \$50 therefor. B., a carpenter, was employed by E. and directed by him, but paid by the company. While thus employed, he was injured. *Held*, that he was a fellow-servant of E., and could not recover damages from the company for his injuries. *National Tube Works Co. v. Bedell*, 96 Pa. St. 176.

Station agent who performs the duties of a train-dispatcher is not a fellow-servant of a carpenter. *Palmer v. Utah & N. R. Co. (Idaho)*, 13 Pac. Rep. 425.

Superintendent of manufacturing corporation, and carpenter, are. *Osborne v. Morgan*, 130 Mass. 102.

Train-hands and carpenter carried free to work are. *Steaver v. Boston, etc., R. Co.*, 14 Gray (Mass.), 466; *contra*, *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339. And see *EMPLOYEES RIDING FREE*.

Turn-table employee and carpenter are. *Morgan v. Vale of Neath R. Co.*, 5 B. & S. 736; *Tunney v. Midland, etc., R. Co.*, L. R. 1 C. P. 391.

Carpenter Building Bridge.—*Train Hands.*—A carpenter employed by railroad company in building bridge is not a fellow-servant of those employed in the management of the company's train, while travelling on such train by direction of the company in order to assist at another place in loading bridge timbers; and if he is injured during the journey by the negligence of such employees, the company is liable to him as to a passenger and stranger. *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339; s. c., 61 Am. Dec. 101.

Chain-carrier.—*Conductor* and chain-carrier are. *Ross v. New York, etc., R. Co.*, 5 Hun (N. Y.), 488; s. c. on appeal, 74 N. Y. 617.

Coal-hoister.—*Employees* loading vessel with coal and coal-hoister are. The Islands, 28 Fed. Rep. 478.

Coal-heaver.—*Track-walker* and coal-heaver are, so held where a track-walker was injured by the fall of a lump of coal from a tender on which it was carelessly piled up. *Schultz v. Chicago & N. W. R. Co.*, 67 Wis. 616; s. c., 58 Am. Rep. 881.

Coal-miner.—*Conductor* and coal-miner detailed to repair track are. *Cumberland, etc., R. Co. v. Scally*, 27 Md. 589.

Conductor.—*Baggage-master* and conductor are. *Colorado, etc., R. Co. v. Martin*, 5 Col. 562; s. c., 17 Am. & Eng. R. R. Cas. 592.

Boy not in service and conductor are not. *New Orleans, etc., R. Co. v. Harrison*, 48 Miss. 112; s. c., 12 Am. Rep. 356.

Brakeman and conductor are. *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Thayer v. St. Louis, etc., R. Co.*, 22 Ind. 26; *Smith v. Potter*, 46 Mich. 158; s. c., 2 Am. & Eng. R. R. Cas. 140; *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642; *Sherman v. Rochester, etc., R. Co.*, 17 N. Y. 153; *Robinson v. Houston, etc., R. Co.*, 46 Tex. 540; *Pilkenton v. Gulf, etc., R. Co. (Tex.)*, 7 S.W. Rep. 582; *Atchison, etc., R. Co. v. Moore (Kan.)*, 11 Am. & Eng. R. R. Cas. 243; *Smith v. Flint, etc., R. Co.*, 46 Mich. 258; *Pease v. Chicago, etc., R. Co. (Wis.)*, 17 Am. & Eng. R. R. Cas. 527; *Rodman v. Mich. Cent. R. Co. (Mich.)*, 17 Am. & Eng. R. R. Cas. 521; *Hayes v. Western, etc., R. Co.*, 3 Cush. (Mass.) 270; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977; s. c., 8 Am. & Eng. R. R. Cas. 171; *Conner v. Chicago, etc., R. Co.*, 59 Mo. 285; *Pease v. Chicago, etc., R. Co.*, 61 Wis. 163; s. c., 17 Am. & Eng. R. R. Cas. 527; *Pittsburg, etc., R. Co. v. Devinney*, 17 Ohio St. 197; *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104; s. c., 80 Am. Dec. 467; *Dunlavy v. Chicago, etc., R. Co.*, 66 Iowa, 435; s. c., 21 Am. & Eng. R. R. Cas. 542. *Compare Louisville, etc., R. Co. v. Moore (Ky.)*, 24 Am. & Eng. R. R. Cas. 443; *Au v. New York, L. E. & W. R. Co.*, 29 Fed. Rep. 72.

Brakeman employed by different company and conductor are not. *Zeigler v. Danbury & N. R. Co.*, 52 Conn. 543; s. c., 23 Am. & Eng. R. R. Cas. 400.

Car-coupler and conductor are. *Wilson v. Madison, etc., R. Co.*, 18 Ind. 266; *Whitman v. Wisconsin & M. R. Co. (Wis.)*, 12 Am. & Eng. R. R. Cas. 214; *Lawless v. Connecticut River Co.*, 136 Mass. 1; s. c., 18 Am. & Eng. R. R. Cas. 96. *Contra, Louisville, etc., R. Co. v.*

Moore (Ky.), 24 Am. & Eng. R. R. Cas. 443.

Coal-miner detailed to repair track and conductor are. *Cumberland, etc., R. Co. v. Scally*, 27 Md. 589.

Contractor's servant and conductor are. *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20; s. c., 71 Am. Dec. 298.

Engineer and conductor are. *Michigan, etc., R. Co. v. Dolan*, 32 Mich. 510; *Ragsdale v. Memphis, etc., R. Co.*, 59 Tenn. (3 Baxt.) 426; *Madden v. Chesapeake*, 28 W. Va. 610; s. c., 57 Am. Rep. 695; *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417. *Contra, Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377; s. c., 17 Am. & Eng. R. R. Cas. 501; *Ross v. Chicago, etc., R. Co.*, 8 Fed. Rep. 544; *Little Miami R. Co. v. Stevens*, 20 Ohio, 415; *Madden v. Railway Co.*, 28 W. Va. 610; s. c., 57 Am. Rep. 695.

Fireman and conductor are. *Slater v. Jewett*, 84 N. Y. 61; s. c., 5 Am. & Eng. R. R. Cas. 515. In *Wood v. Indianapolis, etc., R. Co.*, 47 Mo. 567; s. c., 4 Am. Rep. 353, the conductor of a train of cars was injured in consequence of the mismanagement of the locomotive by a fireman who had been placed in charge of the engine by the agents of the company. In an action for damages against the company, *held*, that they were responsible on the ground that they were "negligent or unmindful of their duty in employing competent and skilful servants in the execution of their business, and injury results therefrom to a fellow-servant."

Laborers riding on train and conductor are. *Howland v. Milwaukee, etc., R. Co.*, 5 Am. & Eng. R. R. Cas. 578; s. c., 54 Wis. 226; *Gilshannon v. Stony Brook R. Co.*, 10 Cush. (Mass.) 228; *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291; *Morgan v. Vale of Neath R. Co.*, L. R. 1 G. B. 149; *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417. But see, *contra, O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239.

Laborer loading cars and conductor are. *McGowan v. St. Louis, etc., R. Co.*, 61 Mo. 528.

Laborer on construction or gravel train and conductor are. *Jeffrey v. Keokuk, etc., R. Co.*, 51 Iowa, 439; 5 Am. & Eng. R. R. Cas. 568; *Cassidy v. Maine Cent. R. Co.*, 76 Me. 488; s. c., 17 Am. & Eng. R. R. Cas. 519; *Ryan v. Cumberland U. R. Co.*, 53 Pa. St. 884; *Chicago, etc., R. Co. v. McDonald*, 21 Ill. App. 409; *Gilshannon v. Stony Brook R. Co.*, 10 Cush. (Mass.) 228; *McGowan v. St. Louis, etc., R. Co.*, 61 Mo. 528. *Contra, Dobbin v.*

Richmond & D. R. Co., 81 N. Car. 446; s. c., 31 Am. Rep. 512.

Laborers employed in construction under orders of conductor of construction train and such conductor are not. Chicago, etc., R. Co. v. Swanson, 16 Neb. 254; s. c., 49 Am. Rep. 718; Chicago, etc., R. Co. v. Lundstrom (Neb.), 21 Am. & Eng. R. R. Cas. 528. And see Burlington & M. R. Co. v. Crockett (Neb.), 24 Am. & Eng. R. R. Cas. 390.

Laborer on track and conductor of gravel train are. The plaintiff, with a large number of other men, was at work for the respondent, "surfacing track;" that is, filling the dirt and gravel between the ties, and dressing up the surface. The gravel used was brought by a train of flat-cars in charge of a conductor and the usual train-hands. It was the duty of the men engaged in "surfacing" to get upon the cars, when the gravel train came up, and shovel off the gravel. The men engaged in "surfacing" were not otherwise connected with the train. *Held*, that the conductor of the train of flat-cars was a fellow-servant of plaintiff, and that, consequently, plaintiff could not recover against the company for an injury resulting from the negligence of the conductor. *Heine v. Chicago & Northwestern R. Co., 58 Wis. 525. But see, *contra*, Burlington, etc., R. Co. v. Crockett (Neb.), 24 Am. & Eng. R. R. Cas. 390.

Superintendent of road and conductor are not. Patterson v. Pittsburg, etc., R. Co., 76 Pa. St. 389; s. c., 18 Am. Rep. 412.

Surveyor riding on train, and conductor, are. Ross v. New York Cent. R. Co., 74 N. Y. 617.

Telegraph-operator and conductor are not. East Tenn., etc., R. Co. v. De Armond (Tenn.), 5 S. W. Rep. 600.

Track-repairer and conductor are. Howd v. Mississippi Cent. R. Co., 50 Miss. 178; New Orleans, etc., R. Co. v. Hughes, 49 Miss. 258. *Contra*, Dick v. Indianapolis, etc., R. Co., 38 Ohio St. 389; s. c., 8 Am. & Eng. R. R. Cas. 101.

Train-dispatcher and conductor are not. McLeod v. Ginther (Ky.), 8 Am. & Eng. R. R. Cas. 162.

Train-hands and conductor are. Manville v. Cleveland, etc., R. Co., 11 Ohio St. (N. S.) 417; Howland v. Milwaukee, etc., R. Co., 54 Wis. 226; s. c., 5 Am. & Eng. R. R. Cas. 578; Pease v. Chicago, etc., R. Co., 61 Wis. 163; s. c., 17 Am. & Eng. R. R. Cas. 527; see also cases *supra*. *Contra*, Moon v. Richmond, etc., R. Co., 78 Va. 745; s. c., 49 Am. Rep. 401; 17 Am. & Eng. R. R. Cas. 531; Ross v.

Chicago, etc., R. Co., 2 McCrary (C. C.), 235; Chicago, etc., R. Co. v. Bayfield, 37 Mich. 205; see also cases cited under LABORER, etc., *supra*.

Train-hands on passenger train are fellow-servants of conductor of gravel train. Manville v. Cleveland, etc., R. Co., 11 Ohio St. 417.

Conductor Acting as Engineer.—*Brakeman* and conductor acting as engineer are. Rodman v. Michigan Cent. R. Co., 55 Mich. 57; s. c., 17 Am. & Eng. R. R. Cas. 521.

Contractor's Servant.—*Conductor* and contractor's servant are. Illinois Cent. R. Co. v. Cox, 21 Ill. 20; s. c., 71 Am. Dec. 148.

Engineer and contractor's servant are. Illinois Cent. R. Co. v. Cox, 21 Ill. 20; s. c., 71 Am. Dec. 148; in Ewan v. Lippincott, 47 N. J. L. 192, the defendant, owning a sawmill, employed master machinists to repair the waterwheel, and the machinists sent the plaintiff, with others, to do the work. It was understood between the workmen and the defendant that the mill should be run when they were not working on the wheel. While they were so at work, the defendant's engineer negligently started the wheel, injuring the plaintiff. *Held*, that the defendant was not liable. *Contra*: In Louisville, etc., R. Co. v. Conroy, 63 Miss. 562; s. c., 56 Am. Rep. 385, it was held that a laborer employed by a contractor for grading a railroad, and a locomotive engineer in the employ and under the control of the company in the same work, are not fellow-servants.

Servants of subcontractor are not fellow-servants of the contractor's employees. Murphy v. Caralli, 3 H. & N. 462; Murray v. Currie, L. R. 6 C. P. 24. One who is employed by a dealer in lumber, to deliver lumber upon an unfinished bridge to subcontractors who have undertaken to build the wooden portion thereof, may recover damages, against the contractors who have undertaken to build the entire superstructure, for an injury sustained by him while so delivering lumber, through a defect in the ironwork of that portion of the bridge which has been completed. Curley v. Harris, 10 Allen (Mass.), 112.

Servants of defendant and those of his contractor are not. In Svenson v. Atlantic Mail S. S. Co., 57 N. Y. 108, the court said: "There was no proof that the plaintiff and the man who caused the injury to him were fellow-servants. The latter was in the employment of the defendant, engaged in unloading the cargo from the steamship upon the

lighter. The former was in the service of the owners of the lighter, in receiving the cargo and transporting the same to the city of New York. They were not the servants of a common principal in any sense, and they were not strictly engaged in the same employment. The duties of the one were confined to the steamship and of the other to the lighter. Hence, this case does not fall within the rule that an employer is not responsible for an injury occasioned to one employee by another engaged in the same general employment." In *Young v. New York Cent. R. Co.*, 30 Barb. (N. Y.) 229, it was held that a servant of a contractor for repairing a railroad bridge, injured by a passing train, through the negligence of the company's servants, may recover from the company. In *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa, 280, the court say: "The deceased, although a subcontractor for the building of bridges, and therefore indirectly in the employ of the defendants, yet his duties were so entirely in another department, and wholly disconnected with operating the road, as that his relation to the employees managing the train which ran over him cannot be, in any proper sense, said to be that of a co-servant." See also *Coughtry v. Globe Woollen Co.*, 56 N. Y. 124; s. c., 15 Am. Rep. 387; *Barrett v. Singer Mfg. Co.*, 1 Sweeny (N. Y.), 545; *Hass v. Philadelphia & S. M. S. S. Co.*, 88 Pa. St. 269; s. c., 32 Am. Rep. 462; *Cunningham v. International R. Co.*, 51 Tex. 503; s. c., 32 Am. Rep. 632; *Riley v. State Line S. S. Co.*, 29 La. Ann. 791; s. c., 29 Am. Rep. 349; *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461. *Contra*, see *Ewan v. Lippincott*, 47 N. J. L. 192; *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20; s. c., 71 Am. Dec. 148. In an action against a city to recover for personal injuries sustained by the plaintiff from the falling in, through the negligence of the servants of the city, of the sides of a sewer which the city was constructing, and in which the plaintiff was at the time engaged in drilling a rock, the plaintiff offered to prove that he was in the employ of a man who employed a large number of men, and who, in his business of drilling and blasting rock for all persons who employed him, sent his workmen from place to place to do the work; that the plaintiff, with other servants of his employer, was sent to drill and blast rock in the bottom of the sewer, under the superintendence of a fellow-workman, who received the same pay as the others; that the workmen were to drill and blast the rock in the sewer in

the places pointed out by the foreman of the sewer department of the city in charge of the whole work; that all the work, except the drilling and blasting, was done by servants of the city; that the whole work, including the drilling and blasting, was under the general supervision of the superintendent of sewers of the city, and under the direct charge of a fireman of the sewer department; that the city paid the plaintiff's employer a certain sum per day for each of his men for the time they were actually employed, and the employer paid his men a less sum each per day, and directed them where to go and what to do, retaining control of them so far that he could change them from one place of work to another and dismiss them. *Held*, that the plaintiff was a fellow-servant with the servants of the city whose negligence caused the injury, and that the action could not be maintained. *Johnson v. City of Boston*, 118 Mass. 114; *Rourke v. White Moss, etc., R. Co.*, L. R. 1 C. P. Div. 556.

Trainmen and contractor's servants are not. *Young v. New York, etc., R. Co.*, 30 Barb. (N. Y.) 229.

Crew.—*Master of lighter*, and crew, are. *Johnson v. Boston, etc., Co.*, 135 Mass. 209; s. c., 46 Am. Rep. 458.

Master of vessel, and seaman, are not. *Thompson v. Herriman*, 47 Wis. 602.

Mate and common sailor are. *Benson v. Goodwin (Mass.)*, 17 N. East. Rep. 517.

Stevedore and crew are not. *Murry v. Currie*, L. R. 6 C. P. 24.

Pilot and crew are not. *Smith & Steele*, 10 Q. B. 125.

Deck-hand.—*Employee on one vessel* and deck-hand on another, the owners of the two vessels being partners, are not. *Connolly v. Davidson*, 15 Minn. 519; s. c., 2 Am. Rep. 154.

Mate and deck-hand are not. *Daub v. Northern, etc., Co.*, 18 Fed. Rep. 625.

Contra: *Mate* and sailor are. *Olson v. Clyde*, 32 Hun (N. Y.) 425; *Bensen v. Goodwin (Mass.)*, 17 N. East. Rep. 517.

Pilot and deck-hand are not. *Smith v. Steele*, L. R. 10 Q. B. 125; *The Titan*, 23 Fed. Rep. 413.

Depot Superintendent.—*Laborer* and depot superintendent are not. *Lalor v. Chicago, etc., R. Co.*, 52 Ill. 401.

Derrick-manager.—*Laborer* and foreman using derrick are. *Duffy v. Upton*, 113 Mass. 114; *Scott v. Sweeny*, 34 Hun (N. Y.) 292.

Derrick-operator.—*Brakeman* and laborer setting up derrick are. *Holden v. Fitchburg, etc., R. Co.*, 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94.

Laborer moving stone on truck, and fore-

man in charge of derrick, are. *Scott v. Sweeney*, 98 N. Y. 211.

Detective.—*Engineer* and detective are. *Pyne v. Chicago*, etc., R. Co., 54 Iowa, 223; s. c., 37 Am. Rep. 198.

Servants Running Hand-car.—Plaintiff having been at divers times employed by defendant as a detective in case of property stolen from its cars, was requested by defendant's agent, duly authorized for that purpose, to go from one station on defendant's road to another to aid in discovering persons who had stolen property from defendant's cars at the latter station; and the means of conveyance furnished by defendant was a hand-car. *Held*, that the defendant was liable for any injury to plaintiff while riding upon said car, caused either by the unfitness of such means of conveyance or by any negligence of defendant's servants in running the same. *Pool v. Chicago*, etc., R. Co., 53 Wis. 657.

Directors.—*Employees* and directors of a railroad company are not. *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174.

Draughtsman.—*Carpenter* and draughtsman are not. *Baird v. Pettit*, 70 Pa. St. 477.

Drawer of Iron.—*Hammerer* and drawer of iron are. *Bartonshill*, etc., Co. v. Reid, 3 Mc Q. (H. L. Cas.) 266.

Driller.—*Laborer.*—One employed in a building in process of construction, to drill holes in an iron girder on the fourth floor, is a fellow-servant of persons engaged in clearing up rubbish on the eighth floor and dumping it through the open floors into the cellar. *Somer v. Harrison* (Pa.), 8 Atl. Rep. 799.

Driver boss.—"Mining-boss" and "driver boss" are. *Lehigh V. Coal Co. v. Jones*, 86 Pa. St. 432.

Driver of Stage-coach.—*Guard* and driver of stage-coach are. *Bartonshill*, etc., Co. v. Reid, 3 Mc Q. (H. of L.) 226.

Driver of Street-car.—*Passenger.*—The plaintiff was a passenger on a car of a street railway having but one track, with occasional turnouts. In turning out to avoid a car coming in the other direction, the car ran beyond the turnout and the driver requested the plaintiff to assist him in backing it upon the turnout. While so engaged, he was injured by the negligence of the driver of another car. *Held*, that the railway company was liable. *Street R. Co. v. Bolton*, 43 Ohio St. 224; s. c., 54 Am. Rep. 803.

Elevator Engineer.—*Defendant's servant* was injured by the falling of an elevator used to hoist grain into a storage building. The accident was occasioned by the negligence of the engineer in

charge, in allowing the elevator to be carried too high, thereby breaking the rope by which it was raised. *Held*, that the defendant was not liable for such neglect of a co-employee of plaintiff. *Stringham v. Stenart*, 27 Hun (N. Y.), 562.

Employee bound to keep fire apparatus in repair. *mill-hand* and, are. *Jones v. Granite Mills Co.*, 126 Mass. 84; s. c., 30 Am. Rep. 661.

Employees riding free on railway train, and train hands, are. *Howland v. Milwaukee*, etc., R. Co., 54 Wis. 226; s. c., 5 Am. & Eng. R. R. Cas. 578; *Ross v. New York*, etc., R. Co., 74 N. Y. 617; *Tunney v. Midland*, etc., R. Co., L. R. 1 C. P. 291; *Kansas*, etc., R. Co. v. Salmon, 11 Kan. 83; *Copper v. Louisville*, etc., R. Co., 103 Ind. 305; s. c., 21 Am. & Eng. R. R. Cas. 525; *Gilshannon v. Stonybrook*, etc., R. Co., 10 Cush. (Mass.), 228; *Seaver v. Boston*, etc., R. Co., 14 Gray (Mass.), 466; *Dallas v. Gulf*, etc., R. Co., 61 Tex. 196; *Vick v. New York*, etc., R. Co., 95 N. Y. 267; s. c., 17 Am. & Eng. R. R. Cas. 609; *Manville v. Cleveland*, etc., R. Co., 11 Ohio St., 417; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366; s. c., 74 Am. Dec. 259; *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202; s. c., 17 Am. & Eng. R. R. Cas. 614. *Contra.*—Plaintiff intestate was hired from day to day as a brakeman, running between X and Y every day except Sunday, for which day he was not paid unless employed. He was, however, expected to remain at X from Saturday night till Monday morning; but his family residing in Y, he received permission one Sunday to visit them, and, while travelling thither under a conductor's pass, he was killed by the negligence of the company's employees. *Held*, that he was not a co-employee. *State v. Western Md. R. Co.*, 63 Md. 433; see also *O'Donnell v. Allegheny*, etc., R. Co., 59 Pa. St. 239; *Russell v. Hudson*, etc., R. Co., 5 Dur. (N. Y.) 39; *Baltimore*, etc., R. Co. v. State, 33 Md. 542; *Hutchinson v. York*, etc., R. Co., 5 Ech. 343.

Employee Using Hand-car.—*Track repairer.* A gang of track-repairers on a railroad quit work fifteen minutes before the usual hour by order of the foreman, whither they were to be carried free, according to a monthly custom, to be paid off. The plaintiff, in endeavoring to board the train, was injured by a hand-car worked by other men in the company's employment. *Held*, that he could not recover therefor. *O'Brien v. Boston & A. R. Co.*, 138 Mass. 387; s. c., 52 Am. Rep. 279.

Engineer.—*Boiler-maker* and engineer are not. *Pennsylvania, etc., R. Co. v. Mason*, 109 Pa. St. 296; s. c., 58 Am. Rep. 722.

Brakeman and engineer are. See BRAKEMAN.

Brakeman Working Switch.—A brakeman working a switch for his train on one track in a railroad-yard is a fellow-servant with the engineman of another train of the same corporation upon an adjacent track, and cannot maintain an action against the corporation for an injury caused by the negligence of the engineman in driving his engine too fast, and not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engineman. *Randall v. Baltimore & O. R. Co.*, 109 U. S. 498; s. c., 15 Am. & Eng. R. R. Cas. 243.

Car-coupler and engineer are. *Kroy v. Chicago, etc., R. Co.*, 32 Iowa, 357; *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Summerhays v. Kansas, etc., R. Co.*, 2 Colo. 484; *St. Louis, etc., R. Co. v. Britz*, 72 Ill. 256; *Smith v. Potter*, 46 Mich. 258, s. c., 2 Am. & Eng. R. R. Cas. 140; *Nashville, etc., R. Co. v. Wheelless*, 10 Lea (Tenn.), 741; s. c., 4 Am. & Eng. R. R. Cas. 633; *Fowler v. Chicago, etc., R. Co. (Wis.)*, 17 Am. & Eng. R. R. Cas. 358; *Hayes v. Western R. Co.*, 3 Cush. (Mass.) 270. *Contra, Louisville, etc., R. Co. v. Moore (Ky.)*, 24 Am. & Eng. R. R. Cas. 443. In *Eason v. Sabine & E. T. R. Co.*, 65 Tex. 577; s. c., 57 Am. Rep. 606, the plaintiff, in the employ of persons shipping lumber by the defendant's cars, was requested by the defendant's conductor to couple a car to facilitate the loading, and was injured by the negligence of the engineer. *Held*, that the defendant was liable.

Car-inspector and engineer are not. *Chicago & A. R. Co. v. Hoyt (Ill.)*, 31 Am. & Eng. R. R. Cas. 309.

Car-repairer and engineer are. *Chicago, etc., R. Co. v. Murphy*, 53 Ill. 336; s. c., 5 Am. Rep. 48; *Valtz v. Ohio, etc., R. Co.*, 85 Ill. 56; *Cone v. Delaware, L. & W. R. Co.*, 81 N. Y. 207; s. c., 2 Am. & Eng. R. R. Cas. 57; *Texas, etc., R. Co. v. Harrington*, 62 Tex. 597; s. c., 21 Am. & Eng. R. R. Cas. 571; *Virginia, etc., R. Co. v. Norment (Va.)*, 4 S. E. Rep. 211.

Carpenter and engineer are not. *Ryan v. Chicago, etc., R. Co.*, 60 Ill. 171; s. c., 14 Am. Rep. 32.

Carpenter going from work, and engineer, are not. *Ryan v. Chicago, etc., R. Co.*, 60 Ill. 171.

Conductor and engineer are. *Michigan, etc., R. Co. v. Dolan*, 32 Mich. 510; *Ragdsdale v. Memphis, etc., R. Co.*, 59 Tenn. (3 Baxt.) 426; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610; s. c., 57 Am. Rep. 695; *Manville v. Cleveland & Toledo R. Co.*, 11 Ohio St. 417. *Contra, Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 277; s. c., 17 Am. & Eng. R. R. Cas. 501; *Ross v. Chicago, etc., R. Co.*, 8 Fed. Rep. 544; *Little Miami R. Co. v. Stevens*, 20 Ohio, 414; *Madden v. Railway Co.*, 28 W. Va. 610; s. c., 57 Am. Rep. 695.

Contractor's laborer and engineer are not. M. contracted with a railroad company to do certain grading for it. The company furnished an engineer and a train to move the dirt. The engineer was engaged and paid by the company, and was under its control and direction except that M. gave the signals when to move. While such train was being run under the exclusive management of the engineer except in the particular just indicated, it ran over a cow, was thrown from the track, and C., a laborer employed by M. to throw dirt to and from the train, was injured. *Held*, that the engineer, being the servant of the railroad company, was not a fellow-servant with C., and an action by the latter against the railroad company for the injury thus sustained cannot be defeated by the defence that the plaintiff and the engineer were fellow-servants. *Louisville, etc., R. Co. v. Conroy*, 63 Miss. 562; s. c., 56 Am. Rep. 855.

Detective and engineer are. *Payne v. Chicago, etc., R. Co.*, 54 Iowa, 223; s. c., 37 Am. Rep. 198.

Employee in engine-yard and engineer are. *Tex. & Pac. R. Co. v. Harrington*, 62 Tex. 597; *Keys v. Pennsylvania R. Co. (Pa.)*, 3 Atl. Rep. 15.

Engineer, and engineer on different engine belonging to same company, are. *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977; s. c., 8 Am. & Eng. R. R. Cas. 171; *Van Avery v. Union Pac. R. Co.*, 35 Fed. Rep. 40. *Contra, compare Railroad Co. v. Ackerly (Ky.)*, 8 S. W. Rep. 691.

Engine builders and repairers and engineer are not. *Toledo, etc., R. Co. v. Moore*, 77 Ill. 217, where an engineer and fireman were killed by the explosion of a locomotive boiler which had been recently and insufficiently repaired in the shops of the company, the company is not relieved from liability by the fact that the repairers and the deceased were fellow-servants, although under the same superintendent. *Pennsylvania, etc., Canal & R.*

Co. v. Mason, 109 Pa. St. 286; s. c., 5 Am. Rep. 272.

Fireman and engineer are. Jordan v. Wells, 3 Woods (C. C.), 527; Nashville etc., R. Co. v. Handman, 15 Lea (Tenn.), 423; Bull v. Mobile, etc., R. Co., 67 Ala. 206; Henry v. Lake Shore, etc., R. Co., 49 Mich. 495; Murry v. S. Carolina R. Co., 1 McMullan (S. Car.), 385; Pauliner v. Erie R. Co., 34 N. J. L. 151; Alabama, etc., R. Co. v. Waller, 48 Ala. 459; Howard v. Denver, etc., R. Co., 26 Fed. Rep. 837; s. c., 24 Am. & Eng. R. Cas. 448. *Contra.*—In Mann v. Oriental Print Works, 11 R. I. 152, a fireman employed to tend an engine fire was called upon by the engineer to assist in throwing on a belt which worked a pump used to fill the boiler. The fireman, being injured by the belt, brought an action for the injury received against the corporation, which employed both the engineer and himself. *Held:* (1) That if the fireman, although employed only for a fireman, was placed under the orders of the engineer, and was by him suddenly called upon to assist in throwing on a belt, out of his own sphere but within the sphere of duty of the engineer, and was thus subjected to a risk with which he was not acquainted, or to a peculiar and greater risk at that time of which he was not informed or cautioned, the defendant would be liable; (2) that unless the plaintiff fireman had been instructed not to obey the engineer except in the line of the fireman's employment, the engineer was authorized to call upon him for assistance in any matter within the engineer's department, and the defendant would be liable even if there was another person who might more properly be called upon; (4) that if the plaintiff fireman was instructed not to obey the engineer out of the line of his employment, and he chose, notwithstanding, to obey, he could not hold the defendant liable. (5) that if the throwing on and off of the belts was not within the engineer's department, but was confined by the corporation to a belt-fixer, the defendant would not be liable.

Foreman of crew of wreckers who boards train on the road where a wreck has occurred, is a fellow-servant of the engineer of the train and a colliding train, although not in the service at the time, but only on his way to work. Abend v. Terre Haute & I. R. Co., 111 Ill. 202; s. c., 17 Am. & Eng. R. R. Cas. 614.

Laborer on construction train, and engineer, are. Missouri Pac. R. Co. v. Haley, 45 Kan. 35; s. c., 5 Am. & Eng. R. R. Cas. 594; Chicago, etc., R. Co. v. Keefe, 47 Ill. 108; Ohio, etc., R. Co. v.

Tindall, 13 Ind. 366; s. c., 74 Am. Dec. 259; St. Louis, etc., R. Co. v. Schackelford, 42 Ark. 417.

Machinists and engineer are. Noyes v. Smith, 28 Vt. 59; s. c., 65 Am. Dec. 222. *Contra*, Fuller v. Jewett, 80 N. Y. 46; s. c., 36 Am. Rep. 575.

Master mechanic and engineer are not. Hough v. Texas & Pac. R. Co., 100 U. S. 213; Ford v. Fitchburg R. Co., 110 Mass. 240; s. c., 13 Am. Rep. 598. *Contra*, Hard v. Vermont, etc., R. Co., 32 Vt. 473.

Person having entire charge and control of freight business, and persons in charge of engine, are. Speed v. Atlantic & Pac. R. Co., 71 Mo. 303; s. c., 2 Am. & Eng. R. R. Cas. 77.

Repairmen and engineer are. Pennsylvania R. Co. v. Watcher, 60 Md. 395; s. c., 15 Am. & Eng. R. R. Cas. 188.

Roadmaster and engineer are. Walker v. Boston & M. R. Co., 128 Mass. 8; s. c., 1 Am. & Eng. R. R. Cas. 141.

Section-hand and engineer are. (See TRACK-REPAIRER, *infra*.) Gormley v. Ohio, etc., R. Co., 72 Ind. 31; s. c., 5 Am. & Eng. R. R. Cas. 582; Blake v. Maine Cent. R. Co., 70 Me. 60; Clifford v. Old Colony R. Co., 141 Mass. 564; Houston & T. C. R. Co. v. Rider, 62 Tex. 267. *Contra*, Calvo v. Charlotte, etc., R. Co., 23 S. Car. 526; s. c., 55 Am. Rep. 28.

Section-master or section foreman and engineer are not. Calvo v. Charlotte, C. & R. Co., 23 S. Car. 526; s. c., 28 Am. & Eng. R. R. Cas. 327; St. Louis & S. F. R. Co. v. Weaver, 35 Kan. 412; s. c., 28 Am. & Eng. R. R. Cas. 341.

Servants of lessee road and engineer of lessor road run the risk of each other's negligence. Clark v. Chicago, B. & Q. R. Co., 92 Ill. 43.

Shoveller.—Engineer in charge of a steam-shovel, and a workman engaged with the said machine, are co-employees. Thompson v. Chicago, M. & St. P. R. Co., 18 Fed. Rep. 239.

The engineers and shovellers employed on a construction train are co-servants, engaged in the same branch of service. St. Louis & S. R. Co. v. Britz, 72 Ill. 256; Chicago, etc., R. Co. v. McDonald, 21 Ill. App. 409.

Signalman and engineer are. East Tenn., etc., R. Co. v. Rush, 15 Lea (Tenn.), 145.

Station agent and engineer are fellow-servants. Brown v. Minneapolis & St. L. R. Co., 31 Minn. 553; s. c., 15 Am. & Eng. R. R. Cas. 333.

Station-master.—A station-master to whom was given the charge and management of all the freight trains within his

division, and on whom the special duty devolved of keeping the track clear of obstructions, while engaged in attending to his own personal affairs, was crossing the railway less than 80 rods from a public highway, and run over and injured by one of the trains. The engineer failed to ring the bell or sound the whistle. *Held*, that the station-master was not merely an employee of the company, but, being its agent, having superintendence of the freight trains, he could not hold the company responsible for the negligence of the engineer in failing to sound the bell or whistle; that, if he was not at the time acting as such agent, he was failing in his duty, and could not make his negligence the foundation of a recovery. *Evans v. Atlantic & Pac. R. Co.*, 62 Mo. 49; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419. *Contra* *Dealey v. Philadelphia, etc., R. Co. (Pa.)*, 4 Atl. Rep. 170.

Subcontractor for building bridges for a railroad is not a co-servant with those employed by it in managing its trains, so as to relieve the railroad from responsibility for injuries caused to the former through negligence of the latter. *Donaldson v. Mississippi & Mo. R. Co.*, 18 Iowa, 280: s. c., 87 Am. Dec. 391.

Superintendent and engineer are not. *Washburn v. Nashville, etc., R. Co.*, 3 Head (Tenn.), 368; s. c., 75 Am. Dec. 784.

Switchman and engineer are. *Brown v. Central Pac. R. Co. (Cal.)*, 7 Pac. Rep. 447; *Farwell v. Boston, etc., R. Co.*, 4 Metc. (Mass.) 49; s. c., 38 Am. Dec. 339; *Smith v. Memphis & L. R. Co.*, 18 Fed. Rep. 304; *Satterly v. Morgan*, 35 La. Ann. 1166; *Chicago, etc., R. Co. v. Henry*, 7 Ill. App. 322; *Columbia, etc., R. Co. v. Troesch*, 68 Ill. 545; *East Tenn., etc., R. Co. v. Gurley*, 12 Lea (Tenn.), 46; s. c., 17 Am. & Eng. R. R. Cas. 568; *Fowler v. Chicago, etc., R. Co.*, 61 Wis. 159; s. c., 17 Am. & Eng. R. R. Cas. 536; *Naylor v. New York, etc., R. Co.*, 33 Fed. Rep. 801. But an engineer employed by a company owning and running trains, injured by the negligence of a switch-tender employed by a different company owning and leasing the road, is not fellow-servant of such switchman. *Smith v. New York & H. R. Co.*, 19 N. Y. 127; s. c., 75 Am. Dec. 205.

Teamster.—A teamster who hauls ties in the construction of a railroad is not associated with the engine-driver of a train on which the workmen ride to dinner, so as to defeat his recovery against the common master for injuries caused by negligence of said engine-driver. *Hobson v.*

New Mexico & A. R. Co. (Ariz.), 28 Am. & Eng. R. R. Cas. 360.

Telegraph-operator and engineer are. *Dana v. New York, etc., R. Co.* 23 Hun (N. Y.). *Contra*, *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610; s. c., 57 Am. Rep. 694.

Track-repairer and engineer are. (See SECTION-HAND, *supra*) *O'Connel v. Baltimore, etc., R. Co.*, 20 Md. 21; s. c., 83 Am. Dec. 549; *Ryan v. Cumberland, etc., R. Co.*, 23 Pa. 384; *Baltimore, etc., Co. v. State*, 41 Md. 277; *Pennsylvania, etc., R. Co. v. Watcher*, 60 Md. 395; s. c., 15 Am. & Eng. R. R. Cas. 187; *Collins v. St. Paul, etc., R. Co.*, 30 Minn. 31; s. c., 8 Am. & Eng. R. R. Cas. 150; *Ohio, etc., R. Co. v. Collarn*, 72 Ind. 261; s. c., 38 Am. Rep. 134; *Van Winkle v. Manhattan R. Co.*, 32 Fed. Rep. 278; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366; s. c., 74 Am. Dec. 259; *Whaalen v. Mad River, etc., R. Co.*, 8 Ohio St. 249; *Coon v. New York, etc., R. Co.*, 5 N. Y. 492; *St. Louis, etc., R. Co. v. Shackelford*, 42 Ark. 417; *Sullivan v. Mississippi, etc., R. Co.*, 11 Iowa, 421; *Connelly v. Minneapolis E. R. Co. (Minn.)*, 35 N. W. Rep. 582. *Contra*.—See *Calvo v. Charlotte, etc., R. Co.*, 23 S. Car. 526; s. c., 55 Am. Rep. 28; *Chicago, etc., R. Co. v. Moranda*, 93 Ill. 302; s. c. 17 Am. & Eng. R. R. Cas. 564; *Dick v. Indianapolis, etc., R. Co.*, 38 Ohio St. 390; s. c., 8 Am. & Eng. R. R. Cas. 101; *Pittsburg, etc., R. Co. v. Powers*, 74 Ill. 341; *Toledo, etc., R. Co. v. O'Connor*, 77 Ill. 391; *Garrahy v. Kansas City, etc., R. Co.*, 25 Fed. Rep. 258.

Train-dispatcher.—In *Blessing v. St. Louis, Kansas City & N. R. Co.*, 77 Mo. 410; s. c., 15 Am. & Eng. R. R. Cas. 298, an action against a railroad company, to recover for the death of a locomotive engineer killed, while on duty, through the negligence of the train-dispatcher, the plaintiff failed to show that the train-dispatcher and the engineer were not fellow-servants. *Held*, that for this omission the plaintiff was properly nonsuited. *Contra*, *Dorigan v. New York & N. E. R. Co.*, 52 Conn. 285; s. c., 52 Am. Rep. 590; *Lewis v. Serfert*, 116 Pa. St. 628.

Tunnel, Workman in.—Where one employed by a railroad company to work in a tunnel was ordered by the superintendent of the work, under threat of dismissal, to get on a freight train for transportation to another tunnel, and in doing so he was violently cast on the ground and injured by the negligence of the engineer in starting the train, the company is not liable. *Capper v. Louisville, etc.,*

R. Co., 103 Ind. 305; s. c., 21 Am. & Eng. R. R. Cas. 525.

Workman in Same Business.—Where machinery is held together by two clamps, which are improper appliances and make the use of the machinery dangerous, and one of these clamps breaks, and the engineer continues to run the machinery with but one clamp, which renders the use of the machinery more dangerous, and this afterwards breaks and injures a workman engaged in the same general business, the employer is not responsible; for the proximate cause of the injury was the carelessness of the engineer, who was a fellow-servant of the injured man, in running his engine when it was dangerous. *Philadelphia Iron & S. Co. v. Davis*, 111 Pa. St. 597.

Yardmaster and engineer are. *Michigan Cent. R. Co. v. Gilbert* (Mich.), 2 Am. & Eng. R. R. Cas. 230; *East Tenn. etc., R. Co. v. Gurley*, 12 Lea (Tenn.), 46; s. c., 17 Am. & Eng. R. R. Cas. 568.

Yardman and engineer are. *Bradley v. Nashville, etc., R. Co.*, 14 Lea (Tenn.) 374.

Engineer at Mine.—*Miners in shaft*, and runner of engine employed in lowering men and material, are. *Buckley v. Gould, etc., Co.*, 14 Fed. Rep. 833.

Engineer in Charge of Steam-shovel. *Workman* engaged with steam-shovel, and engineer in charge of it, are fellow-servants. *Thompson v. Chicago, etc., R. Co.*, 18 Fed. Rep. 239.

Engine-stripper.—*Yard-hand* and person employed to strip engines are. *Chicago, etc., R. Co. v. Scheuring*, 4 Ill. App. 533.

Engine-repairer.—*Brakeman* and engine-repairer are. *Shauck v. Northern Cent. R. Co.*, 25 Md. 462.

Engineer and engine-repairer are not. *Pennsylvania, etc., R. Co. v. Mason*, 109 Pa. St. 296; s. c., 58 Am. Rep. 722.

Fireman and engine-repairer are not. *Philadelphia, etc., R. Co. v. Mason*, 109 Pa. St. 296; s. c., 58 Am. Rep. 722.

Excavator.—*Mining engineer* and excavator are. *Buckley v. Gould, etc., Mining Co.*, 14 Fed. Rep. 833.

Express Agent.—*Assistant* and express agent driving team are. *Dwyer v. American Ex. Co.*, 55 Wis. 453; s. c., 8 Am. & Eng. R. R. Cas. 159.

Employees of steamboat and express agent are not. *Yoemans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

Employees on freight train and expressman on passenger train are not. *Central Trust Co. v. Wabash, etc., R. Co.*, 34 Fed. Rep. 616.

Engineer and express agent are where

a railway does its own express business. *Baltimore & O. R. Co. v. McKenzie* (Va.), 24 Am. & Eng. R. R. Cas. 395.

Section boss and expressman are not. *Baltimore & O. R. Co. v. McKenzie* (Va.), 24 Am. & Eng. R. R. Cas. 395.

Trainmen and express agent are. *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585. *Contra*, *Blair v. Erie R. Co.* 66 N. Y. 313; s. c., 23 Am. Rep. 55.

Express Company's Employee.—*Manager* and employee of express company are. *Dwyer v. Adams Ex. Co.*, 55 Wis. 453; s. c., 8 Am. & Eng. R. R. Cas. 159.

Factory Boss.—*Girl operators.*—The plaintiff, a girl fifteen years old, was employed in the defendant's factory and was kept at work until three o'clock Sunday mornings, and was then, by order of the superintendent, allowed to remain in the factory until daylight, but only in a basement room. On the occasion in question the night overseer of the factory, finding the basement room damp, put the plaintiff, with other children, operatives, in a second-story lighted room, which had an unguarded elevator hole in the adjoining unlighted passageway. The children played at hide-and-seek, and the plaintiff, running into the passageway, fell through the hole and was injured. *Held*, the defendant was properly held liable. *Atlanta Cotton Factory Co. v. Speer*, 69 Ga. 137.

Fireman.—*Brakeman* and fireman are. *Kersey v. Kansas City, etc., R. Co.*, 79 Mo. 362; s. c., 17 Am. & Eng. R. R. Cas. 638; *Greenwood v. Marquette, etc., R. Co.*, 49 Mich. 197; s. c., 8 Am. & Eng. R. R. Cas. 133; *Galveston, etc., R. Co. v. Faber*, 63 Tex. 347.

Boiler-maker and fireman are not. *Nashville, etc., R. Co. v. Jones*, 9 Heisk. (Tenn.) 27.

Bridge-builder and fireman are not. *Davis v. Central Vermont R. Co.*, 55 Vt. 84; s. c., 11 Am. & Eng. R. R. Cas. 173.

Conductor and fireman are. *Slater v. Jewett*, 84 N. Y. 61; s. c., 5 Am. & Eng. R. R. Cas. 515; *Wood v. Indianapolis, etc., R. Co.*, 47 Mo. 567; s. c., 4 Am. Rep. 353.

Directors and fireman are not. *Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174.

Engineer and fireman are. *Jordon v. Wells*, 3 Woods, (C. C.) 529; *Nashville, etc., R. Co. v. Handman*, 13 Lea (Tenn.), 423; *Bull v. Mobile, etc., R. Co.*, 67 Ala. 206; *Henry v. Lake Shore, etc., R. Co.*, 49 Mich. 495; *Murry v. S. Carolina R. Co.*, 1 McMullen (S. Car.), 385; *Paulimer v. Erie R. Co.*, 34 N. J. L. 151; *Alabama, etc., R. Co. v. Walker*, 48 Ala. 459. A fireman on a passenger train, and an

engineer in charge of an engine not connected with such train but belonging to the same railroad company, are fellow-servants; and where the fireman is killed by a collision between the engine and the train, caused by the negligence of the engineer, the company will not be held liable. *Howard v. Denver, etc., R. Co.*, 26 Fed. Rep. 837; s. c., 24 Am. & Eng. R. R. Cas. 448. *Contra.*—See *Mann v. Oriental Print Works*, 11 R. I. 152.

General superintendent and fireman are not. *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245.

Mail-catcher.—Person whose duty it is to see that mail-catcher is not placed too near track, and fireman, are not. *Chicago, etc., R. Co. v. Gregory*, 58 Ill. 272.

Master-mechanic and fireman are not. *Krueger v. Louisville, etc., R. Co. (Ind.)*, 31 Am. & Eng. R. R. Cas. 329.

Master of steam-tug, and fireman, are not. *Clatsop Chief*, 7 Sawy. (C. C.) 274.

Roadmaster and fireman are. *Walker v. Boston & M. R. Co.*, 128 Mass. 8; s. c., 1 Am. & Eng. R. R. Cas. 141. *Contra*, *Davis v. Central Vermont R. Co.*, 55 Vt. 84; s. c., 11 Am. & Eng. R. R. Cas. 173.

Switch-constructor and fireman are. *King v. Boston, etc., R. Co.*, 9 Cush. (Mass.) 112.

Switchman and fireman are. *Harvey v. New York Cent. R. Co.*, 88 N.Y. 481; s. c., 8 Am. & Eng. R. R. Cas. 515.

Telegraph operator.—A fireman on a railway train was killed by a collision between his train and another, which was behind time. It was the custom and rule of the company, when a train was behind time, to move it in conformity to telegraphic orders from the train-dispatcher, to be delivered by the receiving operator to the conductor and engineer in the presence of one another. In this instance the train-dispatcher telegraphed directing the late train to await the other at a specified station. The operator gave the message to the conductor, but not to the engineer; the conductor receipted for it in the engineer's name, without the engineer's knowledge, and the operator advised the train-dispatcher that it had been duly communicated. The conductor forgot to deliver the order to the engineer, and the engineer proceeded, and thus caused the collision. It did not appear but that the conductor and operator were competent and skilful, and it appeared that the rule had worked well for several years. *Held*, that the negligence was that of fellow-servants of the deceased, and there could be no recovery therefor against the company.

Staler v. Jewett, 85 N.Y. 61; s. c., 39 Am. Rep. 627 5. Am. & Eng. R. R. Cas. 515. *Compare Sheehan v. New York, etc., R. Co.*, 91 N.Y. 332.

Track-walker and fireman are. So held where the former was injured by the fall of a lump of coal negligently piled upon the locomotive tender. *Schultz v. Chicago & N. W. R. Co.*, 67 Wis. 616; s. c., 58 Am. Rep. 881.

Train-dispatcher and fireman are not. *Crew v. St. Louis, etc., R. Co.*, 20 Fed. Rep. 87; *Smith v. Wabash, St. L. & Pac. (Mo.)*, 4 S. W. Rep. 129.

Trainmaster and fireman are not. *Crew v. St. Louis, etc., R. Co.*, 20 Fed. Rep. 87.

Flagman.—*Brakeman* and flagman are. *Cooper v. Milwaukee, etc., R. Co.*, 23 Wis. 668.

Car-repairer and flagman are. *Gilman v. Eastern R. Co.*, 13 Allen (Mass.), 433.

Carpenter in repair-shop and flagman are. *Tilmore v. Eastern R. Co.*, 13 Allen (Mass.), 433.

Yardmaster and flagman are. *Webb v. Richmond, etc., R. Co.*, 97. N. Car. 837.

Foreman.—*Boy apprentice* and foreman in machine shop are not. *Missouri Pac. R. Co. v. Gregory*, 36 Kan. 424.

Brakeman.—To constitute a servant of a railroad company vice-principal, so as to hold the company liable for his negligence toward another servant, it is not sufficient to show that the duties of the former were to direct and control assistant brakemen in the service of the company at a particular yard, and that the latter was one of the assistant brakemen at that yard. *Rains v. St. Louis, etc., R. Co.*, 71 Mo. 164; s. c., 5 Am. & Eng. R. R. Cas. 610.

Carpenter building bridge, and foreman, are. *Yager v. Atlantic, etc., R. Co.*, 4 Hughes (C. C.), 192; *Neubar v. New York, L. E. & W. R. Co.* 101 N.Y. 607.

Car-repairer, and foreman under whom he is working, are. *Fraker v. St. Paul, etc., R. Co.*, 32 Minn. 54; s. c., 15 Am. & Eng. R. R. Cas. 256; *Kirk v. Atlanta, etc., R. Co.*, 94 N. Car. 625; s. c., 25 Am. & Eng. R. R. Cas. 507. *Contra*, *Lake Shore, etc. R. Co. v. Lavelley*, 36 Ohio St. 221; s. c., 5 Am. & Eng. R. R. Cas. 549; *Hannibal, etc., R. Co. v. Fox*, 31 Kan. 557; s. c., 15 Am. & Eng. R. R. Cas. 325; *Luebke v. Chicago, etc., R. R. Co.*, 59 Wis. 127; s. c., 15 Am. & Eng. R. R. Cas. 183; *Moore v. Wabash, etc., R. Co.*, 85 Mo. 86.

Engineer and foreman of crew of wreckers, who boards a train for a place on the road where a wreck has occurred,

is a fellow-servant of the engineer of the train and a colliding train, although not in service at the time, but only on his way to work. He cannot, therefore, recover for an injury caused by the negligence of either of such engineers. *Abend v. Terre Haute & I. R. Co.* 111 Ill. 203; s. c., 17 Am. & Eng. R. R. Cas. 614.

Machinist helper and foreman of a round-house are. *Gonsion v. Minneapolis & St. L. R. Co.* (Minn.), 31 N. W. Rep. 515.

Hod-carrier and foreman are. *Green v. Banta*, 48 N. Y. Sup. Ct. 156.

Laborer, or subordinate generally, and foreman were held to be fellow-servants in the following cases: *Peterson v. Whitebreast*, etc., Co., 50 Iowa, 673; s. c., 32 Am. Rep. 143; *Hofnagle v. New York Cent. R. Co.*, 55 N. Y. 608; *Laughlin v. State*, 105 N. Y. 159; *Murphy v. Boston & Albany R. Co.*, 59 How. Pr. (N. Y.) 197; *Hawrath v. Northern Cent. R. Co.*, 46 Md. 280; *Zeigler v. Day*, 123 Mass. 152; *Cumberland Coal & Iron Co. v. Scally*, 27 Md. 589; *Hogan v. Central Pac. R. Co.*, 49 Cal. 128; *Willis v. Oregon R. & N. Co.* (Ore.), 17 Am. & Eng. R. R. Cas. 539; *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162; *Olson v. St. Paul*, etc., R. Co. (Minn.), 33 Am. & Eng. R. R. Cas. 356; *Brick v. Rochester*, etc., R. Co., 98 N. Y. 211; s. c., 21 Am. & Eng. R. R. Cas. 605; *Hart v. New York Floating Dry Dock Co.*, 48 N. Y. Super. Ct. 460; *Albro v. Agawam*, etc., Co., 6 Cush. (Mass.) 75; *Chicago*, etc., R. Co. *v. Simmons*, 11 Ill. App. 147; *Houser v. Chicago*, etc., R. Co., 60 Iowa, 230; s. c., 46 Am. Rep. 65; *Lawler v. Androscoggin*, etc., R. Co. 62 Me. 463; s. c. 16 Am. Rep. 492; *Cumberland Coal*, etc., Co. *v. Scally*, 27 Md. 589; *Daubert v. Pickel*, 4 Mo. App. 590; *Barrington v. Delaware*, etc., R. Co. 19 Hun (N. Y.), 216; *Scott v. Sweeny*, 54 Hun (N. Y.), 292; *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep. 570; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 433; *Weger v. Pennsylvania R. Co.* 55 Pa. St. 460; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; s. c., 42 Am. Rep. 543; *Fones v. Phillips*, 39 Ark. 17; *Hoth v. Peters*, 55 Wis. 405; *Peschel v. Chicago*, etc., R. Co., 62 Wis. 338; s. c., 17 Am. & Eng. R. R. Cas. 545; *Doughty v. Penobscot*, etc., Co., 76 Me. 143; *Conley v. Portland*, 78 Me. 217; *Berea*, etc., Co. *v. Kraft*, 31 Ohio St. 287; s. c., 27 Am. Rep. 510; *Copper v. Louisville*, etc., R. Co., 103 Ind. 305; s. c., 21 Am. & Eng. R. R. Cas. 525; *Indiana Car Co. v. Parker*, 100 Ind. 191; *Drinkout v. Eagle Machine Works*, 90 Ind. 423; *Brazil*, etc., Coal Co. *v. Cain*, 98 Ind. 282; *Wright v. New*

York, etc., R. Co., 25 N. Y. 562; *Crispin v. Bobbitt*, 81 N. Y. 516; s. c., 37 Am. Rep. 521; *McDermott v. City of Boston*, 133 Mass. 349; *Flynn v. City*, 134 Mass. 351; *Beilfus v. New York*, etc., R. Co., 29 Hun (N. Y.), 556; *Flynn v. Salem*, 134 Mass. 351; *Duffy v. Upton*, 113 Mass. 544; *Yager v. Atlantic*, etc., R. Co. 4 Hughes (C. C.), 192; *Anderson v. Winston*, 31 Fed. Rep. 528; *Brown v. Winona*, etc., R. Co., 27 Minn. 162; s. c., 38 Am. Rep. 285; *McLean v. Blue Point*, etc., Co., 51 Cal. 255; *Sioux City*, etc., R. Co. *v. Smith* (Neb.), 36 N. W. Rep. 285; *Louisville & N. R. Co. v. Lahr* (Tenn.), 6 S. W. Rep. 663; *Stephens v. Doe* (Cal.), 14 Pac. Rep. 378.

Contra.—In the following cases the foreman and the laborer or subordinate were held not to be fellow-servants: *Cook v. Hannibal & St. Jo. R. Co.*, 63 Mo. 397; *Wabash, St. L. & P. R. Co. v. Hawk*, 121 Ill. 259; s. c., 31 Am. & Eng. R. R. Cas. 306; *Gilmore v. Northern Pac. R. Co.* (C. C.), 15 Am. & Eng. R. R. Cas. 304; *Shultz v. Chicago*, etc., R. Co., 48 Wis. 375; *Miller v. Union Pac. R. Co.*, 4 McCrary (C. C.), 115; *Hannibal*, etc., R. Co. *v. Fox*, 31 Kan. 587; s. c., 45 Am. & Eng. R. R. Cas. 325; *Lake Shore*, etc., R. Co. *v. Lavalley*, 36 Ohio St. 221; s. c., 5 Am. & Eng. R. R. Cas. 549; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Chicago & A. R. Co. v. May*, 108 Ill. 288; 15 Am. & Eng. R. R. Cas. 320; *Brabbits v. Chicago & N. W. R. Co.*, 38 Wis. 289; *Kain v. Smith*, 25 Hun (N. Y.), 146; *Eagan v. Tucker*, 18 Hun (N. Y.), 347; *Hussey v. Coger*, 39 Hun (N. Y.), 639; *Dowling v. Allen*, 74 Mo. 13; s. c., 41 Am. Rep. 298; *Hawkins v. Johnson*, 105 Ind. 39; s. c., 55 Am. Rep. 169; *Mason v. Edison*, etc., Works, 28 Fed. Rep. 228; *Smith v. Sioux City*, etc., R. Co., 15 Neb. 583; s. c., 17 Am. & Eng. R. R. Cas. 561; *Kansas*, etc., R. Co. *v. Little*, 19 Kan. 267; *Weger v. Pennsylvania*, etc., R. Co., 55 Pa. St. 460; *Burlington*, etc., R. Co. *v. Crockett*, 19 Neb. 138; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; s. c., 27 Am. Rep. 510; *Beeson v. Green Mountain*, etc., Co., 57 Cal. 20; *Brown v. Sennett*, 68 Cal. 225; *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298; *Criswell v. Pittsburgh*, etc., R. Co. (W. Va.), 33 Am. & Eng. R. R. Cas. 232; *Mucaines v. Janesville*, 67 Wis. 24; *Dutz v. Geisel*, 23 Mo. App. 676; *Gravelle v. Minneapolis*, etc., R. Co., 3 McCrary (C. C.), 352; *Baldwin v. St. Louis*, K. & N. W. R. Co. (Iowa), 39 N. W. Rep. 507.

Mason and foreman are. *Perchel v. Chicago*, etc., R. Co., 62 Wis. 338; s. c., 17 Am. & Eng. R. R. Cas. 545.

Night watchman and foreman of night

crew are. Chicago, etc., R. Co. v. Géary, 110 Ill. 383; s. c., 17 Am. & Eng. R. R. Cas. 606.

Watchman and foreman of shop are not. St. Louis, etc., R. Co. v. Harper, 44 Ark. 524. See NIGHT WATCHMAN, *supra*.

Yard-hand and foreman are. Fraker v. St. Paul, etc., R. Co., 32 Minn. 54; s. c., 15 Am. & Eng. R. R. Cas. 256. *Contra*, Houston & I. C. R. Co. v. Marcelles, 59 Tex. 334; s. c., 12 Am. & Eng. R. R. Cas. 231.

Gas-fitter.—*Switchman* and gas-fitter are. A railroad company to operate its shops—foundry, hammer shop, paint shop, and general machine shops—employed a master mechanic, with power to employ and discharge workmen; under him was a general foreman; each shop had its foreman, and under the shop foreman were gang foremen. A belonged to a gang whose business it was to bring into the shops the supplies on cars, and to take out the manufactured articles. B, the foundry foreman, obtained permission from C, the master mechanic, to convey a gaspipe from one shop to another over a railroad track used by the gang to which A belonged, which separated the two shops. D, a member of one of the gangs under B, put up the pipe so low that, in passing under it on a car, A was struck and injured. In an action by A against the company, to recover damages for the injury thus sustained, *held*, that A and D were fellow-servants, and that A could not recover for the negligence of D in putting up the gaspipe by which he was injured. New York, etc., R. Co. v. Bell, 112 Pa. St. 400.

General Manager.—*Brakeman* and general manager are not. Phillips v. Chicago, etc., R. Co., 64 Wis. 475; s. c., 23 Am. & Eng. R. R. Cas. 453.

Scaffolder and general manager are. Gallagher v. Piper, 16 C. B. (N. S.) 669.

General Superintendent.—See also FOREMAN, *supra*.) *Fireman* and general superintendent are. Mobile, etc., R. Co. v. Smith, 59 Ala. 245.

Employee in Iron-works.—Plaintiff was an employee in defendant's iron-works, which were under the management and control of defendant's agent, B., the defendant living elsewhere, and only occasionally visiting the works. B. carelessly let steam on an engine near which plaintiff was working, whereby the plaintiff was injured. In an action for that injury, the court charged that B. represented the defendant only in respect to the duties confided to him as managing agent, but refused to charge that, as to

other duties, he was to be regarded as a fellow-servant with the plaintiff, and left it as a question of fact. *Held*, that such refusal was error. Crispin v. Bobbitt, 81 N. Y. 516; s. c., 37 Am. Rep. 521.

Mill Employee.—If the master be not present, and conducts a business by a superintendent, who employs and discharges the laborers and employees, such superintendent is not a fellow-servant, but represents the master. The owner of mills and machinery, which men are employed to operate, owes duties to the employees which he cannot escape by absenting himself and committing the entire charge to an agent. Such agent, in respect to the duty of providing safe machinery, represents the master. Mitchell v. Robinson, 80 Ind. 281; s. c., 41 Am. Rep. 812. A manufacturing corporation employed a superintendent who had charge of all its machinery and works in several mills. Under him and appointed by him were overseers of the several rooms, whose duty it was to keep watch of the machinery and oversee the work in their respective rooms. These overseers appointed second-hands, whose duty it was to act as overseers of the rooms in their absence. There was also an overseer of repairs, whose duty it was to make repairs, on notice from the superintendent or overseer of a room, that repairs were needed. Some new machinery having been procured, the person setting it up notified the superintendent that collars were needed on certain counter-shafts before they were used, and the superintendent notified the overseer of repairs to put them on, but through negligence he failed to do so, and by reason of the want of collars a counter-shaft fell and injured the plaintiff, an employee in the room. *Held*, that the negligence was that of the corporation, and that it was liable for the injury. Wilson v. Willimantic Linen Co., 50 Conn. 433.

Head Stevedore.—*Stevedore* employed under head stevedore, and such head stevedore are. Mullen v. Steamship Co., 9 Phila. (Pa.) 16.

"Helper" in foundry and driver of truck are. Hogan v. Cent. Pac. R. Co., 49 Cal. 128.

Hod-carrier.—*Foreman* and hod-carrier are. Green v. Banta, 48 N. Y. Sup. Ct. 156.

Hoisting-engineer.—*Men in Mining-shaft.*—The runner of a steam engine employed in lowering man and material and hoisting rock in sinking a shaft, is a fellow-servant in the same line or department of service, within the rule, with the men in the shaft engaged in excavating

the shaft and loading the rock to be hoisted. *Buckley v. Gould*, etc., Mining Co., 14 Md. 833.

Inspector.—See *CAR-INSPECTOR*, *supra*.

Laborer.—(No cases are placed under this very general heading, which can be conveniently and properly cited under other headings of a more specific nature.)

Architect and laborer are not. *Whalen v. Centenary Church*, 62 Mo. 326.

Boat-owner and laborer are. *Lowell v. Howell*, L. R. 1 C. P. Div. 161.

Brakeman, and laborer loading dirt, are. *Henry v. Staten Island R. Co.*, 81 N. Y. 373; s. c., 2 Am. & Eng. R. E. Cas. 60; St. Louis, etc., R. Co. v. Britz, 72 Ill. 256.

Laborer setting up derrick, and brakeman, are. *Holden v. Fitchburg R. Co.*, 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94. Laborer on construction train, and brakeman, are. *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; s. c., 5 Am. & Eng. R. R. Cas. 594.

Coal-hoister and laborers loading vessels with coal are. *The Islands*, 28 Fed. Rep. 478.

Conductor and laborers. See *CONDUCTOR*, *supra*.

Conductor's servants.—See that heading, *supra*.

Depot superintendent and laborer are not. *Lalor v. Chicago*, etc., R. Co., 52 Ill. 410.

Derrick foreman, and laborer working with him, are. *Duffy v. Upton*, 113 Mass. 114; *Scott v. Sweeny*, 34 Hun (N. Y.), 292.

Engineer and laborers on construction train are. See *ENGINEER*.

Foreman.—See, as to when laborer and foreman are fellow-servants, that heading, *supra*.

Superintendent.—See that heading.

Train-dispatcher and track-laborer are not. *McKune v. California*, etc., R. Co., 66 Cal. 302; s. c., 18 Am. & Eng. R. R. Cas. 359.

Train-hands, and laborers riding free. See *EMPLOYEES RIDING FREE*, *supra*.

Lessee Company's Employees.—*Employees of lessor company* and employees of lessee company are not. *Phillips v. Chicago, M. & St. P. R. Co. (Wis.)*, 23 Am. & Eng. R. R. Cas. 453. *Contra.*—In *Chicago*, etc., R. Co. v. Clark, 2 Ill. App. 596; s. c. 92 Ill. 43, it was held that where a railroad company leases of another company its track, the trains of the lessee being allowed to run over such track subject to the control, rules, and orders of the lessor, by virtue of an agreement to that effect between the two companies, the lessor will be regarded as the common master of the servants of the lessee while running its trains upon the leased

track, and the employees of the two companies as fellow-servants.

'Longshoreman.—(See *STEVEDORE*.) *Officers of ship*, and one of gang of 'longshoremen engaged in discharging ship's cargo, are not. *The Carolina*, 30 Fed. Rep. 199.

Machinist.—*Engineer* and machinist are. *Noyes v. Smith*, 28 Vt. 59; s. c., 65 Am. Dec. 222; *Ewans v. Lippincott*, 47 N. J. L. 192; s. c., 54 Am. Rep. 148. *Contra*, *Fuller v. Jewett*, 80 N. Y. 46; s. c., 36 Am. Rep. 575.

Machinist helper and *foreman of a round-house* are. *Gonsior v. Minneapolis & St. L. R. Co. (Minn.)*, 31 N. W. Rep. 515.

Machine-repairer.—*Employee using machinery*, and person charged with duty of keeping it in repair. *Houston*, etc., R. Co. v. Marcelles, 59 Tex. 334; s. c., 12 Am. & Eng. R. R. Cas. 231.

Machinery-inspector.—(See *CAR-INSPECTOR*.) *Employees* in car shops and machinery inspector are not. *Atchison*, etc., R. Co. v. McKee, 37 Kan. 592.

Mail-catcher.—Person whose duty it is to see that mail-catcher is not placed to near track, and fireman, are not. *Chicago*, etc., R. Co. v. Gregory, 58 Ill. 272.

Mason.—*Carpenter* and mason. See *CARPENTER*.

Foreman and mason are not. *Peschel v. Chicago*, etc., R. Co., 62 Wis. 338; s. c., 17 Am. & Eng. R. R. Cas. 545.

Master Mechanic.—*Brakeman* and master mechanic are not. *Gottlieb v. New York*, etc., R. Co., 100 N. Y. 462; s. c., 24 Am. & Eng. R. R. Cas. 421; *Cooper v. Pittsburgh*, etc., R. Co., 24 W. Va. 37.

Engineer and master mechanic are not. *Hough v. Texas & Pac. R. Co.*, 100 U. S. 213; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; s. c., 14 Am. Rep. 598. *Contra*, *Hard v. Vermont Cent. R. Co.*, 32 Vt. 473.

Fireman and master mechanic are not. *Krueger v. Louisville*, etc., R. Co. (Ind.), 31 Am. & Eng. R. R. Cas. 329. *Compare* *Columbus*, etc., R. Co. v. Arnold, 31 Ind. 174.

Plumber and master mechanic are not. *Douglass v. Texas*, etc., R. Co., 63 Tex. 564.

Master of Lighter.—*Crew* and master of lighter are. *Johnson v. Boston*, etc., Co., 135 Mass. 209; s. c., 46 Am. Rep. 458.

Master of Steam-tug.—*Fireman* and master of steam-tug are not. *Clatsop Chief*, 7 Sawy. (C. C.) 274.

Laborer shovelling grain for an elevator company, and the captain of a tug, owned by the company, engaged in bringing a vessel to the elevator, are. *Baltimore Elevator Co. v. Neal*, 65 Md. 438.

Master of Vessel.—*Mate* and master of

vessel are. *Matthews v. Case*, 61 Wis. 491; s. c., 50 Am. Rep. 151; *Caniff v. Blanchard Nav. Co.* (Mich.), 33 N. W. Rep. 744.

Seamen and master of vessel are not. *Thompson v. Herriman*, 47 Wis. 602.

Mate of Vessel.—*Captain* and mate of vessel are. *Caniff v. Blanchard Nav. Co.* (Mich.), 33 N. W. Rep. 744.

Deck-hands and mate are not. *Daub v. Northern Pac. R. Co.*, 18 Fed. Rep. 625. *Contra*, mate and sailor are. *Olson v. Clyde*, 32 Hun (N. Y.), 425; *Halverson v. Niren*, 3 Sawy. (C. C.) 562; *Benson v. Goodwin*, 17 N. East. Rep. 517.

Master and mate are. *Matthews v. Case*, 61 Wis. 491; s. c., 50 Am. Rep. 151.

Material-man.—*Track-laborer* and material-man are not. *McKune v. California So. R. Co.*, 66 Cal. 302.

Mechanic in Repair-shops.—*Boilermaker* and mechanic in repair-shops are. *Murphy v. Boston*, etc., R. Co., 88 N. Y. 146; s. c., 8 Am. & Eng. R. R. Cas. 510.

Brakeman and mechanic in repair-shops are. *Wonder v. Baltimore*, etc., R. Co., 32 Md. 411; s. c., 3 Am. Rep. 143.

Engineer and mechanic in repair-shops are not. *Fuller v. Jewett*, 80 N. Y. 46; s. c., 36 Am. Rep. 575.

Other employees and mechanic in repair-shops are. *Murphy v. Boston*, etc., R. Co., 88 N. Y. 146; s. c., 42 Am. Rep. 240.

Member of City Fire Department.—*Member of street department* and member of fire department are not. *Turner v. Indianapolis*, 96 Ind. 51.

Mill-operator.—*Servants* failing to keep fire-extinguishing apparatus in order, and operator in mill, are. *Jones v. Granite Mills*, 126 Mass. 84; s. c., 30 Am. Rep. 661.

Millwright.—*Carpenter* and millwright are. *National Tube Works Co. v. Bedell*, 96 Pa. St. 175.

Miner.—*Blaster* and miner are. *Keilley v. Belcher*, etc., Co., 3 Sawy. (C. C.) 500.

Common Workman.—A common workman employed about a mine, but not himself a miner, is not a fellow-employee of the miners in any such sense that he cannot recover for an injury caused him by the mining operations. And his employer is bound to see that the premises where he works are reasonably safe. *James v. Emmet*, 53 Mich. 335.

Miner.—If the owner of a mine has negligently allowed fire-damp to accumulate, and it is ignited by a servant who goes into it with a lighted lamp instead of a safety-lamp, contrary to the owner's orders, and another servant is injured by an explosion, the latter has no remedy against the owner. *Berns v. Gaston Gas Coal*

Co., 27 W. Va. 285; s. c., 55 Am. Rep. 304.

Mine-roof superintendent and miner are. *Hall v. Johnson*, 34 L. J. Ex. 222; *Trougher v. Lower*, etc., Co., 62 Iowa, 576.

Mining-boss and miner are. *Waddell v. Simonson*, 112 Pa. St. 567; *Brazil*, etc., Co. v. *Cain*, 98 Ind. 282; *Delaware & H. Canal Co. v. Carroll*, 89 Pa. St. 374; *Beese v. Biddle*, 112 Pa. St. 72. A mining employee who is injured by rock falling upon him while he was engaged in investigating the result of a recent blast, at the direction of the foreman, is a fellow-servant of the latter. *Stephens v. Doe* (Cal.), 14 Pac. Rep. 378. *Contra.*—A mining-captain, having entire and absolute management of the mine independent of the owner, is not a fellow-servant of the other employees, and the master is liable for his negligence injuring them, although he was not appointed directly, but by the owner's agent. *Ryan v. Bogaley*, 50 Mich. 179; s. c., 45 Am. Rep. 35; *Quincy Mining Co. v. Kitts*, 42 Mich. 34. And see *Reddon v. Union Pac. R. Co.* (Utah), 15 Pac. Rep. 262.

Pickers and miners are. *Keilley v. Belcher*, etc., Co., 3 Sawy. (C. C.) 500.

Roadmen and miners are. *Trougher v. Lower*, etc., Coal Co., 62 Iowa 576.

Runner of steam engine employed in lowering men and material, and miners in shaft, are. *Buckley v. Gould*, etc., Mining Co., 14 Fed. Rep. 833.

Subforeman and miner are. *Wilson v. Merry*, L. R. 1 H. L. (Sc. App.) 326.

Superintendent and miner are not.—(See MINING-BOSS.) *Beeson v. Green Mountain*, etc., Co., 57 Cal. 20.

Mining-boss.—*Driver-boy.*—A mine-boss under the act of March 3, 1870, is a fellow-servant with a driver-boy employed to haul coal from the chambers of the mine. *Waddell v. Simoson*, 112 Pa. St. 557.

Miner and mining-boss. See MINER *supra*.

Driver-boss and mining-boss are. *Lehigh Coal Co. v. Jones*, 86 Pa. St. 432.

Mining-engineer.—*Excavators* and mining-engineer are. *Bartonshill*, etc., R. Co. v. *Reid*, 3 McQ. 266; *Buckley v. Gould*, etc., Mining Co., 14 Fed. Rep. 833; *Starne v. Schlothane*, 21 Ill. App. 97.

Night Watchman.—*Foreman of Crew.*—Where it was to some extent the duty of a servant of a railway company, as a night watcher, to note and report upon the conduct of the foreman of a night crew, whose duty it was to make up trains, etc., to his superior, and the night watcher could in no event perform his duty without constantly watching the engine and

cars of the night crew while at or upon a crossing of a public street, it was held that the night watcher and the foreman of the night crew were fellow-servants, within the legal meaning of that term, and that the common master was not liable to the night watcher for an injury received in consequence of the negligence of the foreman of the night crew in the discharge of his duties in switching cars on one of the tracks over the crossing. *Chicago, etc., R. Co. v. Geary*, 110 Ill. 383; s. c., 17 Am. & Eng. R. R. Cas. 606.

Overseer.—See FOREMAN, *supra*.

Passenger Assisting Car-driver.—Plaintiff was a passenger on a car of a street-railway company having but one track, with occasional turnouts. In turning out to avoid a car coming in the other direction, the car ran beyond the turnout, and the driver requested the plaintiff to assist him in backing it upon the turnout. While so engaged, he was injured by the negligence of the driver of the other car. *Held*, that the company was liable. *Street Railway Co. v. Bolton*, 43 Ohio St. 224; s. c., 54 Am. Rep. 803.

Pilot.—*Deck-hand*, and pilot are not. *Smith v. Steele*, L. R. 10 Q. B. 125; *The Titan*, 23 Fed. Rep. 413.

Plumber.—*Master mechanic* and plumber are not. *Douglas v. Texas, etc., R. Co.*, 63 Tex. 564.

Carpenter and plumber are. *Killea v. Taxon*, 125 Mass. 485.

Pop-corn Vendor—*Train-hands*.—A railroad corporation, in consideration of the payments to them by a person of a certain sum of money per year, in quarterly installments, and of his agreement to supply the passengers on one of their trains with iced water, issued season tickets to him quarterly for his passage on any of their regular trains, and permitted him to sell popped corn on all their trains. *Held*, that his relation to them, while travelling upon the railroad under this contract, was that of a passenger, and not of a servant. *Commonwealth v. Vermont & M. R. Co.* 108 Mass. 7.

Repairer.—See CAR-REPAIRER; TRACK-REPAIRER, etc.

Roadmaster.—*Brakeman* and roadmaster are not. *Dunham v. Houston, etc., R. Co.*, 49 Tex. 181; *Atchison, etc., R. Co. v. Moore*, 31 Kan. 197; s. c., 11 Am. & Eng. R. R. Cas. 243.

Engineer and roadmaster are. *Walker v. Boston & M. R. Co.*, 128 Mass. 8. s. c., 1 Am. & Eng. R. R. Cas. 141.

Fireman and roadmaster are not. *Davis v. Vermont Cent. R. Co.*, 55 Vt. 84, s. c., 11 Am. & Eng. R. R. Cas. 174. *Contra*, *Walker v. Boston & M. R. Co.*, 128 Mass.

8; s. c., 1 Am. & Eng. R. R. Cas. 141.

Laborer and roadmaster are. *Lawler v. Androscoggin R. Co.*, 62 Me. 463. Especially when roadmaster assumes to act as mere "boss," or foreman, of gang. *Hoke v. St. Louis, etc., R. Co.*, 11 Mo. App. 574. *Contra*.—In Galveston, etc., R. Co. v. Delahunty, 53 Tex. 206, a railroad company was held liable for damages to an employee who, in assisting to get a car off the track, was injured by the breaking of an old worn rope used by the direction of the roadmaster superintending the job, no negligence being imputed to the plaintiff.

Sectionman and roadmaster are. *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162; s. c., 38 Am. Rep. 285.

Road-supervisor.—*Brakeman* and road-supervisor are. *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245.

Rock-blaster—*Teamster*.—One who is engaged in hauling rock by means of a team, and those who are engaged in blasting such rock, all employed by a common master, are fellow-servants; and such facts being shown by a complaint to recover for an injury to the teamster, an averment that the injured servant "had no connection whatever with any of the employees of the defendant who were engaged in blasting rock," is a mere conclusion, and the facts will control. *Bogard v. Louisville, E. & St. L. R. Co.*, 100 Ind. 491.

Rock-breaker—*Superintendent*.—One who contracts, with a mining company, to break down rock and ore for a certain distance, to disclose the vein, at a stipulated price per foot, the company to furnish steam-drill and to keep the drift clear of rock as the contractor broke it down, is to be regarded as a contractor with, and not a servant of, the company. He is not a fellow-servant with the superintendent of the company, under whose direction the work is performed. *Mayhew v. Sullivan Mining Co.*, 76 Me. 100.

Rowers of Boat.—*Steersman* and boat-rowers are. *Bartonshill, etc., Co. v. Reid*, 3 McQ. (H. of L. Cas.) 266.

Sailors.—See CREW; DECK-HANDS; MATE; MASTER, etc.

Scaffold.—A was dumping bricks upon a scaffold, when it fell and he was injured. *Held*, that the man who built the scaffold was not A's fellow-workman in such sense that A could not hold his master liable for his injuries. *Green v. Banta*, 48 N. Y. Super. Ct. 156. But see *Devlin v. Smith*, 89 N. Y. 470; s. c., 42 Am. Rep. 311.

General manager and scaffold are. *Gallagher v. Piper*, 16 C. B. (N. S.) 669.

Rigger.—A scaffold-builder and rigger

employed on a steamship in port are. *Pickett v. Atlas S. S. Co.*, 12 Daly (N. Y.), 441.

Seaman.—See CREW; DECK - HANDS; MATE; MASTER, etc.

Section Boss or Section Foreman.—*Brakeman* and section-master, or section boss, are. *Mobile, etc.*, R. Co. *v. Smith*, 59 Ala. 245; *Slatterly v. Toledo, etc.*, R. Co., 23 Ind. 81; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419; *Hardy v. Carolina Cent. R. Co.*, 76 N. Car. 5. *Contra, Hullehan v. Green Bay, etc.*, R. Co. (Wis.), 31 Am. & Eng. R. R. Cas. 322; *Shanny v. Androscoggin Mills Co.*, 66 Me. 420; *Lewis v. St. Louis, etc.*, R. Co., 59 Mo. 495; s. c., 21 Am. Rep. 385; *Houston, etc.*, R. Co. *v. Dunham*, 49 Tex. 181; *Moon v. Richmond & A. R. Co.*, 78 Va. 745; s. c., 17 Am. & Eng. R. R. Cas. 531.

Engineer and section-master are not. *Calvo v. Charlotte, C. & A. R. Co.*, 23 S. Car. 526; s. c., 28 Am. & Eng. R. R. Cas. 327; *St. Louis, etc.*, R. Co. *v. Weaver*, 35 Kan. 412; s. c., 28 Am. & Eng. R. R. Cas. 341. And see *Chicago, etc.*, R. Co. *v. Moranda*, 108 Ill. 576; s. c., 17 Am. & Eng. R. R. Cas. 564.

Express agent and section boss are not. *Baltimore, etc.*, R. Co. *v. McKenzie (Va.)*, 24 Am. & Eng. R. R. Cas. 391.

Laborers and section foreman. See FOREMAN.

Laborers on wood-train and section foreman are not. *Thompson v. Drymola*, 26 Minn. 40.

Section hand and section boss are. (See also FOREMAN.) *Clifford v. Old Colony R. Co.*, 141 Mass. 564; *Little Rock, etc.*, R. Co. *v. Duffy*, 35 Ark. 602; s. c., 4 Am. & Eng. R. R. Cas. 637; *Olson v. St. Paul, etc.*, R. Co. (Minn.), 33 Am. & Eng. R. R. Cas. 356; *Barringer v. Delaware, etc., Canal Co.*, 19 Hun (N. Y.), 216. *Contra, International, etc.*, R. Co. *v. Hester*, 64 Tex. 401; s. c., 21 Am. & Eng. R. R. Cas. 535; *Patton v. Western N. Car. R. Co.*, 96 N. Car. 455; *McDermott v. Hannibal, etc.*, R. Co., 87 Mo. 285; *Clowers v. Wabash, etc.*, R. Co., 21 Mo. App. 213.

Switchman and section-master are not. *Hall v. Missouri Pac. R. Co.*, 74 Mo. 298; s. c., 8 Am. & Eng. R. R. Cas. 106.

Train-hands and section foreman are not. *Drymola v. Thompson*, 26 Minn. 40.

Section - hand.—(See also TRACK-REPAIRER.) *Brakeman* and section-hand are not. *Morris v. Richmond, etc.*, R. Co., 8 Va. L. J. 540. *Contra.*—Where, immediately preceding the injury complained of, section-hands employed by a railroad company dig away the earth around a switch-rod so as to leave a cavity in consequence of which a brakeman, in the dis-

charge of his duty in uncoupling cars, is injured, these section-hands will not be considered fellow-servants of the brakeman in such a sense as will relieve the company from liability for the injury, but their act will be taken to be the act of the company. *Vaultrain v. St. Louis, etc.*, R. Co., 8 Mo. App. 538.

Engineer and section-hand are. See ENGINEER.

Roadmaster and section - hand are. *Brown v. Winona, etc.*, R. Co. 27 Minn. 162; s. c., 38 Am. Rep. 285.

Section Boss.—See that heading, *supra*.

Train-hands and section-hands are. *Foster v. Minnesota, etc.*, R. Co., 14 Minn. 360.

Shovellers.—*Brakemen* and shovellers are. *St. Louis, etc.*, R. Co. *v. Britz*, 72 Ill. 256; *Louisville, etc.*, R. Co. *v. Robinson*, 4 Bush (Ky.), 507.

Conductor.—Plaintiff, while going as a shoveller of snow for the defendant company upon a train engaged in the business of removing snow from the track, was injured by the overturning of the car in which he rode, by reason of an unsuccessful attempt of the conductor to remove a snow-bank from the track by means of the snow-plough alone, aided by the momentum of the train. *Held*, upon all the facts set out in the complaint, that a recovery by plaintiff is precluded by the facts that such overturning of his car was one of the perils of the business which he assumed, and that the conductor and others, whose negligence is alleged, were fellow-servants in the same employment. *Howland v. Milwaukee, etc.*, R. Co., 54 Wis. 226; s. c., 22 Am. & Eng. R. R. Cas. 568; *Heine v. Chicago & N. W. R. Co.*, 58 Wis. 525; *Chicago, etc.*, R. Co. *v. McDonald*, 1 Ill. App. 409. See also CONDUCTOR; LABORERS, *supra*.

Engineer and shovellers on construction train are. *St. Louis, etc.*, R. Co. *v. Britz*, 72 Ill. 256; *Louisville, etc.*, R. Co. *v. Robinson*, 4 Bush (Ky.), 507; *Thompson v. Chicago, etc.*, R. Co., 18 Fed. Rep. 239; *Chicago, etc.*, R. Co. *v. McDonald*, 21 Ill. App. 409.

Master of steam-tug and shoveller of grain at elevator are. *Baltimore Elevator Co. v. Neal*, 65 Md. 438.

Track-layers and shovellers are. *Lovegrove v. London, etc.*, R. Co., 16 C. B. (N. S.) 666.

Signalman.—*Engineer*, and servant employed to put danger signals on track, are. *East Tenn., etc.*, R. Co. *v. Rush*, 15 Lea (Tenn.), 145.

Employee going to work, and signalman, are. *Moran v. New York, etc.*, R. Co., 67 Barb. (N. Y.) 96.

Station Agent.—*Brakeman* and station

agent are. *Gaffney v. New York, etc., R. Co.* (R. I.), 31 Am. & Eng. R. R. Cas. 265; *Toner v. Chicago, etc., R. Co.*, 69 Wis. 188; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419.

Carpenter employed by a railroad company is not a fellow-servant of a station agent who performs the duties of train-despatcher. *Palmer v. Utah & N. R. Co.* (Idaho), 13 Pac. Rep. 425.

Engineer and station agent are. *Brown v. Minneapolis, etc., R. Co.*, 31 Minn. 553; s. c., 15 Am. & Eng. R. R. Cas. 333.

Laborer and station agent are. *Brown v. Minneapolis, etc., R. Co.*, 31 Minn. 553; s. c., 15 Am. & Eng. R. R. Cas. 333.

Station-master.—*Engineer* and station-master are not. *Evans v. Atlantic, etc., R. Co.*, 62 Mo. 49; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419. *Contra.*—Where, by reason of the negligence of a station-master in employ of a railroad, in not delivering a telegram to the engineer of a passenger train having the right of way, notifying him that a switch was open, by means of which he must cross from one track to another to get around a freight train on the same track, and cautioning him as to the rate of speed, the engine was thrown from the track at the switch and the engineer killed, *held*, that the injury was occasioned by the negligence of a co-employee, and no action could be maintained. *Dealey v. Philadelphia, etc., R. Co.* (Penn.), 4 Atl. Rep. 170.

Steam-hammer operator and *employee making repairs* are. A corporation engaged in the manufacturing of iron for different purposes maintained several establishments, each having a separate purpose and foreman, but all being under one general superintendent. A was employed to operate a steam-hammer at one of the departments known as the forge. The company, in replacing the hammer with a new one, took some of its operatives from another department known as the foundry, and engaged them to complete the repairs, in the course of which the said operatives negligently left a supporting beam unfastened. A was not present when this was done, but in other respects assisted to some extent in the completion of the repairs. He was directed by the foreman of the forge to see that "everything was right" about the machine. Upon the completion of the repairs, A resumed the operation of the machine and was killed by the falling of the unfastened beam. In an action by A's widow against the corporation, *held*, that he was a fellow-servant of the operatives who made the repairs and whose negligence caused

the accident. *Reading Iron Works v. Devine*, 109 Pa. St. 248.

Laborer and steam-hammer operator are. *Haurathy v. Northern Cent. R. Co.*, 46 Md. 280.

Stevedore.—*Boatswain* and stevedore are. *The Furnessia*, 30 Fed. Rep. 878.

Crew and stevedore are not. *Murray v. Currie*, L. R. 6 C. P. 24.

Chief stevedore and stevedore are not. *Mullan v. Philadelphia, etc., R. Co.*, 78 Pa. St. 25; s. c., 21 Am. Rep. 2.

Laborer.—A shipowner is not liable for an injury to his employee by the negligence of a stevedore in loading the vessel. *Rankin v. Merchant's, etc., Transp. Co.*, 73 Ga. 229; s. c., 54 Am. Rep. 874.

Stevedore's Foreman.—*Laborers.*—The foreman of a gang of men to whom a stevedore delegates the entire management of the work of unloading a vessel, with full discretion to control and supervise it, is not a fellow-servant with his subordinate employees; and if, in the performance of the work, death or injury results to such an employee through the negligence of the foreman, the stevedore is liable, although he exercised due care in the selection of a foreman. *Brown v. Sennett*, 68 Cal. 225. See also *The Wm. F. Babcock*, 31 Fed. Rep. 418.

Stockholder Riding Free.—*Train hands* and stockholder are not. *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 482.

Subcontractor.—*Train-hands.*—Subcontractor for building bridges for railroad is not a co-servant with those employed by it in managing its trains, so as to relieve the railroad from responsibility for injuries caused to the former through the negligence of the latter. *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280; s. c., 87 Am. Dec. 391.

Superintendent (see FOREMAN, *supra*).—*Carpenter* and superintendent of manufacturing corporation are. *Osborne v. Morgan*, 130 Mass. 102.

Conductor and superintendent of railroad are not. *Patterson v. Pittsburg, etc., R. Co.*, 76 Pa. St. 389; s. c., 18 Am. Rep. 412.

Engineer and superintendent are not. *Washburn v. Nashville, etc., R. Co.*, 3 Head (Tenn.), 368; s. c., 75 Am. Dec. 784.

Fireman and general superintendent are. *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245.

Laborer.—One S. was sent in charge of a wrecking-train to get a car on a track. S. superintended this branch of the business of the defendant railroad company, under the orders of the person in charge of the shops and yards. S. negligently

gave an improper order, and a workman under his order was killed. *Held*, that S. and the workman were fellow-servants, and the company was not liable. *Beilfus v. New York, etc., R. Co.*, 29 Hun (N. Y.), 556. And see *Zeigler v. Day*, 123 Mass. 152; *Flynn v. Salem*, 134 Mass. 351. *Contra*, *Wilson v. Willimantic, etc., R. Co.*, 50 Conn. 433; s. c., 47 Am. Rep. 653; *Mucaines v. Janesville*, 67 Wis. 24; *Beeson v. Green Mountain Gold Mining Co.*, 57 Cal. 20. If the master be not present, and conducts a business by a superintendent, who employs and discharges the laborers and employees, such superintendent is not a fellow-servant, but represents the master. The owner of mills and machinery, which men are employed to operate, owes duties to the employees which he cannot escape by absenting himself and committing the entire charge to an agent. Such agent, in respect to the duty of providing safe machinery, represents the master. *Mitchell v. Robinson*, 80 Ind. 281; s. c., 41 Am. Rep. 812. See also FOREMAN, GENERAL SUPERINTENDENT, and GENERAL MANAGER, *supra*.

Operator in factory, and superintendent, are not. *Gunter v. Granite Mills Mfg. Co.*, 18 S. Car. 262. But see FACTORY BOSS.

Rock-breaker at mine, and superintendent, are not. *Mayhew v. Sullivan Mining Co.*, 76 Me. 100.

Surveyor.—*Conductor*, and surveyor riding on his train, are. *Ross v. New York Cent. R. Co.*, 74 N. Y. 617.

Switchman.—*Baggage-master* and switchman are. *Roberts v. Chicago, etc., R. Co.*, 33 Minn. 218.

Brakeman and switchman are. *Slatterly v. Toledo, etc., R. Co.*, 23 Ind. 81; *Robertson v. Terre Haute, etc., R. Co.*, 78 Ind. 79; s. c., 8 Am. & Eng. R. R. Cas. 175; *Tenney v. Boston, etc., R. Co.*, 52 N. Y. 632; *Harvey v. New York, etc., R. Co.*, 88 N. Y. 481; s. c., 8 Am. & Eng. R. R. Cas. 515.

Car-inspector and switchman are. *Gibson v. Northern, etc., R. Co.*, 22 Hun (N. Y.), 289.

Car-repairer and switchman are. *Gilmore v. Eastern R. Co.*, 10 Allen (Mass.), 233; s. c., 87 Am. Dec. 635.

Engineer and switchman are. *Brown v. Central Pac. R. Co. (Cal.)*, 7 Pac. Rep. 447; *Farwell v. Boston, etc., R. Co.*, 4 Metc. (Mass) 49; s. c., 38 Am. Dec. 339; *Bartonshill, etc., R. Co. v. Reid*, 3 McQ. (H. of L.) 266; *Smith v. Memphis & L. R. Co.*, 18 Fed. Rep. 304; *Slatterly v. Morgan*, 35 La. Ann. 1166; *Chicago, etc., R. Co. v. Henry*, 7 Ill. App. 322; *Columbus, etc., R. Co. v. Troesch*, 68 Ill. 545; *East Tenn., etc., R. Co. v. Gurley*, 12 Lea

(Tenn.), 46; s. c., 17 Am. & Eng. R. R. Cas. 568; *Fowler v. Chicago, etc., R. Co. (Wis.)*, 17 Am. & Eng. R. R. Cas. 536; *Naylor v. New York Cent. R. Co.*, 33 Fed. Rep. 80r. But see *Smith v. New York, etc., R. Co.*, 19 N. Y. 127; s. c., 75 Am. Dec. 305.

Fireman and switchman are. *Harvey v. New York, etc., R. Co.*, 88 N. Y. 481; s. c., 8 Am. & Eng. R. R. Cas. 515; *Tenney v. Boston, etc., R. Co.*, 62 Barb. (N. Y.) 218.

Gas-fitter.—A switchman who is one of a gang of men employed about the shop-yard, in carrying to and from machine shops of a railroad company supplies and repaired or finished articles, upon cars run in by means of side-tracks, though working under a separate foreman, is such a fellow-servant of a gas-fitter who, under a general direction from the master-mechanic (who is in charge of all shops, with power to employ and discharge) to extend a gas-pipe between two of the shops, places it at such a height as to knock the switchman from the top of the cars running in between them, as precludes him from a recovery for injuries sustained through the latter's negligence. *New York, etc., R. Co. v. Bell*, 112 Pa. St. 400.

Person employed to load cars, and switch-tender, are not. *Chicago, etc., R. Co. v. Henry*, 7 Ill. App. 322.

Section-master and switchman are not. *Hall v. Missouri, etc., R. Co.*, 74 Mo. 298.

Teamster.—*Engine-driver*.—A teamster who hauls ties in the construction of a railroad is not consociated with the engine-driver of a train, on which the workmen ride to dinner, so as to defeat his recovery against the common master for injuries caused by negligence of said engine-driver. *Hobson v. New Mexico, etc., R. Co. (Ariz.)*, 28 Am. & Eng. R. R. Cas. 360.

Rock-blaster and teamster are. *Bogard v. Louisville, etc., R. Co.*, 100 Ind. 491.

Telegraph-operator.—*Conductor*.—A telegraph-operator, whose only connection with the conductor of a train is as transmitter of the superintendent's orders, is not a fellow-servant of such conductor. *East Tenn., etc., R. Co. v. De Armond (Tenn.)*, 5 S. W. Rep. 600.

Engineer and telegraph-operator are. *Dana v. New York, etc., R. Co.*, 22 Hun (N. Y.), 473. *Contra*.—Where an engineer upon one train of a railroad company is injured by the negligence of the conductor of another train of the company, running in an opposite direction, or by the fault of one of the company's telegraphic operators in transmitting a telegraphic order to such conductor, such en-

gineer being wholly without fault or the means of preventing such negligence or of avoiding its consequences, such engineer is not the fellow-servant of said conductor, nor is he the fellow-servant of said operator in regard to acts and telegraphic orders between the operator and said conductor, within the rule which exempts the company from liability for the negligent acts of fellow-servants or persons engaged in the common service; and the company will be held responsible for an injury to such engineer caused by the negligence of such conductor or operator in such manner. *Madden v. Railway Co.*, 28 W. Va. 610; s. c., 57 Am. Rep. 695.

Fireman and telegrapher are. *Slater v. Jewett*, 85 N. Y. 61; s. c., 5 Am. & Eng. R. R. Cas. 515. *Compare Sheehan v. New York, etc.*, R. Co., 90 N. Y. 332.

Trackman—*Brakeman* and trackman are. *Connelly v. Minneapolis E. R. Co.* (Minn.), 35 N. W. Rep. 582.

Engineer and trackman are. *Connelly v. Minneapolis E. R. Co.* (Minn.), 35 N. W. Rep. 582.

Managers of train and trackman are. *Coon v. Syracuse, etc.*, R. Co., 5 N. Y. 492.

Track-repairer.—(See also SECTION-MAS-TER and SECTION-HAND, *supra*).

Brakeman and track-repairer are not. *Torrians v. Richmond & A. R. Co.* (Va.), 4 S. E. Rep. 339. *Contra*, *Connelly v. Minneapolis E. R. Co.* (Minn.), 35 N. W. Rep. 582.

Conductor and track-repairer are. *Howd v. Mississippi Cent. R. Co.*, 50 Miss. 178; *New Orleans, etc.*, R. Co. *v. Hughes*, 49 Miss. 258. *Contra*, *Dick v. Indianapolis, etc.*, R. Co., 38 Ohio St. 389; s. c., 8 Am. & Eng. R. R. Cas. 101.

Engineer and track-repairer. See ENGINEER.

Employees working hand-car, and track-repairer, are. *O'Brien v. Boston & A. R. Co.*, 138 Mass. 387; s. c., 52 Am. Rep. 279.

Material-man and track-repairer are not. *McKune v. California So. R. Co.*, 66 Cal. 302; s. c., 21 Am. & Eng. R. R. Cas. 539; *Van Wickle v. Manhattan*, 32 Fed. Rep. 278.

Train-dispatcher and track-repairer are not. *McKune v. California So. R. Co.*, 66 Cal. 302; s. c., 21 Am. & Eng. R. R. Cas. 539.

Train-hands and track-repairer are. *Collins v. St. Paul, etc.*, R. Co., 30 Minn. 31; s. c., 8 Am. & Eng. R. R. Cas. 150; *Pennsylvania R. Co. v. Wochter*, 60 Md. 395; s. c., 17 Am. & Eng. R. R. Cas. 188; *Vantrain v. St. Louis, etc.*, R. Co., 8 Mo. App. 558; *Corbett v. St. Louis, etc.*,

R. Co., 26 Mo. App. 621; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; s. c., 35 Am. Rep. 297; *Gormley v. Ohio & M. R. Co.*, 72 Ind. 31.

Track-walker (see TRACK-REPAIRER; SECTION-HANDS) and *coal-heaver* are. *Shultz v. Chicago, etc.*, R. Co., 67 Wis. 616; s. c., 58 Am. Rep. 881.

Fireman and track-walker are. *Schultz v. Chicago, etc.*, R. Co., 67 Wis. 616; s. c., 58 Am. Rep. 881.

Train-dispatcher.—(See TELEGRAPH-OPERATOR).

Brakeman and train-dispatcher are. *Robertson v. Terre Haute, etc.*, R. Co., 78 Ind. 77; s. c., 41 Am. Rep. 552; 8 Am. & Eng. R. R. Cas. 175; *Rose v. Boston, etc.*, R. Co., 58 N. Y. 217. *Contra*, *Philips v. Chicago, etc.*, R. Co. (Wis.), 23 Am. & Eng. R. R. Cas. 453.

Carpenter is not a fellow-servant of a station agent who performs the duties of a train-dispatcher. *Palmer v. Utah & N. R. Co.* (Idaho), 13 Pac. Rep. 425.

Conductor and train-dispatcher are not. *McLeod v. Ginther*, 80 Ky. 399; s. c., 8 Am. & Eng. R. R. Cas. 162.

Engineer and train-dispatcher are. *Blessing v. St. Louis, etc.*, R. Co., 77 Mo. 410; s. c., 15 Am. & Eng. R. R. Cas. 298. *Contra*, *Darrigan v. New York, etc.*, R. Co., 52 Conn. 285; s. c., 23 Am. & Eng. R. R. Cas. 438; *Lewis v. Serfort*, 116 Pa. St. 628.

Fireman and train-dispatcher are not. *Crew v. St. Louis, etc.*, R. Co., 20 Fed. Rep. 87; *Smith v. Wabash, St. L. & Pac. R. Co.* (Mo.), 4 S. W. Rep. 129.

Track-repairer and train-dispatcher are not. *McKune v. California So. R. Co.*, 66 Cal. 302; s. c., 17 Am. & Eng. R. R. Cas. 589.

Train-hands.—(See also more specific headings; as, ENGINEER, CONDUCTOR, BRAKEMAN, etc.)

Baggage-man and trainmen are. *Moseley v. Chamberlain*, 18 Wis. 700.

Brakeman.—See that heading.

Carpenter travelling on train, and train-hands, are not. *Gillenwater v. Madison, etc.*, R. Co., 5 Ind. 339; s. c., 16 Am. Dec. 101. *Contra*, *Steaver v. Boston, etc.*, R. Co., 14 Gray (Mass.), 466.

Conductor.—See that heading.

Contractor's servants and trainmen are not. *Young v. New York, etc.*, R. Co., 36 Barb. (N. Y.) 229.

Employees riding free and train-hands are.—See that heading.

Engine-wiper and train-hands are. *Ewald v. Chicago & N. W. R. Co.* (Wis.), 33 Am. & Eng. R. R. Cas. 326.

Express-agent and train-hands are. *Pennsylvania Co. v. Woodworth*, 26

Ohio St. 555. *Contra*, Blair v. Erie R. Co., 66 N. Y. 313; s. c., 23 Am. Rep. 55. *Pop-corn vendor* and train-hands are not. Commonwealth v. Vermont & M. R. Co., 108 Mass. 7.

Section foreman and train-hands are not. Drymala v. Thompson, 26 Minn. 40.

Stockholder riding free, and train-hands, are not. Phila., etc., R. Co. v. Derby, 14 How. (U. S.) 482.

Track-repairer and train-hands are. Collins v. St. Paul, etc., R. Co., 30 Minn. 31; s. c., 8 Am. & Eng. R. R. Cas. 150; Pennsylvania R. Co. v. Wachter, 60 Md. 395; s. c., 17 Am. & Eng. R. R. Cas. 188; Carbett v. St. Louis, etc., R. Co., 26 Mo. App. 621; Blake v. Maine Cent. R. Co., 70 Me. 60; s. c., 35 Am. Rep. 297; Gormley v. Ohio & M. R. Co., 72 Ind. 31.

Trainmaker.—*Car-inspector*, and one charged with duty of making up trains, are not. Tierney v. Minneapolis, etc., R. Co., 33 Minn. 311; s. c., 21 Am. & Eng. R. R. Cas. 545.

Yardmaster, and one whose duty it is to assist in making up trains, are. McCosker v. Long Island R. Co., 84 N. Y. 77; s. c., 5 Am. & Eng. R. R. Cas. 564.

Trainmaster.—*Fireman* and trainmaster are not. Crew v. St. Louis, etc., R. Co., 19 Fed. 87.

Tunnel-repairer and *brakeman* are. Capper v. Louisville, etc., R. Co., 103 Ind. 305; s. c., 21 Am. & Eng. R. R. Cas. 525.

Under-boss of gravel train, and *other employees*, are not. Burlington, etc., R. Co. v. Crockett, 19 Neb. 138.

Volunteers.—*Employees* and volunteers are. Mayton v. Texas, etc., R. Co., 63 Tex. 77; s. c., 51 Am. Rep. 637; Flower v. Pennsylvania R. Co., 69 Pa. St. 210; s. c., 8 Am. Rep. 251; Osborne v. Knox, etc., R. Co., 68 Me. 49; s. c., 28 Am. & Eng. R. R. Cas. 16; Chicago, etc., R. Co. v. West (Ill.), 17 N. East. Rep. 788.

The plaintiff was a passenger on defendant's railroad, on a car northward bound. The railway was a single-track, with occasional sidetracks for the passage of cars moving in opposite directions. The north-bound car having been drawn beyond the sidetrack, where it was to have met the south-bound car, it became necessary to push it back to the sidetrack, so that the cars could pass and each proceed to its destination. At the request of the driver of the north-bound car, the plaintiff assisted him in pushing the car back to the sidetrack. While so engaged, without fault on his

part, he was injured by the carelessness of defendant's driver on the south-bound car. *Held*: (1) The plaintiff did not engage in the service of defendant as a mere volunteer; (2) under the circumstances the plaintiff cannot be considered as a fellow-servant with the driver of the south-bound car; (3) in the case stated, the doctrine of *respondent superior* applies. McIntyre R. Co. v. Bolton (Ohio), 21 Am. & Eng. R. R. Cas. 501.

Watchman.—*Car-repairer*, and watchman to guard him, are. Luebke v. Chicago, etc., R. Co., 63 Wis. 91; s. c., 53 Am. Res. 266.

Foreman of night-crew and *night-watchman* are. Chicago, etc., R. Co., v. Geary, 110 Ill. 383; s. c., 17 Am. & Eng. R. R. Cas. 606.

Master-mechanic and *foreman of shops* is not a fellow-servant of a watchman. St. Louis, etc., R. Co. v. Harper, 44 Ark. 524.

Train-hands and *tie-watcher* are. Dallas v. Gulf, Colo. & S. F. R. Co., 61 Tex. 196; s. c., 21 Am. & Eng. R. R. Cas. 575.

Water-carrier.—*Men working on construction train*, and employee to carry them water, are. Missouri, etc., R. Co. v. Haley, 25 Kan. 35.

Wife of employee may recover for injuries caused by negligence of husband's fellow-servant. Gannon v. Housatonic, etc., R. Co., 112 Mass. 234; s. c., 17 Am. Rep. 82.

Yard-hand.—*Engineer* and *yard-hand* are. Bradley v. Nashville, etc., R. Co., 14 Lea (Tenn.), 374.

Engine-stripper and *yard-hand* are. Chicago, etc., R. Co. v. Scheuring, 4 Ill. App. 533.

Foreman and *yard-hand* are. Fraker v. St. Paul M. & M. R. Co., 32 Minn. 54; s. c., 15 Am. & Eng. R. R. Cas. 256. *Compare* Chicago, etc., R. Co. v. May, 108 Ill. 288; Houston, etc., R. Co. v. Mercelles, 59 Tex. 334; s. c., 12 Am. & Eng. R. R. Cas. 231; and see FOREMAN, *supra*.

Saw-mill operatives.—One who works at odd jobs around the mill-yard of a corporation operating a saw-mill and salt-block, and occasionally loads salt on a barge for market, is the fellow-servant of men in the salt warehouse handling barrels, and cannot recover for injuries received from a descending elevator, through their negligence. Sell v. Reitz & Bros. Lumber Co. (Mich.), 38 N. W. Rep. 451.

Yardmaster and *assistant* are. McCosker v. Long Island R. Co., 84 N. Y. 77; s. c., 5 Am. & Eng. R. R. Cas. 564.

Brakeman and *yardmaster* are. Besel

FELONIOUS HOMICIDE.—See HOMICIDE.

FELON—FELONY.—See CRIMINAL LAW.

FEME COVERT.—See HUSBAND AND WIFE.

FEME SOLE.—See MARRIED WOMEN.

FEMALE INFANTS, ABUSE OF.—See AGE, Vol I. p. 326.

FENCES.—(See also ADVERSE POSSESSION, Vol. I. p. 248; BOUNDARIES.)

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I. DEFINITION.—A fence is defined to be a building or erection between two contiguous estates, so as to divide them, or on the same estate, so as to divide one part from another.¹

v. New York Cent. & H. R. R. Co., 70 N. Y. 171.

Car-coupler and yardmaster are. Webb v. Richmond, etc., R. Co. (N. Car.), 2 S. East. Rep. 440; Gravelle v. Minneapolis, etc., R. Co., 3 McCrary (C. C.), 352.

Car-inspector and yardmaster are not. Macy v. St. Paul, etc., R. Co., 25 Minn. 200.

Car-repairer and yardmaster are. Kirk v. Atlanta, etc., R. Co., 94 N. Car. 625; s. c., 25 Am. & Eng. R. R. Cas. 507; Dobbins v. R. Co., 81 N. Car. 446; Ritt v. Louisville & N. R. Co. (Ky.), 31 Am.

& Eng. R. R. Cas. 289; Besel v. New York, etc., R. Co., 70 N. Y. 171.

Engineer and yardmaster are. Michigan Cent. R. Co. v. Gilbert (Mich.), 2 Am. & Eng. R. R. Cas. 230; East Tenn., etc., R. Co. v. Gurley, 12 Lea (Tenn.), 46; s. c., 17 Am. & Eng. R. R. Cas. 568.

Flagman and yardmaster are. Webb v. Richmond, etc., R. Co., 97 N. Car. 387.

1. Bouv. L. Dict. 651. Jacob and Wharton, following him, define fence as a hedge, ditch, or other inclosure of land for the better manurance and improve-

II. WHO BOUND TO FENCE.—1. **Landowners.**—(a) **COMMON-LAW RULE.**—At the common law, land-proprietors were not obliged to fence against the cattle of an adjoining close. No one was obliged to take any precautions to prevent cattle in an adjoining close from trespassing on his own land; and the want of a fence was no objection to recovery for damages done by animals, except as it is made so by statute, contract, or usage.¹ This doctrine of the common law of England is recognized by the common law of *New Hampshire, Vermont, Massachusetts, New York, New Jersey, Delaware, Maryland, Indiana, Kentucky, Michigan, Minnesota, Wisconsin*, and perhaps some of the other States.² In several of the States this rule of the common law is not in force, and the owner of cattle is not obliged to confine them to his own property, but the occupant of land must at his own peril keep them out. This is the rule in *Ohio, Illinois, Iowa, California, North Carolina, South Carolina, Georgia, Missouri, Arkansas, Mississippi, Texas, and Colorado.*³

ment of the same. In the *United States* it generally signifies an artificial structure for the purpose of inclosing land. Abb. L. Dic. 490. A fence is nothing more than a line of obstacle, and may be composed of any material which will present a sufficient obstruction. *Allen v. Tobias*, 77 Ill. 169. And has been held to include a gate. *Estes v. Atlantic*, etc., R. R. Co., 63 Me. 308.

1. *Mills v. Stark*, 4 N. H. 512; s. c., 17 Am. Dec. 444; *Halliday v. Marsh*, 3 Wend. (N. Y.) 142; s. c., 20 Am. Dec. 678; *Moon v. Levert*, 24 Ala. 310; *Indianapolis*, etc., R. Co. v. *Harter*, 38 Ind. 557; *Little v. Lathrop*, 5 Greene (Me.), 356; *Richardson v. Milburn*, 11 Md. 340; *Rust v. Low*, 6 Mass. 90; *Stafford v. Ingersol*, 3 Hill (N. Y.), 38; *Hurd v. Rutland*, etc., R. Co., 25 Vt. 116; *Page v. Hallingsworth*, 7 Ind. 317; *Brady v. Ball*, 14 Ind. 317; *Michigan*, etc., R. Co. v. *Fisher*, 27 Ind. 96; *Indianapolis*, etc., R. Co. v. *Harter*, 38 Ind. 357; *Wells v. Beal*, 9 Kan. 597; *Star v. Rookesby*, 1 Salk. 335; *Adams v. McKinney*, Add. (Pa.) 258; *Little v. Lathrop*, 5 Greene (Me.), 356; *Webber v. Closson*, 35 Me. 26; *Lyons v. Merrick*, 105 Mass. 71; *Vicksburg*, etc., R. Co. v. *Patton*, 31 Miss. 156; *Avery v. Maxwell*, 4 N. H. 36; *Chambers v. Matthews*, 18 N. J. L. 368; *Vandergrift v. Redicker*, 22 N. J. L. 185; s. c., 2 Am. L. J. 116; *Wells v. Howell*, 19 Johns. (N. Y.) 385; *Gregg v. Gregg*, 55 Pa. St. 227; *New York*, etc., R. Co. v. *Skinner*, 19 Pa. St. 298; s. c., 1 Am. L. Reg. 97; 1 *Thomp. Neg.* 209, 465, 499; 3 *Bl. Com.* 211; 2 *Waterman on Tresp.* § 858; *Cooley on Torts*, 337.

2. *Giles v. Boston*, etc., R. Co., 56 N.

H. 552; *Jackson v. Rutland*, etc., R. Co., 25 Vt. 150; *Hurd v. Rutland*, etc., R. Co., 25 Vt. 116; *Keenan v. Cavanaugh*, 44 Vt. 268; *Tower v. Providence*, etc., R. Co., 2 R. I. 404; *Rust v. Low*, 6 Mass. 90; *Lyons v. Merrick*, 105 Mass. 71; *Maynard v. Boston*, etc., R. Co., 115 Mass. 458; *Locke v. First Div.*, etc., R. Co., 15 Minn. 350; *Baltimore*, etc., R. Co. v. *Lamborn*, 12 Md. 257; *Lawrence v. Combs*, 37 N. H. 335; *Vandergrift v. Redicker*, 22 N. J. L. 185; s. c., 2 Am. L. J. 116; *Williams v. Michigan*, etc., R. Co., 2 Mich. 260; *Louisville*, etc., Co. v. *Bollard*, 2 Metc. (Ky.) 165; *Wells v. Beal*, 9 Kan. 597; *Baker v. Robbins*, 9 Kan. 303; *Pittsburg*, etc., R. Co. v. *Stuart*, 71 Ind. 500; *Indianapolis*, etc., R. Co. v. *Harter*, 38 Ind. 557; *Michigan*, etc., R. Co. v. *Fisher*, 27 Ind. 96; *Harrison v. Brown*, 5 Wis. 27; *Stucke v. Milwaukee*, etc., R. Co., 9 Wis. 202.

In *McCall v. Chamberlain*, 13 Wis. 640, it is stated that the rule is generally disregarded by common consent in the newly settled parts of the State. In *Maine*, the common-law rule was abrogated by statute in 1834.—*Webber v. Closson*, 35 Me. 26;—but where there is an undivided partition fence between adjacent owners, they are remitted to their common-law rights and each must keep his cattle on his own land. *Little v. Lathrop*, 5 Greene (Me.), 356; *Sturtevant v. Merrill*, 33 Me. 62.

3. *Headen v. Rust*, 39 Ill. 186; *Wagner v. Bissel*, 3 Iowa, 396; *Alger v. Mississippi*, etc., R. Co., 10 Iowa, 268; *Whitbeck v. Dubuque*, etc., R. Co., 21 Iowa, 103; *Frazier v. Nortinus*, 34 Iowa, 82; *Vicksburg*, etc., R. Co. v. *Patton*, 31 Miss. 156;

(b) STATUTORY REGULATIONS.—In those States where the common-law rule has not been adopted, the subject is regulated by statute.¹

(c) OBLIGATION TO FENCE.—The fence laws only relate to outside and division fences.² But the law of outside fences imposes on the landowner no duty of fencing. He is left by it at entire liberty to fence or not; only, if he does not fence he cannot recover such damages as his crops may sustain from roaming stock.³ So long as he leaves his lands uninclosed, he takes the risk of occasional intrusions thereon by the animals of others running at

New Orleans, etc., R. Co. v. Field, 46 Miss. 573; Gorman v. Pacific R. Co., 26 Mo. 441; Hannibal, etc., R. Co. v. Kenney, 41 Mo. 271; McPherters v. Hannibal, etc., R. Co., 45 Mo. 22; Chase v. Chase, 15 Nev. 259; Lows v. North Carolina R. Co., 7 Jones L. (N. Car.) 468; Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172; s. c., Thomp. Neg. 472; Cincinnati, etc., R. Co. v. Watterson, 4 Ohio St. 424; Cleveland, etc., R. Co. v. Elliott, 4 Ohio St. 474; Marietta R. Co. v. Stephenson, 24 Ohio St. 48; Campbell v. Bridwell, 5 Oreg. 311; Murray v. South Carolina R. Co., 10 Rich. (S. Car.) 227; Blaine v. Chesapeake, etc., R. Co., 9 W. Va. 252; Baylor v. Baltimore, etc., R. Co., 9 W. Va. 270; Little Rock, etc., R. Co. v. Finley, 37 Ark. 562; Waters v. Moss, 12 Cal. 535; Logan v. Gednez, 38 Cal. 579; Morris v. Fraker, 5 Colo. 425; Studwell v. Ritch, 14 Conn. 292; Macon, etc., R. Co. v. Lester, 30 Ga. 914; Georgia, etc., R. Co. v. Nuly, 56 Ga. 540; Seely v. Peters, 6 Gilm. (Ill.) 30; N. Pa. Co. v. Rehman, 49 Pa. St. 101; Stoner v. Shurgart, 45 Ill. 76. In Macon, etc., R. Co. v. Lester, 30 Ga. 914, in discussing the question as to whether or not it is the duty of an owner of domestic animals in Georgia to keep them at home, the court used the following language: "Such a law as this would require a revolution in our people's habits of thought and action. A man could not walk across his neighbor's uninclosed land, nor allow his horses, or his hog, or his cow to range in the woods nor to graze on the fields or the wire grass without subjecting himself to damages for a trespass. Our whole people, with their present habits, would be converted into a set of trespassers. We do not think that such is the law." In Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 182; Bartley, J., commenting on the doctrine that fences at common law are designed to keep the owner's cattle in, and not other cattle out, says: "The reason of law should never rest in mere abstraction, without any application to

the practical affairs of society; and it is a maxim that, when the reason of law ceases, the law itself ceases. Fences have two sides to them, and the real and practical purpose of fences in this State has been, not only to protect the inclosures of the proprietors from the intrusion of animals without, but also to confine such as may be kept within."

1. Reasons for not adopting the common-law rule in the above-named States are well given by Trumbull, J., in Suley v. Peters, 5 Gilm. (Ill.) 130: "However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill-adapted to a new country like ours. If the common law prevails now, it must have prevailed from the earliest settlement of the State; and can it be supposed that, when the early settlers of this country located upon the borders of our extensive prairies, they brought with them, and adopted as applicable to their condition, a rule of law requiring every one to fence up his cattle? that they designed the millions of fertile acres stretched out before them to grow ungrazed, except as each purchaser from the government was able to inclose his part with a fence? This State (Ill.) is unlike any of the Eastern States in their early settlement, because from the scarcity of timber it must be many years yet before our extensive prairies can be fenced; and their luxuriant growth, sufficient for thousands of cattle, must be suffered to decay where it grows, unless settlers upon their borders be permitted to turn cattle upon them."

2. Johnson v. Wing, 3 Mich. 163; Reddick v. Newburn, 76 Mo. 424; Herald v. Meyers, 20 Iowa, 378; Cooley on Torts, 338.

3. Mann v. Williamson, 70 Mo. 661; Chase v. Chase, 15 Nev. 259; Oil v. Rowley, 69 Ill. 469; Aylesworth v. Herrington, 17 Mich. 417; Morris v. Fraker, 5 Col. 425; Clark v. Stipp, 75 Ind. 114. See Richardson v. Milburn, 11 Md. 340.

large.¹ But, while the law of outside fences allows the landowner the choice of fencing or submitting to the depredation of roaming cattle, the law of division fences makes it compulsory on him to do his part in making and repairing fences on the line between his lands and those of others.

(d) HERDING ON ANOTHER'S LAND.—While the statutes do not require the owner to restrain his cattle from passing of their own accord upon the unfenced lands of others, they give him no authority to drive them there. The landowner may distrain cattle turned on his premises by their owner, although his fences are not such as the law requires.² If the land is unfenced and uncultivated, the owner of cattle will be liable if he drives them there without permission of the landowner.³ The law requiring a lawful fence as a prerequisite to the recovery of damages, gives no rights upon another's land, whether fenced or not.⁴ But for such wilful trespasses the landowner is entitled only to his actual damages, and not to any of the penalties prescribed.⁵

(e) CONTROL OF UNFENCED LAND.—The owner's land may be unfenced, yet he may drive cattle off and guard against their return;⁶ but he must use reasonable care not to do any unnecessary injury in driving them off.⁷ He may use a dog, provided the size and character of the dog does not render that imprudent.⁸ He may use such means as are necessary to drive them off, and is not liable criminally if it results in the mutilation of the animal.⁹ If he inflicts unnecessary injury in driving them, he is answerable for the damage.¹⁰ He may drive them into a highway; and if they afterwards suffer injury, he is not responsible therefor.¹¹

(f) OUTSIDE FENCES.—Where the owner of land abutting upon a public highway is bound by statute to maintain a fence, he cannot recover damages caused by its defects.¹² But he is

1. *Kerwhacker v. Railroad Co.*, 3 Ohio St. 172.

2. *Melody v. Reab*, 4 Mass. 471.

3. *Delaney v. Errickson*, 11 Neb. 533; *Logan v. Gedney*, 38 Cal. 579. See *Powers v. Kindt*, 13 Kan. 74.

4. *Caulkins v. Matthews*, 5 Kan. 199; *Union Pac. R. Co. v. Rollins*, 5 Kan. 167.

5. *Dent v. Ross*, 52 Miss. 188.

6. *Lord v. Wormwood*, 29 Me. 282.

7. *Totten v. Cole*, 33 Mo. 138; *Wilhite v. Speckman*, 79 Ala. 400.

8. *Clark v. Adams*, 18 Vt. 425. See *Spray v. Ammerman*, 66 Ill. 309.

9. *Avery v. People*, 11 Ill. App. 332. See *Thomas v. State*, 30 Ark. 433.

10. *Palmer v. Silverthorn*, 32 Pa. St. 65.

11. *Palmer v. Silverthorn*, 32 Pa. St. 65. See *Knour v. Wagoner*, 16 Ind. 414.

12. *Rolle*, Abr. Trespass, 565, pl. 3; 2 Wat. on Tresp. 299; *Mooney v. Maynard*, 1 Vt. 470; s. c., 18 Am. Dec. 699; *Star v. Rookesby*, 1 Salk, 335; *Morris v. Fraker*, 5 Cal. 425; *Comerford v. Dupuy*, 17 Cal. 308; *Studwell v. Ritch*, 14 Conn. 292; *Hine v. Munsen*, 32 Conn. 219; *Seeley v. Peters*, 5 Gilm. (Ill.) 130; *Headen v. Rust*, 39 Ill. 186; *Westgate v. Carr*, 43 Ill. 450; *Blizzard v. Walker*, 32 Ind. 437; *Hinshaw v. Gilpin*, 64 Ind. 116; *Heath v. Coltenback*, 5 Iowa, 490; *Herald v. Meyers*, 20 Iowa, 378; *Frazier v. Norntinus*, 34 Iowa, 82; *Duffees v. Judd*, 48 Iowa, 256; *Wills v. Walter*, 5 Bush (Ky.) 251; *Mann v. Williamson*, 70 Mo. 661; *Chase v. Chase*, 15 Nev. 259; *York v. Davis*, 11 N. H. 241; *Shepherd v. Hees*, 12 Johns. (N. Y.) 433; *Deyo v. Stewart*, 4 Denio (N. Y.), 101; *Griffin v. Martin*, 7 Barb. (N. Y.) 297; *Cowles v. Balzer*, 47

bound to fence only against stock rightfully on the highway.¹

Barb. (N. Y.) 562; Jones v. Witherspoon, 7 Jones L. (N. C.) 555; Campbell v. Bridwell 5 Oreg. 311; Gregg v. Gregg, 55 Pa. St. 227; Keenan v. Cavanaugh, 44 Vt. 268. The existence of such statute changes the common-law rule, and requires the owner of land to fence his neighbor's cattle out, although in Vermont it is said that the statute relating to fences is merely in affirmance of the rule that the fences prescribed by statute are to keep the owner's cattle in. Hurd v. Rutland, etc., R. Co., 25 Vt. 116.

1. The insufficiency of a fence, under the statute, is no defence to an action for a trespass. But where cattle are lawfully permitted to run at large in the highway, the owner of adjacent land, not fenced according to law, cannot recover for their trespass where they stray from the highway upon such land (Griffin v. Martin, 7 Barb. (N. Y.) 297); and it must appear, in order to justify the trespass, that the land was insufficiently fenced, and that the cattle entered there from the highway. White v. Scott, 4 Barb. (N. Y.) 56.

Where cattle are prohibited from running at large, by statute or local regulations, the owner thereof permitting them to run at large is liable for their trespasses whether the lands upon which they trespass are sufficiently closed or not. Wells v. Beal, 9 Kan. 597; Westgate v. Carr, 43 Ill. 450. But see, *contra*, under the Iowa statute, Duffees v. Judd, 48 Iowa 256. So where the defendant, entering under a license to take material for the repair of a highway, leaves the fence down, so that stock enter, it is no defence that the fence is not a lawful fence at other points. Crawford v. Maxwell, 3 Humph. (Tenn.) 476. A case somewhat at variance with this is Polk v. Lane, 4 Yerg. (Tenn.) 36, where it was held that the owner of land, whose fence was not a lawful fence throughout, could not recover for a trespass by cattle at a point where it was sufficient, on the ground that its general insufficiency might have tempted the cattle to enter. The fact that the average height of the fence is up to the legal standard will not enable the plaintiff to recover where it is below the legal height at the point of entry. Prather v. Reeve, 23 Kan. 627. See Mills v. Stark, 44 N. H. 512; s. c., 17 Am. Dec. 444; Halliday v. Marsh, 3 Wend. (N. Y.) 142; s. c., 20 Am. Dec. 678; Chambers v. Matthews, 18 N. J. L. 368; Dovaston v. Payne, 2 H. Bl. 428.

By the common law, cattle may lawfully

be driven along the highway without subjecting the owner of them to any liability for their casual trespasses upon adjacent uninclosed land where they stray from the road as they are driven along, and "snatchingly" and "sparingly" crop the herbage, if such owner is not guilty of negligence and makes reasonable efforts to recapture them. Dovaston v. Payne, 2 H. Bl. 528; Goodwyn v. Chevely, 28 L. J. Ex. Ch. 298; s. c., Hurlst. & N. 631; 7 W. R. 631; Tillett v. Ward (Q. B. Div.), 22 Am. L. Reg. 245; Stackpole v. Healy, 13 Mass. 33; s. c., 8 Am. Dec. 121; Halladay v. Marsh, 3 Wend. (N. Y.) 142; s. c., 20 Am. Dec. 678; Hartford v. Brady, 114 Mass. 466; McDonnell v. Pittsfield, etc., R. Co., 115 Mass. 464. So where a bull, driven along the highway, runs into a neighboring shop and does damage. Tillett v. Ward (Q. B. Div.), 22 Am. L. Reg. 245. And what is a reasonable time for the removal of cattle thus casually trespassing while driven along the highway is a question for the jury, to be determined according to the circumstances of the particular case. Goodwyn v. Chevely, 28 L. J. Exch. 298; s. c., Hurlst. & N. 631; 7 W. R. 631. And where cattle are lawfully used in working on a highway, and commit casual trespass in turning with a scraper or the like, their owner is not liable. Cool v. Crommet, 13 Me. 250. But a highway is not a pasture for any man's cattle; and if he turns them into the highway to graze, or if they escape into the highway, they are to be deemed unlawfully there, in the absence of any statute or local regulation permitting animals to run at large in the highways; and if they stray upon adjacent land, fenced or unfenced, the owner of them is liable at common law. Stackpole v. Healy, 13 Mass. 33; s. c., 8 Am. Dec. 121; Avery v. Maxwell, 4 N. H. 36; Harrison v. Brown, 5 Wis. 27.

In Hartford v. Brady, 114 Mass. 468, Devens, J., gives a clear statement of the law upon this question. He says: "Inasmuch as the highways have been set apart, among other things, that cattle may be driven thereon, and as, from the nature of such animals, it is impossible, even with care, to keep them upon the highways unless the adjoining land is properly fenced, it has been settled that the owner of unfenced lands upon such ways cannot seize, as damage feasant, or sustain an action for the injury caused by cattle that wander thereupon, if reasonable care has been used in driving them along the

(g) DUTY OF COMMISSIONERS.—Where it is made the duty of commissioners by statute, to keep boundary fences in repair, they may discharge this duty by making the proper orders and regulations, by appointing proper overseers to look after the fences, and by levying the tax allowed by law for repairing them.¹

(h) PARTITION FENCES.—A partition fence is one built along the boundary line between adjoining proprietors. It is, in contemplation of law, on the true line, although it be a worm, or zig-zag, fence, crossing the line from side to side alternately.² One may occupy the necessary land on each side of the true line for such a fence, although it incloses parts of the adjoining tracts.³ One proprietor may place half of a fence of reasonable dimensions on the land of the adjoining owner, and he may cut half of a ditch on the land of such owner when a ditch is proper for a partition fence.⁴ If more than half the fence is built upon the land of one without his consent, he may remove the excess, and, if necessary to its removal, may take all of it down.⁵

highway or, if they have escaped, having been properly managed, if reasonable effort has been made to remove them." *Little v. Lathrop*, 5 Greene (Me.), 365; *Lord v. Wormword*, 29 Me. 282; *Avery v. Maxwell*, 4 N. H. 36; *Mills v. Stark*, 4 N. H. 512.

In a still more recent decision, *McDonnell v. Pittsfield, etc.*, R. Corp., 115 Mass. 564, Justice Devens examines this question again and says: "The principle of the common law which requires that each should keep his cattle on his own land, is so far modified as to hold the owner not liable for the trespass of his cattle which, passing along the highway and being properly managed therein, casually wandered into the unfenced lots bounding thereon, provided he removes them with reasonable promptness. But the cattle are not in such case lawfully upon such lots; they are there only under such circumstances that their trespass, being casual and such as could not have been prevented by reasonable care, is held excusable, and this is all. That they should be rightfully and lawfully upon land, the authority or consent of the owner of the close is necessary; and even if he is without a remedy for the injury they may cause him, the owner of the cattle does not acquire his rights as against the owners of adjoining closes. If after entering upon his close, they proceed into another adjoining thereto, they are their trespassers, and an action may be maintained for such trespass by the owner of the second close, even if the fence was insufficient and if he was also bound to fence as against the owner of the first close. Being thus bound, he is

only bound to fence against cattle on the first close."

1. *State v. County Com'rs*, 97 N. Car. 388.

2. *Ferris v. Van Buskirk*, 18 Barb. (N. Y.) 397.

3. *Ferris v. Van Buskirk*, 18 Barb. (N. Y.) 397; *Patterson v. Lacy*, 48 Mo. 380. *Contra*, *Morton v. Reynolds*, 45 N. J. L. 326.

4. *Newell v. Hill*, 2 Metc. (Mass.) 180; *Oat v. Middleton*, 2 Miles (Pa.), 247.

5. *Sparhawk v. Twichell*, 1 Allen (Mass.), 450.

Conflict as to What is a Division Fence.

—There is a conflict as to whether anything can be regarded as a division fence, unless it stands on the true line. It has been held that unless it is on the line, it is not a division fence, that the fence laws are not applicable to it, and that the owner was not liable for removing it without giving the statutory notice, although the fence stood near to and parallel with the line, and had been treated as a division fence. *Sims v. Field*, 74 Mo. 139; *Jeffries v. Burgin*, 57 Mo. 327.

If not on the line, he does not make it a division fence by giving the other permission to connect with it. *State v. Watson*, 86 N. Car. 626. On the other hand, it has been held that, if the fence be placed on an agreed line, the builder cannot compel contribution by the adjoining owner whether it be on the true line or not. *Oxborough v. Boesser*, 30 Minn. 1.

It is a division fence if built pursuant to an agreement between the owners. *Avery v. Searcy*, 50 Ala. 54. Although it does not conform to the boundary, if it be treated as a division fence, that makes

If one by mistake has built his fence on the other's land, he may remove it in a reasonable time after discovering his mistake.¹

1. *Generally*.—If the parties are jointly bound to maintain a partition fence, and neither is severally bound either by agreement or by statute, to maintain any particular part, the defectiveness of such fence is no defence to an action of trespass by the cattle of one upon the other, and the parties are remitted to their common-law rights and obligations as to keeping their cattle from straying beyond their own land, in those States where the common-law rule is recognized.² And in order to escape liability for trespass committed through the insufficiency of such fence, it must appear to have been divided either according to the statute or by a binding agreement, so as to throw upon each owner the obligation of maintaining some particular part of it, and that the defect by reason of which the injury arose was on the plaintiff's part.³

The fact that each owner has built and maintained a specific part of the fence is not enough,⁴ unless such several maintenance has been so long continued as to raise a legal presumption of a binding agreement therefor.⁵

A joint maintenance, however long continued, is not sufficient to give rise to any prescriptive obligation by either to maintain any particular portion.⁶

Where two persons own adjoining lands, separated by a division fence, one part of which one owner is bound to repair, and the remainder the other is to maintain, neither party can recover damages occasioned by reason of a defect in his own part of the fence, but may collect for damages occasioned by cattle breaking through his neighbor's part, although his own is equally defective.⁷

If cattle enter through a defect in that part of a partition fence which the owner of the cattle is bound to repair, he is of course liable.⁸ If both parts of the fence are out of repair, and it cannot be shown through what part the cattle entered, there can be no recovery.⁹

it so. *Roff v. Brachman*, 24 Ohio St. 3; *Stewart v. Carlton*, 31 Mich. 270; *McNally v. O'Brien*, 88 Ill. 237; *Stallcup v. Bradley*, 3 Coldw. (Tenn.) 406. But the builder cannot compel contribution where the fence is not on the line, unless the other has assented to its construction elsewhere than on the line. *Kennedy v. Owen*, 131 Mass. 431.

1. *Matson v. Calhoun*, 44 Mo. 368; *Jeffries v. Burgin*, 57 Mo. 327.

2. *Little v. Lathrop*, 5 Greene (Me.), 356; *Sturtevant v. Merrill*, 33 Me. 62; *Knox v. Tucker*, 48 Me. 373; *Rust v. Low*, 6 Mass. 100; *Avery v. Maxwell*, 4 N. H. 36; *Tewksbury v. Bucklin*, 7 N. H. 518; *York v. Davis*, 11 N. H. 241; *Lawrence v. Combs*, 37 N. H. 335.

3. *Lord v. Wormwood*, 29 Me. 282; *Knox v. Tucker*, 48 Me. 373.

4. *Sturtevant v. Merrill*, 33 Me. 62.

5. *Knox v. Tucker*, 48 Me. 373.

6. *Webber v. Closson*, 35 Me. 26; *McAninch v. Smith*, 19 Mo. App. 240.

Partition Fence Owned by the Plaintiff.

—Where the partition fence is owned entirely by the plaintiff, but he is under no obligation or contract to maintain it, and it is not such a division fence as is contemplated by the statute, he may recover for a trespass committed through a defect therein where the common-law doctrine prevails. *McBride v. Lynd*, 55 Ill. 411.

7. *Shepherd v. Hees*, 12 Johns. (N. Y.) 433.

8. *Stafford v. Ingersoll*, 3 Hill (N. Y.), 38; *Thayer v. Arnold*, 4 Metc. (Mass.) 589.

9. *Deyo v. Stewart*, 4 Denio (N. Y.), 101.

2. *Statutory Regulations.*—The subject of partition fences is generally regulated by statutes; and it may be stated, in general terms, that such statutes ordinarily require adjacent owners of improved lands to contribute equally to the maintenance of partition fences, provide for the assignment, by fence-viewers, town trustees, or other proper officers, of the portion of fence which each owner is to build and maintain, and for the appraisement by such officers, when necessary to the adjustment of the mutual rights of the parties, of the value of fences erected or repairs made, and prescribe suitable methods of enforcing the adjudications of those officers. These statutes regulating partition fences are in the nature of police regulations.¹

3. *Waiver of Statutory Rights.*—Adjoining owners may waive statutory requirements by agreeing upon something different.² Where they agree, as between themselves, that they will build no fence and each will keep up his own stock, there is upon both a like obligation, which the law will enforce by an action for damages;³ and such an agreement would be valid though not in writing.⁴ But either party to such an agreement may put an end to it at any time by giving the other notice, unless there is something in the agreement to estop him.⁵ By accepting a deed which imposed on the grantee the duty of fencing the land, the grantee is estopped from distraining cattle which trespass on his land for want of a fence.⁶

What is Sufficient to Sustain Recovery.

—If it be shown that the entry was through a part of the fence which the defendant has in fact maintained, this is held *prima facie* sufficient to sustain a recovery; and if the defendant wishes to escape liability by proving that the plaintiff was bound to maintain that part of the fence, he must show it as a matter of defence. *Colden v. Edred*, 15 Johns. (N. Y.) 220. See, *contra*, *Sturtevant v. Merrill*, 33 Me. 62. If the cattle, in fact, entered through that part of the fence which the plaintiff is bound to repair, he cannot recover even though the defendant's portion of the fence is also shown to be out of repair. *Hine v. Munson*, 32 Conn. 219. In *Alabama*, it is held, contrary to what is laid down, that, where the cattle enters upon one's land from a neighboring inclosure, through that part of a division fence which the owner of the cattle has agreed to maintain, trespass will not lie therefor, but the recovery is on the contract. *Walker v. Watrous*, 8 Ala. 493.

1. *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *McKeever v. Jenks*, 59 Iowa, 300.

Historically Considered.—The duty enjoined by such statutes upon adjacent landowners, of uniting in the erection and maintenance of partition fences, is

regarded as almost a common-law obligation in some of the older States, owing to the antiquity of the first statutes upon the subject, and the uniformity with which they have been maintained. This duty was declared and defined in *Pennsylvania* as early as 1700. *Shriver v. Stevens*, 20 Pa. St. 138, 144. In *New York*, it is said that the practice of submitting controversies relating to partition fences, to fence-viewers, originated in colonial times, and that the first statute on the subject was enacted in 1750. *Hewitt v. Watkins*, 11 Barb. (N. Y.) 413. It is held in *McMillen v. Wilson*, 3 Dana (Ky.), 154, that a municipal ordinance requiring adjoining owners to pay half the cost of partition fences which they make part of their inclosure is strictly construed. It is to be denied, however, that a very liberal construction of general statutes upon this subject, for the purpose of upholding the proceedings of fence-viewers within their jurisdiction, has been often indulged.

2. *Albright v. Bruner*, 14 Ill. App. 319.

3. *Dent v. Ross*, 52 Miss. 188; *Milligan v. Wehinger*, 68 Pa. St. 235.

4. *Bills v. Belknap*, 38 Iowa, 225.

5. *Stone v. Wait*, 50 Vt. 663.

6. *Minor v. Deland*, 18 Pick. (Mass.) 266.

4. *Agreement*.—A partition fence may be established by agreement of adjacent landowners, and they may respectively bind themselves to maintain particular portions of such fence, or one of them may agree to maintain the entire fence. The fact that there is a statute providing for the erection and apportionment of partition fences will not preclude the parties from controlling the matter by private agreement.¹

The authorities differ as to whether a division by a verbal agreement is valid.² A division by verbal agreement may be revoked,

1. *D'Arcy v. Miller*, 86 Ill. 102. If the adjoining owners enter into an agreement for the erection of a partition fence, and as to what shall be deemed a sufficient fence, the agreement, and not the statute, will determine its sufficiency. *Albright v. Bruner*, 14 Ill. App. 319. But under an agreement to maintain a "sufficient" fence, where a general law prescribes what shall be a sufficient fence, a lawful fence will be held to be intended. *Albright v. Bruner*, 14 Ill. App. 319. Where two adjoining landowners agreed to divide a partition fence between them, allotting to each a certain part thereof, and such fence is built and repaired by such parties accordingly, and also by subsequent grantees of one of such owners, the fence will be regarded as a division fence under the statute regulating division fences. *D'Arcy v. Miller*, 86 Ill. 102; *York v. Davis*, 11 N. H. 241; *Stallcup v. Bradley*, 3 Coldw. (Tenn.) 406. And such agreement can be revoked only in the statutory mode. *York v. Davis*, 11 N. H. 241. Nor is such agreement annulled by the death of either of the parties. *Stallcup v. Bradley*, 3 Coldw. (Tenn.) 406. See, *contra*, *Bland v. Umstead*, 23 Pa. St. 316. When such an agreement is made, each is bound to maintain his portion in any event until the agreement is repudiated. *Tupper v. Clark*, 43 Vt. 200. At common law, a tenant of a close, having agreed to maintain a partition fence between his close and that of another, could not be compelled to do so, but the only remedy was by an action for a breach of agreement. *Nowel v. Smith*, Cro. Eliz. 709. But, of course, where such an agreement is held to constitute the fence in question a partition fence within the meaning of a statute regulating such fences, all the statutory remedies for the enforcement of the obligations of the respective parties unquestionably apply. In *Kennedy v. Owen*, 134 Mass. 227, it is held, however, that the statutory remedy is applicable only to a case where the duty of maintaining the fence is required by statute,

and does not apply to a case where such duty arises from the acceptance of a deed containing a condition to maintain it.

2. The obligation of a landowner to build and maintain a division fence, in whole or in part, for the benefit of adjoining land, is something more, indeed, than an obligation to furnish the materials and labor necessary from time to time for the erection and reparation of the fence; it imposes a burden upon the land itself. A partition fence ordinarily must rest equally upon the land of the respective proprietors. Hence, an agreement of one of those proprietors to maintain such a fence necessarily imparts a dedication of the use of the land required to support half of it. To that extent it is therefore an estate in the land itself. In accordance, then, with the general rule that an easement, being an interest in realty, cannot be conveyed or reserved by parol (*Washburn on Easements*, 18; *Foster v. Browning*, 4 R. I. 47; s. c., 67 Am. Dec., 505), an agreement by an owner of land to maintain a partition fence between such land and that of an adjoining proprietor, cannot ordinarily rest in parol, but, to be binding, must be in writing. *Tyler on Boundaries*, 344; *Hewlins v. Shippam*, 4 Barn. & Cress. 221; *Knox v. Tucker*, 48 Me. 373. In *Pitzner v. Shinnick*, 41 Wis. 676, it was held that such an agreement, resting in parol, is not binding upon grantees or lessees of the parties who made the agreement, and being informed of it is not sufficient to make it effectual against them. A covenant, however, for the maintenance of a partition fence runs with the land, and binds, not only the covenantor, but his heirs and assigns. *Potter v. Parry*, 7 W. R. 182; *Kellogg v. Robinson*, 6 Vt. 276; s. c., 27 Am. Dec. 550; *Blain v. Taylor*, 19 Abb. Pr. (N. Y.) 228; *Tyler on Boundaries*, 345. But, contrary to the above decisions, it is held in *Guyer v. Stratton*, 29 Conn. 421, that a parol partition of a divisional fence by adjoining proprietors is valid. *York v.*

however, at any time, by application to the fence-viewers and obtaining a statutory assignment;¹ but mere notice to the other of an intention to revoke is insufficient.² The lessee of one owner is bound by such an agreement, and cannot recover, from the other, damages resulting from his cattle breaking over the part which the landlord should have kept in repair.³

5. *Contribution*.—Where there is nothing but the line between two tracts of land, and they are otherwise within the statute, they are adjoining owners and are bound to contribute to partition fences;⁴ neither can escape this obligation except by agreement.⁵ The adjoining proprietor must pay for half of a hedge, although there are gaps in it where, from the nature of the ground, it would not grow.⁶ So, although the fence is more expensive than that required by statute, he is not thereby excused from paying his share,⁷ nor is he excused because the line is in dispute, if there is in fact a division fence.⁸ Nor is he excused because it does not conform to the boundary, if it was recognized and treated as a division fence.⁹ The statutes generally require only that adjacent owners of "improved" or inclosed lands shall contribute to parti-

Davis, 11 N. H. 241; Brooks v. Allen, 1 Wis. 127.

1. York v. Davis, 11 N. H. 241. But a division fence established by agreement cannot be questioned after a lapse of thirty years. Darst v. Enlow, 116 Ill. 475.

2. York v. Davis, 11 N. H. 241; Stone v. Wait, 50 Vt. 663.

3. Bayne v. Chastian, 68 Ind. 376; Stafford v. Ingersol, 3 Hill (N. Y.), 38; Tewksbury v. Bucklin, 7 N. H. 518. But a married woman will not be affected by the agreement of her husband as to the location of a fence upon her land, or submission of the question to arbitrators made in her absence and without her knowledge and consent. Benedict v. Pearce, 53 Conn. 496.

Action for Failure to Comply with Agreement.—Where R. and B. own adjoining lands and agree upon the amount and the particular portion of the partition fence which each shall keep up and maintain, and R., in pursuance of such agreement, expends time, labor, and money in keeping up and maintaining for a considerable time his portion of the partition fence, it is then a fraud upon R. for B. to procure an award of the fence-viewers assigning to R. another and an additional portion of the fence to keep and maintain; and as R. has no appeal from the award of the fence-viewers, and no petition in error, and no remedy more direct than an action in the nature of a suit in equity to set aside the award of the fence-viewers, held, that R. may

maintain such action. Robertson v. Bell, 36 Kan. 648.

Party in Default.—The fact that adjoining landowners have agreed that each shall keep up certain specified portions of a partition fence does not permit a resort, however, to the statutory method for the assessment of damages against the party in default. Bruner v. Palmer, 108 Ind. 397.

4. Rangler v. McCreight, 27 Pa. St. 95.

5. They may dispense with the obligation by agreeing that there shall be a lane between them; nor need the agreement be in writing. Bills v. Belknap, 38 Iowa, 225. By agreeing to inclose their lands in common, such agreement releases for the time being each party from obligation to build a partition fence, and they will then be remitted to their common-law rights as respects liability for mutual trespasses. Winters v. Jacobs, 29 Iowa, 115. It was held, however, in Painter v. Reece, 2 Pa. St. 126, where an existing partition fence was destroyed, that either owner might escape any liability for rebuilding it by building his fence on his own land, leaving the intervening space open. But, contrary to these cases, it was held that two adjacent landowners cannot evade the law as to the maintenance of partition fences by building his fence on his own land a few feet from the line. Talbot v. Blackledge, 22 Iowa, 572.

6. McKeever v. Jenks, 59 Iowa, 300.

7. Robb v. Brachmann, 24 Ohio St. 3.

8. Stephens v. Shriver, 25 Pa. St. 78.

9. Robb v. Brachmann, 24 Ohio St. 3.

tion fences; and owners whose lands are unimproved or uninclosed cannot be compelled to contribute.¹ When land is to be deemed under improvement, so as to render the owner liable to contribution to the expence of partition fences, is a mixed question of law and fact, to be determined by the jury under proper instructions.² The liability of the owner or occupant of land, which has lain uninclosed, becomes fixed as soon as he incloses the same.³

1. *Bechtel v. Neilson*, 19 Wis. 49. The fact that a part of the land of the adjacent owner is improved does not require him to maintain any part of a partition fence along that part which is not improved. *James v. Tibbetts*, 60 Me. 557. So, under a statute allowing owner to elect to let his land lie open or in common, and thus to escape liability for partition fence, such owner may, unless there is something to the contrary in the statute, let part of his land lie open and avoid contributing to the partition fence *pro tanto*. *Chamberlain v. Reed*, 14 Hun (N. Y.), 403. Under the *New York* statute before a party can claim that he has chosen to let his land "lie open to a public common," he must have given the adjoining owner or the fence-viewers notice that he has so chosen; otherwise he will be liable to the adjoining owner for the expence of building his proportion of the division fence. *Perkins v. Perkins*, 44 Barb. (N. Y.) 134; *Holladay v. Marsh*, 3 Wend. (N. Y.) 142; s. c., 20 Am. Dec. 678. Where one who has let his land lie open under the statute, afterwards incloses it, and joins to line fence erected by an adjacent owner, he becomes liable for half the cost of it, and the fence-viewers may take jurisdiction to apportion it. *Field v. Proprietors*, 1 Cush. (N. Y.) 11; *Hewitt v. Watkins*, 11 Barb. (N. Y.) 409. His subsequent abandonment of his intent to inclose, before the statutory steps are taken to determine his liability, will not divest the jurisdiction. *Boenig v. Hordberg*, 24 Minn. 307.

2. *Chase v. Jefts*, 58 N. H. 280. Land occupied by buildings devoted to the public use is "under improvement," but is held to be laid "in common," and therefore not within the statute. *Wiggin v. Baptist Society*, 43 N. H. 260. Land "in common," under statute in *Iowa*, is land the use of which is such that it does not require a fence; and not necessarily land used strictly in common. *Syas v. Peck*, 58 Iowa, 256. But in *New York* it is held that letting "lie open to a public common," within the sense of the statute, must amount, on the part of the owner, to a license for its free use by all the people of the town, and their cattle, in order to avoid liability for a partition fence. *Perkins v. Perkins*,

44 Barb. (N. Y.) 134. Land is deemed not to lie "in common," but to be within the statute as to partition fences, in *Iowa*, when the owner segregates from adjoining land by a fence, or by such use of it that he and his neighbors cannot, in the nature of things, use it in common. *Hewitt v. Jewell*, 59 Iowa, 37.

In order to be liable under a statute relating to partition fences, the party must be in the possession, use, and control of premises so as to be able to fence them voluntarily: and it is held that a husband lodging with his wife who is the owner and exclusive manager of the premises, he himself being engaged in business elsewhere, is not within the statute. *Carpenter v. Vail*, 36 Mich. 226. One who has by agreement inclosed his land with that of others is nevertheless liable to contribute to a partition fence between his land and that of an adjacent owner. *Gonzales v. Wasson*, 51 Cal. 296. But an owner whose land is in the possession of a trespasser, or one claiming for himself or a stranger, is not liable for the erection or repair of a partition fence between that and adjacent land. *Moore v. Lerert*, 24 Ala. 310.

In *Wisconsin*, the statute relating to fences and fence-viewers does not apply to ornamental partition fences between town, village, or city lots; nor does it prohibit parties from contracting for building such fences. *Brooks v. Allen*, 1 Wis. 127. A similar discussion under a *Tennessee* statute: *Lightfoot v. Grove*, 5 Heisk. (Tenn.) 473. Compare *State v. McMinn*, 81 N. Car. 585.

3. *Field v. Prop'r*, 1 Cush. (Mass.) 11; *Hale v. Andrew*, 75 Ill. 252.

Obligation to Contribute, a Chose in Action.—In *Illinois*, it was held that the obligation to contribute, when it had attached, was a "chose in action," and that the grantee of one who had built a division fence does not succeed to the rights of his grantor to enforce contribution where the obligation had arisen before the grant. *Hale v. Andrew*, 75 Ill. 252. But in *Missouri*, it was held that the right of contribution passed under the deed as an incident to the land, and might be enforced by the grantee. *Brawner v. Loughton*, 57 Mo. 516.

6. *Lawful Fence*.—The object of fencing is to provide against damage caused by or to domestic animals properly restrained by a common fence. One is not obliged to fence against such small animals as would pass through or under an ordinary fence, nor against such wild animals as would break through.¹ The design of the fence law was to secure a fence that would turn ordinary stock, domestic animals that were not breachy or unruly. The statutes generally define what shall constitute a lawful fence. If the law prescribes the height of a fence, the landowner cannot recover for damages by animals without showing that his fence was of the statutory height, although the animals were breachy.² The statute may define what will constitute a lawful fence; yet a bluff, a hedge, a trench, a trestle, or the like will answer as a substitute for the statutory fence; provided it is strong and secure. If it is

Rights by Prescription.—The rights of parties with respect to contribution may be enlarged or restricted by prescription; for a party may be bound in this way to build where there is no statutory obligation. *Lawrence v. Jenkins*, 21 W. R. 577; s. c., L. R. 82 B. Div. 274; 28 L. T. (N. S.) 406; 42 L. J. Q. B. 147; *Knox v. Tucker*, 48 Me. 373; *Harlow v. Stinson*, 60 Me. 347. Where the owner of land, and his grantors, have for more than twenty years maintained a specific portion of a partition fence, recognizing their obligation to do so, it will be presumed that there was a valid agreement to that effect. *Knox v. Tucker*, 48 Me. 373; *Harlow v. Stinson*, 60 Me. 347. In *Glidden v. Towle*, 31 N. H. 147, it is held that a division of a partition fence cannot be established by a prescription gained after the enactment of a statute giving fence-viewers power to make a division in case of dispute so as to oust their jurisdiction to make such division. In *Chase v. Jefts*, 58 N. H. 43, it is decided also that a statute allowing a division of such a fence to be established by evidence of twenty years' usage and acquiescence does not operate retrospectively, and that a prescription beginning before the passage of the act will not do. At common law a writ of *curia clauda* would lie to enforce a prescriptive obligation to maintain a partition fence, or a specific portion of it; but now it seems to compel performance of a mere agreement to maintain such a fence. *Nowl v. Smith*, Cro. Eliz. 709; *Lawrence v. Jenkins*, 21 W. R. 577; s. c., L. R. 8 Q. B. Div. 274; 28 L. T. (N. S.) 406; 42 L. J. Q. B. 147. Prescription rests on the theory that, by the terms of some former grant, the burden was imposed on the owner of one tract to fence between it and another tract. *Rust v. Low*, 6 Mass. 90; *Minor v. Deland*, 18 Pick. (Mass.) 266. Under our system

of conveyancing, there is very little basis for such presumptions; yet it has been held that one had thus become bound to maintain specific portions of a fence,—*Harlow v. Stinson*, 60 Me. 347;—and that parol proof of usage was competent to show a presumption. *Heath v. Ricker*, 2 Me. 72.

Actions for Refusal to Contribute.—An action under Rev. Stat. Wis. ch. 55, and laws 1880, ch. 138, to recover money by an owner of land used and occupied for farming purposes against the owner of the adjoining land used for the same purposes, for his neglect and refusal to contribute to the building of a division fence, is legal and not equitable in its character, and should be tried by a jury unless a jury is waived. *Farr v. Spain*, 67 Wis. 631.

1. *Canefox v. Crenshaw*, 24 Mo. 199.

2. *Moore v. White*, 45 Mo. 206; *Kerwhacker v. Railroad Co.*, 3 Ohio St. 172; *Runyan v. Patterson*, 87 N. Car. 343; *Adams v. McKinney*, Add. (Pa.) 258; *Barnum v. Vandusen*, 16 Conn. 200. But the "lawful partition fences" which are required by ch. 307, Wis. Laws of 1880, to be maintained and kept in repair as a condition precedent to the recovery of damages for trespasses by animals, etc., are merely line fences complying with the requirements of sec. 1390, R. S., and it is immaterial whether or not they have been divided under secs. 1392, 1393, R. S. Evidence offered by the plaintiff, in an action to recover such damages, to show that the line fence between his land and the defendant's, through which the animals passed, was "a legal fence kept up and maintained by the parties," should have been received, although perhaps the burden of showing that fact was not, in the first instance, upon him. *Taylor v. Young*, 61 Wis. 314.

such a fence as farmers of practical knowledge and experience would consider sufficient to protect crops, it will answer, although not such a fence as the statute prescribes.¹

7. *Defective Fence*.—Before a cause of action can accrue in favor of one adjoining landowner against the other, he must make a sufficient fence along the whole line, or have a portion of it assigned to the other, so that the duty would rest exclusively on the latter to keep that part in repair.² Neither can claim the statutory protection until the fence has been apportioned between them for repairs.³ Until the fence is apportioned between

1. *Hilliard v. Railroad Co.*, 37 Iowa, 442; *Phillips v. Oyster*, 32 Iowa, 257; *Miner v. Bennett*, 45 Iowa, 635.

A partition fence on land that is covered a part of the year with the waters of an artificial mill pond, but is occupied and used as a pasture or mowing-land during another part of the year, is not a "lawful fence," within the meaning of the *Mass. Rev. Stats.* ch. 19, §§ 9, 14; *Lamb v. Hicks*, 11 Metc. (Mass.) 496. See *State v. Lamb*, 8 Ired. L. (N. Car.) 229; *Jones v. Witherspoon*, 7 Jones L. (N. Car.) 555; *Soule v. Barlow*, 48 Vt. 132; *Tripp v. Hazell*, 1 Strobh. 173.

2. *Studwell v. Ritch*, 14 Conn. 292; *Rangler v. McCreight*, 27 Pa. St. 95; *Rust v. Low*, 6 Mass. 90.

3. *Coxe v. Robbins*, 9 N. J. L. 384; *Meyers v. Dodd*, 9 Ind. 290.

Rights and Remedies Generally.—If cattle enter on one's land and fall into a pit or well, their owner cannot recover damages of the landowner on that account, whether the land be insufficiently fenced or not fenced at all. *Caulkins v. Matthews*, 5 Kan. 191; *McGill v. Compton*, 66 Ill. 327; *Knight v. Abert*, 6 Pa. St. 476; *Hughes v. R. R. Co.*, 66 Mo. 325. He is not liable for damage if his neighbor's ox gets into his cornfield because it is not fenced, and kills himself by eating the corn. *Herald v. Meyers*, 20 Iowa, 378. But in *Hess v. Lupton*, 7 Ohio, pt. 1, 216, it was held that, if one leave an open pit in an unclosed lot in a town, into which his neighbor's beast falls and perishes, an action lies; but if such an accident happen in a pit left open in a place remote from the haunts of cattle, no suit is sustainable, for the risk of doing mischief is so small that the exposure is not negligent. So, if cattle get into the plaintiff's field because of his failure to keep his part of the fence in repair, the owner of the cattle is not liable for the damage. *Duffees v. Judd*, 48 Iowa, 256; *Wills v. Walters*, 5 Bush (Ky.), 351; *York v. Dairs*, 11 N. H. 241. Where each agreed,

without having any statutory assignment, to keep up a specific part of the fence, and one failed to do so, it was held that the remedy of the other was an action for breach of contract. *Moore v. Levert*, 24 Ala. 310; *Walker v. Watrous*, 8 Ala. 493; see *Fox v. Beebe*, 24 Cal. 271. But that view is opposed to all the cases which recognize that the fence may be apportioned between the owners by agreement, and seems to be unsound in principle. As the law will not allow one to recover for damages which have resulted from his failure to do his duty, in an action to recover for injuries done by trespassing cattle, the landowner must, if they entered through his part of the division fence, show that it was such as the statute required. *Polk v. Lane*, 4 Yerg. (Tenn.) 36; or if, through the part which the other proprietor was bound to repair, that it was not a lawful fence. *Tupper v. Clark*, 43 Vt. 200; *D'Arcy v. Miller*, 86 Ill. 102; *Lyons v. Merrick*, 105 Mass. 71. If the plaintiff's fence was sufficient at the place of entrance, he is entitled to recover, although his fence was defective at other points, provided the latter did not in any way contribute to the entrance. *Crawford v. Maxwell*, 3 Humph. (Tenn.) 476; *Ozburn v. Adams*, 70 Ill. 291; *Rice v. Nagle*, 14 Kan. 498. When the evidence showed that plaintiff's fence was in places less than four feet high, an instruction that if it averaged four feet it was sufficient, is erroneous. *Prather v. Reeve*, 23 Kan. 629. If the cattle get in where the fence is lawful, and also where it is deficient, the extent of defendant's liability is for the jury. *Noble v. Chase*, 60 Iowa, 261. If defendant's cattle are breachy, and break over his part of the fence, plaintiff is entitled to recover, although defendant's fence was lawful; for the fence laws were designed as a protection against ordinary stock—not such as are unruly or breachy.

But in *Bullard v. Mulligan*, 69 Iowa, 416, plaintiff's horse escaped over a particular fence, into defendant's field, at a

the adjoining owners, it is equally the duty of each to keep up every part of it. Hence, if it is defective it is as much the fault of one as the other; and, being equally at fault, neither can recover of the other on account of its condition.¹

8. *Removal of Fences*.—The right of one to remove a division fence, without the consent of the other, is regulated in the several States by statutes which require him to give notice a specified period of time before its removal.² Unless the statute requires the notice to be in writing, verbal notice is sufficient.³ One may, without notice, take it down for the purpose of rebuilding with other material.⁴

9. *Fence-viewers*.—Special tribunals designated as fence-viewers have been created in the several States for the settlement of the disputes which may arise between adjoining owners over their fences. In some of the States they consist of specified officers, while in others they are selected by the parties or specified officers on the application of either party to the dispute. Their decision upon questions in their jurisdiction is conclusive.⁵ They pos-

place where it was plaintiff's duty to fence, and where the evidence tended to show that he had failed to maintain it. Defendant, in trying to drive the horse back, caused him to become entangled in the wires, whereby he received injuries from which he died. In an action, *held*, that plaintiff's negligence in failing to maintain the fence was not material, and that, there being no evidence of any other negligence on plaintiff's part, an instruction that, before plaintiff could recover, he must prove that he was not himself guilty of any negligence contributory to the injury, was erroneous, because it tended to lead the jury to suppose that plaintiff's neglect to maintain the fence was contributory negligence, to be considered in the case. See *Roney v. Aldrich*, 44 Hun (N. Y.), 320.

1. *Stedwell v. Rich*, 14 Conn. 292.

2. Under the Mo. R. S. 1879, § 5663, six months' notice must be given before removing any division fence. *Knott v. Gleaze*, 22 Mo. App. 352. But, ordinarily, if the fence is not a division fence, the owner may remove it after giving reasonable notice, although less than the statutory period. *Ivins v. Ackerson*, 38 N. J. L. 220; *Guger v. Stratton*, 29 Conn. 421. See *Harlow v. Stinson*, 60 Me. 347.

3. *Holliday v. Marsh*, 3 Wend. (N. Y.) 142; s. c., 20 Am. Dec. 578.

4. *Burrell v. Burrell*, 11 Mass. 294.

Removing Fence Without Notice.—While it was held not to be criminal to break it or knock off planks that the others had added to it to make it higher, without notice (*Drees v. State*,

37 Ark. 122) the better view is, that the right to tear it down does not depend on its ownership, and that it can only be torn down in the manner prescribed by statute. *Sayles v. Bemis*, 57 Wis. 315; *Stallcup v. Bradley*, 3 Coldw. (Tenn.) 406. Where the plaintiff sued for damages to his crop, planted after the other had wrongfully removed the fence protecting one side of the land, he cannot recover from the wrongdoer because of injuries by cattle to such crop. *Hassa v. Junger*, 15 Wis. 598. So, where the owner of the fence allowed another to connect with it, but, before the other had completed his inclosure, removed it without notice, he was not subject to the statutory penalty. *Gundy v. State*, 63 Ind. 528. Notice of the intention to remove should be given to the owner or occupant of the land. *Stallcup v. Bradley*, 3 Coldw. (Tenn.) 406. Where defendant has given due notice of intention to remove the fence, the plaintiff is not entitled to any damages on account of its removal. *Whalen v. Blackburn*, 14 Wis. 432. When such a fence is removed without notice, the wrongdoer is liable for such damages as may occur before the plaintiff has had reasonable time to protect his crop. *Smith v. Johnson*, 76 Pa. St. 191.

5. *McKeever v. Jenks*, 59 Iowa, 300; *Oxborough v. Boesser*, 30 Minn. 1. Within their jurisdiction, the proceedings of fence-viewers are not to be scrutinized with technical nicety, but should receive indulgent consideration. *Talbot v. Blackledge*, 22 Iowa, 572. Substantial compliance with the statute will be sufficient to render their proceedings valid;

sess no powers except such as the statute expressly confers on them,¹ and must keep within the bounds of their jurisdiction.² As their duties are judicial, they must be disinterested and not related to the parties.³ If selected by one party without notice to the other their award will not bind the latter.⁴ As to matters of form, their proceedings will be treated with great indulgence.⁵ Owners in severalty, of adjoining lands, should not join in the application for viewers.⁶ The application for viewers need not be in writing.⁷ Their adjudication on the sufficiency of a fence should be made on a personal inspection, without a formal hearing.⁸

Notice to the adverse party is essential to give them jurisdiction to make an apportionment of a partition fence, to adjudicate upon the sufficiency of such a fence or of repairs thereof, or to appraise the value of such fence or repairs; and without such notice, whether the statute prescribes notice or not, their proceedings are void for

Shriver v. Stephens, 20 Pa. St. 138. Justice Lowrie in this case said: "It is important, to peace among neighbors, that the office of fenceviewers should be effective in settling controversies about the making and repair of fences; and, in order that it may be so, we must not allow them to be embarrassed by rules of practice that are suited only to those who make the law their principal study. Where the statute makes no particular form essential, we should not require it. If the duty of the viewers has been substantially performed, we ought to allow their certificate all the force and virtue intended by the statute." And the general rule is that their decisions to matters within their jurisdiction, in the absence of mistake or fraud are final and conclusive. *Bills v. Belknap*, 38 Iowa, 225; *Grey v. Edrinton*, 29 Kan. 208; *Baker v. Lakeman*, 12 Met. (Mass.) 195; *Oxborough v. Boesser*, 30 Minn. 1; *Foote v. Dewey*, 1 Hun (N. Y.), 529; *Robb v. Brachmann*, 24 Ohio St. 3. A statute making their determination is constitutional. *McKeever v. Jenks*, 59 Iowa, 300. The fact that a report of a division of a partition fence directs that each shall build the part assigned to him, and that such part shall be "kept in repair by him, his heirs and assigns, forever," does not vitiate it, for it merely states the legal effect of the division. *Gallup v. Mulvah*, 26 N. H. 132. In *Pennsylvania* it is held that, although a certificate of fence-viewers be defective, it must be sustained as to matters within their jurisdiction if the facts will support it. *Shriver v. Stevens*, 20 Pa. St. 138. An apportionment between adjacent owners of part only of their division fence is good if there is no dispute as to the residue or request to apportion

it. *Prescott v. Mudgett*, 13 Me. 428; *Alger v. Pool*, 11 Cush. (Mass.) 450.

1. *Bills v. Belknap*, 38 Iowa, 225.

2. *Voelz v. Brietenfield*, 68 Wis. 491; *Sears v. Charlemount*, 6 Allen (Mass.), 437. An adjudication by fence-viewers directing anything beyond what the law prescribes is void for the excess, though not, it seems, entirely void if any part is good. *Longley v. Hilton*, 34 Me. 332. They have no authority to fix the line, if it is in dispute; and, if they order a fence made on a line which is not the true line, it has been held that their action is void. *Gallup v. Mulvah*, 24 N. H. 204; *Talcott v. Stillman*, 28 Conn. 193; *Peschongs v. Mueller*, 50 Iowa 237. See, *contra*, *Robb v. Brachmann*, 24 Ohio St. 3; *Baker v. Lakeman*, 12 Met. (Mass.) 195. But the adverse party cannotoust their jurisdiction by raising disputes as to the line. *Gallup v. Mulvah*, 24 N. H. 204. The fence must be a partition fence to give the viewers jurisdiction, and they cannot conclude a party by deciding that to be a partition which is not. *Bills v. Belknap*, 38 Iowa, 225. A township committee acting as fence-viewers have no authority to change the place of a partition fence already existing, under a statute authorizing them to act in case of disputes as to the placing of partition fences. *Miller v. Barnet*, 5 N. J. L. 547.

3. *Sanborn v. Fellows*, 22 N. H. 473.

4. *Thompson v. Butson*, 78 Ill. 277; *Franklin v. Wells*, 6 R. I. 422.

5. *Talbott v. Blacklege*, 22 Iowa, 312.

6. *Briggs v. Haynes*, 68 Me. 535.

7. *Tubbs v. Ogden*, 46 Iowa, 134.

8. *Tubbs v. Ogden*, 46 Iowa, 134; *Fox v. Beebe*, 24 Conn. 271.

want of jurisdiction unless the parties voluntarily appear and appearance is itself notice.¹

It is not essential that their decision should be in writing.² If the parties are present when the decision is announced and recorded, they are not entitled to notice of the decision;³ but if they are absent, they should have due notice in writing of the decision.⁴ But notice that a fence is defective need not specify the particular defects.⁵ Notice to one tenant in common is sufficient when he is in sole possession of the premises affected by the decision.⁶ The decision may be made by two viewers after notice to the other to be present, although the statute provides for three viewers.⁷

10. *Encroachment on Another's Land*.—One proprietor has no right to build on the land of another—even a few feet to inclose a gap between their fences;⁸ nor could he sustain an action against such other proprietor for throwing down such extension, even

1. Lockhart v. Wessels, 46 Iowa, 81; Tubbs v. Ogden, 46 Iowa, 134; Hale v. Andrews, 75 Ill. 252; Thompson v. Bulson, 78 Ill. 277; Harris v. Sturdevant, 29 Me. 366; Scott v. Dickinson, 14 Pick. (Mass.) 276; Lamb v. Hicks, 11 Metc. (Mass.) 496; Fairbanks v. Childs, 44 N. H. 458; Shriver v. Stevens, 20 Pa. St. 140; Franklin v. Wells, 6 R. I. 422. But in Edgerton v. Moore, 28 Conn. 600, where the statute which provides that, where any person shall, after notice from the fence-viewers, have neglected to repair his part of the divisional fence, and upon such neglect the same shall have been repaired by the adjoining owner, it was held that the fence-viewers might estimate the value of such repairs, and make a certificate thereof, and that the party making the repairs shall have a right to recover double their value from the delinquent party. It is not necessary that the fence-viewers should give notice to such delinquent party of the time of their meeting to estimate the value of their repairs.

If the application to the viewers embraces two or more distinct subjects for their action, there must be notice of each. Fairbanks v. Childs, 44 N. H. 458. They cannot, without the express consent of the parties interested, act upon any other or different question than that expressed in the notice. Hale v. Andrews, 75 Ill. 252. The party whose fence is complained of should have a reasonable notice of the meeting of the fence-viewers; but no definite time is required. Tubbs v. Ogden, 46 Iowa, 134. Although written notice, "proceeding from the viewers, is preferable under a statute authorizing them to proceed after "due" notice, yet verbal notice by the opposite party, if no objection is made to it, is sufficient. Tal-

bot v. Blacklege, 22 Iowa, 572. See Moore v. Given, 39 Ohio St. 661.

Several division fences between the same owners may be included in the same application where there is nothing in the statute to forbid it; and, if the fences are separately divided, the fact that some of them were improperly included affords no ground of objection. Glidden v. Towle, 31 N. H. 147. Two or more several landowners adjoining another cannot join in the application for a division of a partition fence when the statute does not clearly authorize it. Briggs v. Haynes, 68 Me. 535.

Complaint of fence-viewers need not be in writing unless the statute so provides expressly or by implication. Tubbs v. Ogden, 46 Iowa, 134. See Lockhart v. Wessels, 46 Iowa, 81.

2. Tubbs v. Ogden, 46 Iowa, 134.

3. Talbot v. Blacklege, 22 Iowa, 572; Willoughby v. Carleton, 9 Johns. (N. Y.) 136.

4. Briggs v. Haynes, 68 Me. 535.

5. Fox v. Beebs, 24 Conn. 271.

6. Moore v. Given, 39 Ohio St. 661.

7. Guyer v. Stratton, 29 Conn. 42. Where a statute prescribes the form of an order or other summary proceeding it must be followed as far forth as is consistent with the nature and exigency of the proceeding. It was accordingly held that an order for the removal of fences, made by two commissioners in the case of an encroachment of a highway, was void, it not appearing on the face of the order that the third commissioner was duly notified to attend the meeting of the board and apprised of the purpose for which he was required to attend. Fitch v. Commissioners of Highways of Kirkland, 22 Wend. (N. Y.) 132.

8. Smith v. Johnson, 76 Pa. St. 191.

when the motives were malicious.¹ A division fence may be placed partly on the land of the adjoining owner. That rule being statutory, does not, however, apply to fences meeting on the front line of adjoining premises.² One who incloses up to a fence already erected may insert the rails of his fence into the division fence; and, if they project a small distance, it falls within maxim *de minimis*.³ If one gives the other permission to join to a fence standing on the land of the former, he cannot revoke the license or throw down the extension until he has given reasonable notice, so that the other may protect his land;⁴ but a sale by the former, of his land, would revoke the license.⁵

11. *Action for Damages*.—When parties own adjoining lands separated by a division fence, and the stock of one of the adjoining owners break through a defective part of his fence and injure the crops of the other, the latter may maintain an action to recover damages done by such stock, notwithstanding his part of the fence is also defective.⁶

(i) *FENCE AS A FIXTURE*.—A fence is generally considered to be a part of the realty.⁷ And rails, when made into a fence, become a part of the realty.⁸ Rails cannot be replevied as personal property where one has wrongfully taken and built a fence of them.⁹

1. *Smith v. Johnson*, 76 Pa. St. 191; *State v. Hendrick*, 3 Jones L. 375; *Clowers v. Sawyers*, 1 Head (Tenn.), 156.

2. *Warren v. Sabin*, 1 Lans. (N. Y.) 79.

3. *Dysart v. Leeds*, 2 Pa. St. 488.

4. *Sims v. Field*, 74 Mo. 139.

5. *Houx v. Seat*, 26 Mo. 179.

6. *Ozburn v. Adams*, 70 Ill. 291.

Damages for Injuries, Generally.—If cattle belonging to two persons make repeated trespasses upon crops, under such circumstances as renders it impossible to distinguish the damage done by the particular cattle, the damages may be apportioned as against the owners according to the number owned by each. *Partenheimer v. Van Order*, 20 Barb. (N. Y.) 479; *Powers v. Kindt*, 13 Kan. 74. See *Van Steenburg v. Tobias*, 17 Wend. (N. Y.) 562; *Auchmutz v. Ham*, 1 Den. (N. Y.) 495; *Benny v. Correll*, 9 Ind. 72. But one owner is not liable for the damages done by the cattle of others, which enter through the breach made by his own cattle, unless such other cattle are under his charge. *Durham v. Goodwin*, 54 Ill. 469.

Several owners of trespassing animals cannot be joined in one action for damages. Each owner is liable for damages done by his own cattle. *Chipman v. Palmer*, 77 N. Y. 51; *Reddick v. Newburn*, 76 Mo. 424; *Cogswell v. Murphy*, 46 Iowa, 44.

A landowner is not liable for damages done by cattle of another, kept on his

land with his consent, unless they are in his custody. *Tewksbury v. Bucklin*, 7 N. H. 518. The custodian of trespassing animals is liable for their trespasses. *Kennett v. Durgin*, 59 N. H. 566; *Moulton v. Moore*, 56 Vt. 700; *Smith v. Jacques*, 6 Conn. 530.

Where the cattle are in the hands of an agistor, the owner is not liable unless he purposely selected an irresponsible or incompetent person as agistor. *Reddick v. Newburn*, 76 Mo. 243; *Rossill v. Cotten*, 31 Pa. St. 525; *Cooley on Torts*, 340. *Contra*, *Sheridan v. Bean*, 8 Metc. (Mass.) 284.

Damages for Driving Cattle on Another's Land.—One who drives his cattle upon another's land, through a breach in the fence where the fence has been thrown down without the owner's fault, is liable for the damages done by the cattle. *Erbes v. Wehmeyer*, 69 Iowa, 85.

Action for Double Damages—Necessary Allegation.—In an action for double damages by trespassing cattle, plaintiff must allege that he maintained a statutory fence. *Fenton v. Montgomery*, 19 Mo. App. 156. See *Kneale v. Price*, 21 Mo. App. 295.

7. *Brown v. Bridges*, 31 Iowa, 138; *Wentz v. Fincher*, 12 Ired. L. (N. Car.) 297; *Glidden v. Bennett*, 43 N. H. 306.

8. *Emrich v. Ireland*, 55 Miss. 290; *Kimball v. Adams*, 52 Wis. 554. See *Rawson v. Ward*, 128 Mass. 552.

9. *Ricketts v. Dorrel*, 55 Ind. 470.

Where a fence is built on the land of one without any agreement, it becomes his property; and the landowner may remove it and dispose of the material at pleasure. And this rule applies though it was not attached to the land otherwise than by its weight, and was placed on his land by mistake.¹ If the fence is placed on his land by agreement, and he sells to one who has no notice of the agreement, the latter becomes owner of the fence.² Material placed along the line of a contemplated fence, but not yet used because the fence was not completed, has been held to be realty.³ Other authorities with better reason hold that rails do not become fixtures until annexed to the land.⁴ Fencing material accidentally or temporarily detached retains its character as realty.⁵

2. Railway Companies—(a) COMMON LAW.—Railway companies are not bound, by any principle of the common law, to fence their roads, make cattle-guards, or any other barrier or inclosure against the intrusion of live stock upon their roads, and are not in any wise liable for injuries there happening merely as for want of such barriers, cattle-guards, or fences.⁶ As they are not bound, irrespective of statute, to fence their roads, a failure on their part to do so binds them to a greater degree of care in running their trains.⁷ So if injury occur to stock by reason of negligence on the

See *State v. Graves*, 74 N. Car. 396; *Gibson v. Vaughn*, 2 Bailey (S. Car.), 389.

1. *Kimball v. Adams*, 52 Wis. 554; *Ewell on Fixt.* 59. *Contra*, *Lowenburg v. Bernd*, 47 Mo. 297.

2. *Climer v. Wallace*, 28 Mo. 556. See *Mott v. Palmer*, 1 N. Y. 564.

3. *Conklin v. Parsons*, 1 Chand. (Wis.) 240.

4. *Thweat v. Stamps*, 67 Ala. 96; *Robertson v. Phillips*, 3 Greene (Iowa), 220; *Ewell on Fixt.* 302.

5. *Goodrich v. Jones*, 2 Hill (N. Y.), 142. See *Ripley v. Page*, 12 Vt. 353; *McLaughlin v. Johnson*, 46 Ill. 163.

6. *Rorer on Railroads*, 614, citing *Henry v. Dubuque*, etc., R. Co., 2 Iowa, 288; *Kenedy v. Dubuque*, etc., R. Co., 2 Iowa, 521; *Perkins v. Eastern R. Co.*, 29 Me. 307; *Towns v. Cheshire R. Co.*, 1 Foster (21 N. H.), 363; *Dean v. Sullivan R. Co.*, 2 Foster (22 N. H.), 316; N. Y., etc., R. Co. v. *Skinner*, 19 Pa. St. R. 298; *Pennsylvania R. Co. v. Riblet*, 66 Pa. St. 164; *Williams v. New Albany*, etc., R. Co., 5 Ind. (Porter) 111; *Indianapolis*, etc., R. Co. v. *Herter*, 38 Ind. 557; s. c., 10 Am. R. Rep. 247; *Oregon Cent. R. Co. v. Wait*, 3 Oreg. 91; s. c., 6 Am. R. Rep. 517; *Boston*, etc., R. Co. v. *Briggs*, 132 Mass. 24; s. c., 7 Am. & Eng. R. R. Cas. 541; *Campbell v. New York & New Eng. R. Co.*, 13 Am. & Eng. R. R. Cas. 589; 50 Conn. 128.

7. *Kerwhacker v. Cleveland*, etc., R. Co., 3 Ohio St. 172, 185; *Morss v. Bos-*

ton, etc., R. Co., 2 Cush. (Mass.) 536; *Fernow v. Dubuque*, etc., R. Co., 22 Iowa, 528; *Joliet*, etc., R. Co. v. *Jones*, 20 Ill. 221; *Macon*, etc., R. Co. v. *Vaughn*, 48 Ga. 464; *Atlantic*, etc., R. Co. v. *Burt*, 49 Ga. 606; *Vicksburg*, etc., R. Co. v. *Patton*, 31 Miss. 156; *Memphis*, etc., R. Co. v. *Orr*, 43 Miss. 279; *New Orleans*, etc., R. Co. v. *Field*, 46 Miss. 573; *Boston & A. R. Co. v. Briggs*, 132 Mass. 24; s. c., 7 Am. & Eng. R. R. Cas. 541; *McPheeters v. Hannibal*, etc., R. Co., 45 Mo. 22; *Macon*, etc., R. Co. v. *Vaughn*, 48 Ga. 464; 11 Am. R. Rep. 387; *Kaes v. Mo. Pac. R. Co.*, 6 Mo. App. 397; *Ga. R. & B. Co. v. Neely*, 56 Ga. 540; *Marietta*, etc., R. Co. v. *Stephenson*, 24 Ohio St. 48.

It is the duty of a railroad company, whose road runs through a village, to run their trains while in the village at such a rate of speed as to have them under control, and be able to avoid injury to persons or property, though there is no ordinance of such village on the subject; and, if they fail to do so, they are guilty of negligence. *Chicago*, etc., R. Co. v. *Engle*, 84 Ill. 397. The owner of stock has the right to expect that the railway company will exercise ordinary care to prevent injury to his property, both in the construction of crossings and in the operation of its trains. *Kuhn v. C. R. I. & P. R. Co.*, 42 Iowa, 420; *Mobile & Ohio R. Co. v. Williams*, 53 Ala. 595, *Coyle v. Balt. & Ohio R. Co.*, 11 W. Va. 94.

part of the company, they are liable; but if the owner, by negligence on his part, contribute to bring about the injury, the owner in such case cannot recover.¹

(b) **STATUTORY OBLIGATION.**—Statutes have been passed in England and many of the States requiring railway companies to fence their tracks, and holding them liable for all injuries occasioned by the failure to do so, irrespective of whether or not they have been guilty of negligence.² They usually provide that, if the

1. *Poler v. N. Y. Cent. R. Co.*, 16 N. Y. 476, 483; *Indianapolis, etc., R. Co. v. Harter*, 38 Ind. 557.

2. *Norris v. Androscoggin R. Co.*, 39 Me. 273; *Smith v. Eastern R. Co.*, 35 N. H. 356; *Toledo, etc., R. Co. v. Delahunty*, 71 Ill. 615; *Ohio, etc., R. Co. v. Clutter*, 82 Ill. 123; *Wall v. St. Louis, etc., R. Co.*, 59 Mo. 112; *Cary v. St. Louis, etc., R. Co.*, 60 Mo. 209; *Sika v. Chicago, etc., R. Co.*, 21 Wis. 370; *Burton & North Mo., etc., R. Co.*, 30 Mo. 372; *Toledo, etc., R. Co. v. Cory*, 39 Ind. 218; *Swift v. Northern M. R. Co.*, 29 Iowa, 243; *St. Joseph, etc., R. Co. v. Grover*, 11 Kan. 302; *Bulkley v. N. Y., etc., R. Co.*, 27 Conn. 480; *Smith v. Eastern R. Co.*, 35 N. H. 357; *Flattes v. Chicago, etc., R. Co.*, 35 Iowa, 191; *Larkin v. Delaware, etc., R. Co.*, 22 Hun, 309; *Gillam v. Sioux City, etc., R. Co.*, 26 Minn. 268.

The provisions of the statutes requiring railway companies to maintain suitable fences and cattle guards along their lines of road imposes upon them the duty to fence against cattle, horses, etc., generally making them liable to all persons who suffer damage by reason of their neglect or failure so to do. No exemption from liability is intended in the case of strays or animals merely trespassing, though such exemption is implied where the fault or negligence of their owners contributes to the injury. *Watier v. Chicago, etc., R. Co.*, 31 Minn. 582; s. c., 13 Am. & Eng. R. R. Cas. 582; *Fremont R. Co. v. Lamb*, 11 Neb. 592; s. c., 5 Am. & Eng. R. R. Cas. 365; *Burlington, etc., v. Brinkman*, 14 Neb. 70; s. c., 11 Am. & Eng. R. R. Cas. 438; *Perkins v. Eastern R. Co.*, 29 Me. 307; *Chapin v. Sullivan R. Co.*, 39 N. H. 53; *Morse v. Rutland & B. R. Co.*, 27 Vt. 49; *Town v. Providence & W. R. Co.*, 2 R. I. 404; *Eames v. Salem & L. R. Co.*, 98 Mass. 560; *Corwin v. N. Y. & E. R. Co.*, 13 N. Y. 42; *Vandegrift v. Rediker*, 2 Zab. 185; *Pa. R. Co. v. Riblet*, 66 Pa. St. 164; *Indianapolis, C. & L. R. Co. v. Harter*, 38 Ind. 557; *Alton & S. R. Co. v. Baugh*, 14 Ill. 211; *Henry v. Dubuque*

& P. R. Co., 2 Iowa, 288; *Locke v. St. Paul & P. R. Co.*, 15 Minn. 350; *Stuche v. Mil. & M. R. Co.*, 9 Wis. 202.

When Obligation Absolved.—Under the *Kansas* railroad stock law of 1874 it has been held that generally a railroad company, in order to be absolved from liability for stock killed by it in the operation of its railroad, must have its railroad "inclosed with a good and lawful fence, to prevent such animals from being on such road."

A railroad company is not absolved from complying with the express terms of the statute requiring it to inclose its road with a good and lawful fence, except where some paramount interest of the public intervenes, or some paramount obligation or duty to the public rests upon the railroad company, rendering it improper for the company to fence its road. No private interest or convenience, or inconvenience, on the part of a railroad company will alone be sufficient to absolve it from fencing its road where the statute, in express terms, requires that the road shall be fenced. Nor will any private interest or convenience on the part of individuals be sufficient to absolve a railroad company from fencing its road. *Atchinson, etc., R. Co. v. Shaft*, 33 Kan. 521; s. c., 19 Am. & Eng. R. R. Cas. 529.

Owner of Land may Release Obligation to Fence.—It seems that the owner of land may release the obligation of the railroad company to fence that portion of their track bordering upon his land. *Shepard v. Buffalo, etc., R. Co.*, 35 N. Y. 641; *Ells v. Pacific R. Co.*, 48 Mo. 431; *Tower v. Providence, etc., R. Co.*, 2 R. I. 404; *Pittsburg, etc., R. Co. v. Smith*, 26 Ohio St. 124; *Indianapolis, etc., R. Co. v. Petty*, 25 Ind. 413; *Wilder v. Maine, etc., R. Co.*, 65 Me. 333; *Duffy v. New York, etc., R. Co.*, 2 Hilt. (N. Y.) 496. But see *Cinn., etc., R. Co. v. Hildreth*, 77 Ind. 504; *Corry v. Great Western R. Co.*, L. R. 7 Q. B. Div. 322; s. c., 2 Am. & Eng. R. R. Cas. 612. Such release may be either express or implied. Where the owner contracts himself to maintain fences, this will be held

an implied waiver of the obligation of the railroad company to do so. *Eames v. Worcester & N. R. Co.*, 105 Mass. 193; *Ft. Wayne, etc., R. Co. v. Mussetter*, 48 Ind. 286; *Cincinnati, etc., R. Co. v. Ridge*, 54 Ind. 39; *Balt., etc., R. Co. v. Johnson*, 59 Ind. 188; *Poler v. New York Cent. R. Co.*, 16 N. Y. 476.

Lessee of Railroad Bound to Construct and Maintain Fences.—The lessee of a railroad is bound to observe the statutory duty to fence, and will be held liable for an injury occasioned by a failure to perform such duty. *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; *Stewart v. Chicago & N. W. R. Co.*, 27 Iowa, 282; *Clary v. Midland Iowa R. Co.*, 37 Iowa, 344; *Downing v. Chicago, R. I. & P. R. Co.*, 43 Iowa, 96; *Pittsburg, etc., R. Co. v. Bolner*, 57 Ind. 572; *Pittsburg, etc., R. Co. v. Hannon*, 60 Ind. 417; *Pittsburg, etc., R. Co. v. Currant*, 61 Ind. 38; *Cincinnati, H. & D. R. Co. v. Bunnell*, 61 Ind. 183; *Jeffersonville, etc., R. Co. v. Downey*, 61 Ind. 287; *Clement v. Canfield*, 28 Vt. 302; *Stewart v. Chicago, etc., R. Co.*, 27 Iowa, 282; *Whitney v. Atlantic & St. L. R. Co.*, 44 Me. 362; *Bean v. Atlantic & St. L. R. Co.*, 63 Me. 293; *Fontaine v. Southern Pac. R. Co.*, 54 Cal. 645; s. c., 1 Am. & Eng. R. R. Cas. 159; *St. Louis, etc., R. Co. v. Curl*, 28 Kan. 622; s. c., 11 Am. & Eng. R. R. Cas. 458.

Where Fence Interferes with Operating the Road.—A railroad company is not required, by the statute, to fence its road at places where such fence interferes with its own rights in operating its road or transacting its business, nor where the rights of the public in travelling or doing business with the company are interfered with, or where such fencing would imperil the lives of its employees; and no recovery can be had under the statute for stock killed by its locomotives or cars at such places on the line of its road. *Evansville, etc., R. Co. v. Willis*, 93 Ind. 507; s. c., 19 Am. & Eng. R. R. Cas. 565.

Burden of Proof is on Company to Show no Obligation to Fence.—Where a railroad company, in an action for killing cattle, defends upon the ground that it was not bound to fence its road at the point where the animals came on the track, the burden of proof is upon it to show that such is the case. *Jeffersonville, etc., R. Co. v. O'Connor*, 37 Ind. 95; *Indianapolis, etc., R. Co. v. Penry*, 48 Ind. 128; *Flint, etc., R. Co. v. Lull*, 28 Mich. 510; *Toledo, etc., R. Co. v. Pence*, 68 Ill. 525; *Ewing v. Chicago, etc., R. Co.*, 72 Ill. 25; *Comstock v. Des Moines, etc., R. Co.*, 32 Iowa, 376; *Jeffersonville, etc., R. Co. v.*

Lyon, 72 Ind. 107; s. c., 2 Am. & Eng. R. R. Cas. 648; *Union Pacific R. Co. v. Dyche*, 28 Kan. 200; s. c., 11 Am. & Eng. R. R. Cas. 427; *Indianapolis, P. & C. R. Co. v. Lindley*, 75 Ind. 426; s. c., 11 Am. & Eng. R. R. Cas. 495; *Cincinnati, etc., R. Co. v. Ford*, 89 Ind. 92; s. c., 13 Am. & Eng. R. R. Cas. 571; *Terre Haute & Ind. R. Co. v. Penn.*, 90 Ind. 284; s. c., 15 Am. & Eng. R. R. Cas. 561.

When Road Should be Fenced.—When there is no express statutory provision, it is the duty of a railroad company to keep its road fenced from the time that it is open for use. *Clark v. Vermont, etc., R. Co.*, 28 Vt. 103; *Continental Improvement Co. v. Ives*, 30 Mich. 448; *Comings v. Hannibal, etc., R. Co.*, 48 Mo. 512; *Holden v. Rutland & B. R. Co.*, 30 Vt. 297; *Baltimore, etc., R. Co. v. McClellan*, 59 Ind. 440; *Rockford, etc., R. Co. v. Heflin*, 65 Ill. 367; *Sever v. Kansas City R. Co.*, 78 Mo. 528; 19 Am. & Eng. R. R. Cas. 642.

Statutory Provisions as to Time of Fencing.—By statute in some States, a railroad company is given a specified time after the completion of its road to fence the same. Actions for injuries occurring in the interim are governed by common-law principles. *McCall v. Chamberlain*, 13 Wis. 637; *Rockford, etc., R. Co. v. Connell*, 67 Ill. 192; *Gilman, etc., R. Co. v. Spencer*, 76 Ill. 216; *St. Louis, etc., R. Co. v. Kirby*, 104 Ill. 345; s. c., 10 Am. & Eng. R. R. Cas. 214.

Actions for Injuries After Lapse of Statutory Period.—After the lapse of that time the company will be held liable according to the provisions of the statute. *Rockford, etc., R. Co. v. Heflin*, 65 Ill. 366; *Toledo, etc., R. Co. v. Crane*, 68 Ill. 355; *Peoria, etc., R. Co. v. Barton*, 80 Ill. 72.

Fact that Abutting Owner Fences Land does not Excuse Railroad Company.—The fact that the owner of land, alongside of which a railroad runs, has himself erected and maintained a fence, does not exempt the railroad company from liability for non-performance of its statutory duties in that respect. *Jeffersonville, etc., R. Co. v. Sullivan*, 38 Ind. 262; *Fort Wayne, etc., R. Co. v. Mussetter*, 48 Ind. 286; *Jeffersonville, etc., R. Co. v. Nichols*, 30 Ind. 321; *Hoverka v. Minneapolis & St. L. R. Co.*, 13 Am. & Eng. R. R. Cas. 605; *Louisville, etc., R. Co. v. White*, 94 Ind. 257; s. c., 20 Am. & Eng. R. R. Cas. 449.

Injuries to Crops Arising from Failure to Fence.—A railroad company failing to construct a statutory fence is ordinarily held liable for injuries done to crops by

cattle straying on lands which should have been fenced. *Smith v. Chicago*, etc., R. Co., 38 Iowa, 518; *Donald v. St. Louis*, etc., R. Co., 44 Iowa, 157; *Dean v. Sullivan R. Co.*, 22 N. H. 316; *Holden v. Rutland*, etc., R. Co., 30 Vt. 298; *Comings v. Hannibal*, etc., R. Co., 48 Mo. 512; *Trice v. Hannibal*, etc., R. Co., 49 Mo. 440; *Grau v. St. Louis*, etc., R. Co., 54 Mo. 240; *St. Louis & San F. R. Co. v. Sharp*, 27 Kan. 134; s. c., 13 Am. & Eng. R. R. Cas. 595; *Chicago*, etc., R. Co. v. *Clare*, 79 Mo. 39.

A railway company's liability for an injury done to crops by cattle, that have gone upon the premises in consequence of the company's neglect to fence its right of way, is not changed by the fact that the road was at the time in the hands of a contractor who had nothing to do with the fencing. *Pound v. Port Huron*, etc., R. Co., 54 Mich. 13; s. c., 19 Am. & Eng. R. R. Cas. 640.

The owner may recover for injury to his crops, and also for expense incurred in attempting to protect them and prevent further injury, occasioned by failure of the company to construct cattle-guards. *St. Louis*, etc., R. Co. v. *Ritz*, 33 Kan. 404; s. c., 19 Am. & Eng. R. R. Cas. 611; *Raridon v. Cent. Iowa R. Co.*, 65 Iowa, 640; s. c., 19 Am. & Eng. R. R. Cas. 640; *Mo. Pac. R. Co. v. Morrow*, 32 Kan. 217; s. c., 19 Am. & Eng. R. R. Cas. 630.

When the company enters on a farm and takes down existing fences, and straying cattle injure crops before new fences are erected, the company is liable. *Pound v. Port Huron*, etc., R. Co., 54 Mich. 13; s. c., 19 Am. & Eng. R. R. Cas. 614.

Injuries to crops, orchards, pastures, and fences, being such as result from the tearing down of fences of plaintiff at the time the railroad entered the land, and from the failure to so fence and guard its way where it entered and left the land as that animals could not enter and destroy plaintiff's property, are proper elements of damage. *Houston*, etc., R. v. *Adams*, 63 Tex. 200; s. c., 20 Am. & Eng. R. R. Cas. 246.

Statutes Enacted after Construction of Railroad.—Where a railroad company is obliged, by statute enacted subsequent to the construction of the railroad, to fence its tracks, it cannot recover the cost of building the fence from the owners of land adjoining its right of way. *Boston*, etc., R. Co. v. *Briggs*, 132 Mass. 24; s. c., 7 Am. & Eng. R. R. Cas. (Mass.) 541.

Parties Operating Railroad under Agreement with Company, Bound to Construct and Maintain Fences.—Parties operating

a railroad under a contract or agreement with the company owning the same, are bound to observe the statutory duty to fence, and will be held liable in case injury occurs for their failure to observe such duty. *East St. Louis*, etc., R. Co. v. *Gerber*, 82 Ill. 632; *Burchfield v. Northern Central R. Co.*, 57 Barb. (N. Y.) 589; *Gardner v. Smith*, 7 Mich. 410; *Jones v. Seligman*, 16 Hun (N. Y.) 230; *Purdy v. New York & N. H. R. Co.*, 61 N. Y. 353; *Farrell v. Union Trust Co.*, 77 Mo. 455; s. c., 13 Am. & Eng. R. R. Cas. 572; *McCall v. Chamberlain*, 13 Wis. 641; *Union Trust Co. v. Kendall*, 20 Kan. 515.

County Road Running Parallel with Railroad.—A county road ran parallel with, and immediately adjoining, the right of way of a railroad company, where the latter passed through uninclosed prairie lands. *Held*, that this did not exempt the company from the duty to fence imposed by the forty-third section of the railroad law of Missouri. *Hannibal*, etc., R. Co. v. *Rutledge*, 78 Mo. 286; s. c., 19 Am. & Eng. R. R. Cas. 669.

Nor is a railroad company excused from liability for failure to fence in its tracks because a way alongside of its track at the place in question was in use, and necessary to reach stock-lots and chutes where cattle could be loaded on its cars. *Bamster v. Pennsylvania Co.*, 98 Ind. 220; s. c., 19 Am. & Eng. R. R. Cas. 570.

The obligation of a railroad company to fence its track exists except at places where a fence would impair the use of private property or the rights of the public. *Wabash*, etc., R. Co. v. *Tretus*, 96 Ind. 450; s. c., 19 Am. & Eng. R. R. Cas. 601.

Statutory Provisions.—Land was taken for a railroad track at a time when a statute was in force requiring railroad companies to fence their lines except where the railroad commissioners should determine that a fence was not necessary, and in the appraisal of damages to the landowner nothing was allowed for the expense of maintaining a fence. The statute was afterwards repealed, and a new one passed requiring railroad companies to fence only where the railroad commissioners should order it. *Held*, that there was no obligation on the part of the railroad company to maintain the fence in the absence of an order from the railroad commissioners. *Campbell v. New York & N. Eng. R. Co.*, 13 Am. & Eng. R. R. Cas. 589; 50 Conn. 128.

Against Whom.—Under the Consolidated Canadian Railway Act, 1879, ch. 9 (D.), as amended, a railway company are

company neglects to comply with their terms, it shall be liable for "all damages," and sometimes double damages.¹

(c) CONSTITUTIONALITY OF STATUTES.—Under the police power, the State has the undoubted right to require all railway corporations to inclose their lands with a suitable fence, as a matter of public safety.²

(d) APPLICABILITY OF SUCH STATUTES.—1. *Fences at Highway Crossings*.—A railroad company is never bound to fence its track at a point where a public highway crosses it. There is an implied exception to all statutory provisions in this respect,³ and

not bound to fence except as against a "proprietor or tenant" in occupation, and that the company are not liable to a mere squatter for the killing of his horses without other negligence than their omission to fence as against him. *Conway v. Canada Pac. R. Co.*, 7 Ontario Q. B. D. 673; s. c., 19 Am. & Eng. R. R. Cas. 650.

"Hog Law" does not Relieve Railroad Companies from Obligation to Fence.—The fact that the "hog law" is in force in a certain county does not relieve railroad companies from their statutory obligation to fence their roads when passing along or adjoining inclosed or cultivated fields, as prescribed by section 809, Mo. R. S. *Moore v. Mo. Pacific R. Co.*, 3 W. Rep. (Mo.) 755.

1. *Mackie v. Central Iowa R. Co.*, 54 Iowa, 540; *Shimmel v. Chicago*, etc., R. Co., 34 Minn. 216; *Johnson v. Railway Co.*, 29 Minn. 425.

2. *Chicago*, etc., R. Co. *v. Dremser*, 109 Ill. 402; s. c., 19 Am. & Eng. R. R. Cas. 545.

The constitutionality of such statutes, requiring railways to fence their tracks, has often been questioned on the ground that they vary the terms of the original contract, between the State and the company, embodied in their charter. But they have been invariably maintained as valid police regulations. *Gorman v. Pacific*, etc., R. Co., 26 Mo. 441; *Wilder v. Maine*, etc., R. Co., 65 Me. 333; *Thorpe v. Rutland*, etc., R. Co., 27 Vt. 140; *Indianapolis*, etc., R. Co. *v. Parker*, 29 Ind. 471; *Kansas*, etc., R. Co. *v. Mower*, 16 Kan. 573; *Blair v. Milwaukee*, etc., R. Co., 20 Wis. 267; *Indianapolis*, etc., R. Co. *v. McKinney*, 24 Ind. 283; *Trice v. Hannibal*, etc., R. Co. 49 Mo. 438; *Pa. R. Co. v. Riblet*, 66 Pa. St. 164; *Speelman v. Mo. Pac. R. Co.*, 71 Mo. 434; s. c., 2 Am. & Eng. R. R. Cas. 636; *McCall v. Chamberlain*, 13 Wis. 637; *Bennett v. C. & N. W. R. Co.*, 19 Wis. 145; *Brown v. Milwaukee*, etc., R. Co., 21 Wis. 39; *Ohio*, etc., R. Co. *v. Clutter*, 82 Ill. 123; *Nall v. St. Louis R. Co.*, 59

Mo. 112; *Cary v. St. Louis R. Co.*, 60 Mo. 209; *Small v. Chi.*, Rock Isl., etc., R. Co., 50 Iowa, 338.

Constitutionality of Such Provisions.—

A statute of *Missouri* provides that every railroad corporation in the State shall erect and maintain lawful fences on the sides of its road where it passes through, along, or adjoining inclosed or cultivated fields, or uninclosed lands with openings and gates at necessary farm crossings of the road, and also construct and maintain cattle-guards, where fences are required, sufficient to prevent horses, cattle, mules, and all other animals from getting on the railroad; and that, until fences, open gates, and farm crossings, and cattle-guards shall be made and maintained, such corporation shall be liable in double the amount of all damages done by its agents, engines or cars, to horses, cattle, mules, or other animals escaping from or coming upon said lands, fields, or inclosures occasioned in either case by the failure to construct or maintain such fences or cattle-guards. *Held*, this statute does not, in case where stock is killed on its road, deprive the company of property without due process of law, in allowing the owner of the stock to recover damages in excess of its value; nor does it deny to the company the equal protection of the laws. *Missouri Pac. R. Co. v. Humes*, 6 Sup. Ct. Rep. 110.

In the act of the legislature of *Montana*; entitled "An act to provide for the payment of stock killed or injured by railways," the clause "the findings of such appraisers shall be taken and held to be conclusive evidence of the value and ownership of, and the injury to, such stock" prevents the railroad company from exercising its right of appeal from the findings of the appraisers, thus depriving it of the right of trial by jury; and such provision is in conflict with the Constitution of the United States; and therefore invalid. *Graves v. Northern Pac. R. Co.*, 5 Montana, 556.

3. *Flint*, etc., R. Co. *v. Lull*, 28 Mich. 510; *Soward v. Chicago & N. W. R. Co.*,

it is not for such companies to settle the matter, or to know whether roads used as public highways are legally established, and are such in point of law, or not. It is enough for them to know that practically and ordinarily roads are used and treated as such by the public.¹

2. *Depot Grounds and Stations.*—And the statutes creating such liability as for omission to fence, for stock killed whilst running at large by a railroad company, are held not to apply to depot² and station grounds,³ nor to cities, towns, and

30 Iowa, 551; s. c., 33 Iowa, 386; Hurd v. Rutland & B. R. Co., 25 Vt. 116; Lafayette, etc., R. Co. v. Shriner, 6 Ind. 141; Indianapolis, etc., R. Co. v. Parker, 20 Ind. 471; Ohio, etc., R. Co. v. Rowland, 50 Ind. 349; Meyer v. North Missouri R. Co., 35 Mo. 352; McPheeters v. Hannibal & St. J. R. Co., 45 Mo. 22; Iba v. Hannibal & St. J. R. Co., 45 Mo. 469; Atchison, T. & S. F. R. Co. v. Griffis, 29 Kans. 150; s. c., 13 Am. & Eng. R. R. Cas. 532.

1. The true test whether or not a railroad company is bound to fence at a particular point is, whether there is a practical user of the land at such point as a public place, either as a highway or otherwise. This is irrespective of the questions of dedication, statutory appropriation, etc. McKinley v. Chicago, etc., R. Co., 47 Iowa, 76; Brace v. New York, etc., R. Co., 27 N. Y. 269; Tracy v. Troy, etc., R. Co., 38 N. Y. 433; Cleveland, etc., R. Co. v. McConnell, 26 Ohio St. 57; Flint, etc., R. Co. v. Lull, 28 Mich. 510; Lloyd v. Pacific R. Co., 49 Mo. 199; Morris v. St. Louis, etc., R. Co., 58 Mo. 78; Swearingen v. Missouri, etc., R. Co., 64 Mo. 73; Robertson v. Atlantic, etc., R. Co., 64 Mo. 412; McKinley v. Chicago, etc., R. Co., 47 Iowa, 76; Jeffersonville, etc., R. Co. v. Parkhurst, 34 Ind. 501; Indianapolis, etc., R. Co. v. Warner, 35 Ind. 516; Cleveland, etc., R. Co. v. Crossley, 36 Ind. 371; Toledo, etc., R. Co. v. Chapin, 66 Ill. 505; Ewing v. Chicago, etc., R. Co., 72 Ill. 25; Chicago, etc., R. Co. v. Campbell, 47 Mich. 265; s. c., 7 Am. & Eng. R. R. Cas. 545; Union Pac. R. Co. v. Harris, 28 Kans. 206; s. c., 11 Am. & Eng. R. R. Cas. 431; Indianapolis, etc., R. Co. v. Thomas, 84 Ind. 194; s. c., 11 Am. & Eng. R. R. Cas. 491; Indianapolis, etc., R. Co. v. Lindley, 75 Ind. 426; s. c., 11 Am. & Eng. R. R. Cas. 495.

Although it is true as a general principle that a railroad company is not bound to fence its track at a point where the adjoining land is generally used by the public, this principle will not apply where

there has been an abandonment of the public use. Whitewater Valley R. Co. v. Quick, 30 Ind. 384; Toledo, etc., R. Co. v. Cary, 37 Ind. 172; Toledo, etc., R. Co. v. Howell, 38 Ind. 447; Jeffersonville, etc., R. Co. v. O'Connor, 37 Ind. 96. But see Indiana, etc., R. Co. v. Gapen, 10 Ind. 292; Meyer v. North Missouri R. Co., 35 Mo., 352; Elliott v. Hannibal, etc., R. Co., 66 Mo. 683.

2. Lloyd v. Pacific R. Co., 49 Mo. 199; Swearingen v. Missouri, etc., R. Co., 64 Mo. 73; Robertson v. Atlantic, etc., R. Co., 64 Mo. 412; Indianapolis, etc., R. Co. v. Oestel, 20 Ind. 231; Galena, etc., R. Co. v. Griffin, 31 Ill. 303; Packard v. Illinois, etc., R. Co., 30 Iowa, 474; Davis v. Burlington, etc., R. Co., 26 Iowa, 549; Rogers v. Chicago, etc., R. Co., 26 Iowa, 558; Durand v. Chicago, etc., R. Co., 26 Iowa, 559; Cleaveland v. Chicago, etc., R. Co., 35 Iowa, 220; Smith v. Chicago, etc., R. Co., 34 Iowa, 506; Plaster v. Illinois, etc., R. Co., 35 Iowa, 449; Latty v. Burlington, etc., R. Co., 38 Iowa, 250; Chicago, etc., R. Co. v. Campbell, 47 Mich. 265; s. c., 7 Am. & Eng. R. R. Cas. 545; Pittsburgh, etc., R. Co. v. Crandall, 58 Ind. 365; Ohio R. Co. v. Rowland, 50 Ind. 354; Flint & Pere Marquette R. Co. v. Lull, 28 Mich. 510; Smith v. Chicago M. & St. P. R. Co., 60 Iowa, 512; s. c., 13 Am. & Eng. R. R. Cas. 534; Schooling v. St. Louis, K. C. & N. R. Co., 75 Mo. 518; s. c., 13 Am. & Eng. R. R. Cas. 536; Louisville, etc., R. Co. v. Skelton, 94 Ind. 222; Rinear v. Grand Rapids, etc., R. Co. (Mich.), 38 N. W. Rep. 599; Wilder v. Chicago, etc., R. Co. (Mich.) 38 N. W. Rep. 289; Kobe v. North Pac. R. Co., 31 Am. & Eng. R. R. Cas. (Minn.), 528; Atchison, etc., R. Co. v. Shaft, 33 Kans. 521; s. c., 19 Am. & Eng. R. R. Cas. 529. But see Johnson v. Chicago & N. W. R. Co., 39 N. W. Rep. 242; Lafferty v. Chicago & N. W. R. Co., 39 N. W. Rep. 660.

3. It is often expressly provided by statute that a railroad company need not fence its road within the limits of incorporated towns. In some States the same

villages.¹ But it is the duty of railway companies, their agents and servants, to use reasonable and proper care to avoid injury to stock; and if they fail so to do, and the stock is injured or killed without any contributory or other negligence of the owner or person controlling the same, the company will be liable.²

3. *Cattle-guards*.—The term "cattle-guards" means such an appliance as will prevent animals from going upon the land adjoin-

conclusion is reached as an implied exception to the general terms of the statute. *Davis v. Burlington*, etc., R. Co., 26 Iowa, 549; *Rogers v. Chicago*, etc., R. Co., 26 Iowa, 558; *Meyer v. North Missouri R. Co.*, 35 Mo. 352; *Iba v. Hannibal & St. Jo. R. Co.*, 45 Mo. 470; *Ellis v. Pacific R. Co.*, 48 Mo. 231; *Edwards v. Hannibal*, etc., R. Co., 66 Mo. 571; *Cousins v. Hannibal*, etc., R. Co., 66 Mo. 572; *Elliott v. Hannibal*, etc., R. Co., 66 Mo. 683; *Illinois*, etc., R. Co. v. *Williams*, 27 Ill. 49; *Ohio*, etc., R. Co. v. *Irwin*, 27 Ill. 178; *Chicago*, etc., R. Co. v. *Rice*, 71 Ill. 567; *Toledo*, etc., R. Co. v. *Spangler*, 71 Ill. 568; *Indiana*, B. & W. R. Co. v. *Leak*, 89 Ind. 596; s. c., 13 Am. & Eng. R. R. Cas. 520; *Wymore v. Hannibal*, etc., R. Co., 79 Mo. 247; s. c., 13 Am. & Eng. R. R. Cas. (Mo.), 524; *Lloyd v. Pac. R. Co.*, 49 Mo. 199. Compare *Greeley v. St. Paul*, etc., R. Co., 33 Minn. 136; s. c., 19 Am. & Eng. R. R. Cas. 559.

1. *Meyer v. North Missouri R. Co.*, 35 Mo. 352; *Iba v. Hannibal & St. Jo. R. Co.*, 45 Mo. 470; *Ellis v. Pacific R. Co.*, 48 Mo. 231; *Edwards v. Hannibal*, etc., R. Co., 66 Mo. 571; *Cousins v. Hannibal*, etc., R. Co., 66 Mo. 572; *Elliott v. Hannibal*, etc., R. Co., 66 Mo. 683; *Ohio*, etc., R. Co. v. *Irwin*, 27 Ill. 178; *Chicago*, etc., R. Co. v. *Rice*, 71 Ill. 567; *Toledo*, etc., R. Co. v. *Spangler*, 71 Ill. 568; *Davis v. Burlington*, etc., R. Co., 26 Iowa, 549; *Rogers v. Chicago*, etc., R. Co., 26 Iowa, 558; *Clary v. Burlington*, etc., R. Co., 14 Neb. 232; s. c., 11 Am. & Eng. R. R. Cas. 493.

2. *Alger v. Miss. & Mo.*, etc., R. Co., 10 Iowa, 268; *Jones v. Galena & Chicago*, etc., R. Co., 16 Iowa, 6; *Balcom v. Dubuque & Sioux City*, etc., R. Co., 21 Iowa, 102; *Whitbeck v. Dubuque & Pac. R. Co.*, 21 Iowa, 103. But see *Smith v. Chicago*, etc., R. Co., 34 Iowa, 506.

Vicinity of Engine-house, Machine-shops, etc.—A railroad company is not required to fence its track in the immediate vicinity of its engine house, machine shops, car house, wood yard, etc., and is, therefore, not liable for stock killed by it in such places, unless there be wilful negligence proved. A multitude

of authorities sustain this rule. *Indianapolis*, etc., R. Co. v. *Oestel*, 20 Ind. 231; *Indianapolis*, etc., R. Co. v. *Crandall*, 58 Ind. 365; *Jeffersonville*, etc., R. Co. v. *Beatty*, 36 Ind. 15; *Pittsburg*, etc., R. Co. v. *Bowyer*, 45 Ind. 496; *Flint*, etc., R. Co. v. *Lull*, 28 Mich. 510; *Blair v. Milwaukee*, etc., R. Co., 20 Wis. 254; *Swearingen v. Missouri*, etc., R. Co., 64 Mo. 73; *Morris v. St. Louis*, etc., R. Co., 58 Mo. 78; *Durand v. Chicago*, etc., R. Co., 26 Iowa, 559; *Comstock v. Des Moines*, etc., R. Co., 32 Iowa, 376; *Cole v. Chicago*, etc., R. Co., 38 Iowa, 311; *Munger v. Tonawanda*, etc., R. Co., 4 N.Y. 349; *Toledo*, etc., R. Co. v. *Chapin*, 66 Ill. 504; *Indianapolis*, etc., R. Co. v. *Christy*, 43 Ind. 143; *Chicago*, etc., R. Co. v. *Campbell*, 47 Mich. 265; *Robertson v. Atlantic*, etc., R. Co., 64 Mo. 412; *Flattes v. Chicago*, etc., R. Co., 35 Iowa, 191; *Cleveland v. Railroad Co.*, 35 Iowa, 220; *Kyser v. Kansas City*, etc., R. Co., 56 Iowa, 207; *Latty v. Burlington*, etc., R. Co., 38 Iowa, 250. So where it is impossible to fence both sides of the track. *Indiana*, etc., R. Co. v. *Leak*, 89 Ind. 596; or where a fence would interfere with the business of an adjacent proprietor of a hay-press, saw-mill, or other works. *Ohio*, etc., R. Co. v. *Rowland*, 50 Ind. 349, 21 Ind. 285; *Indianapolis*, etc., R. Co. v. *Kinney*, 8 Ind. 402.

Natural Obstacle.—Where there is a natural obstacle, as, for example, a high bluff, hedge, ditch, etc., that furnishes a security as effectual as the fence prescribed by statute would supply, the company need not fence. *Hillard v. Chicago*, etc., R. Co., 37 Iowa, 442.

Excessive Speed on Station Grounds.—In Iowa, under a statute prohibiting the running of trains upon depot grounds at a rate of speed greater than eight miles an hour, the company is held liable for cattle killed on such grounds by a faster train. *Monahan v. Keokuk*, etc. R. Co., 45 Iowa, 523. This statute has no application outside the grounds, and the plaintiff has the burden of showing a higher rate of speed than that allowed by statute. *Plaster v. Illinois Cent. R. Co.*, 36 Iowa, 449.

ing the right of way.¹ In the absence of statute there is no obligation on the part of a railroad company to maintain cattle-guards, and where there is no contract or charter obligation in respect thereto, such duty will not be implied from the fact that the company has constructed them along the line of road where it enters and leaves cultivated fields, unless the lapse of time has raised the presumption of a grant or covenant.² Where the statute imposes the duty upon a railway company to fence its road it includes the making of suitable cattle-guards.³

1. *Missouri Pac. R. Co. v. Morrow*, 32 Kan. 217. A pit under the track is not sufficient. *Missouri Pac. R. Co. v. Manson*, 31 Kan. 337.

2. *Ward v. Paducah, etc.; R. Co.* (Tenn.), 4 Fed. Rep. 862.

3. *Dunnigan v. Chicago, etc., R. Co.*, 18 Wis. 28; *New Albany, etc., R. Co. v. Pace*, 13 Ind. 411; *Pittsburg, etc., R. Co. v. Eby*, 55 Ind. 567; *Indianapolis, etc., R. Co. v. Irish*, 26 Ind. 268; *Indianapolis, etc., R. Co. v. Kibby*, 28 Ind. 480; *Fremont, etc., R. Co. v. Lamb*, 11 Neb. 592; s. c., 5 Am. & Eng. R. R. Cas. 367; *Lake Shore & Mich. S. R. Co. v. Sharpe*, 38 Ohio St. 150; s. c., 7 Am. & Eng. R. R. Cas. 543; *St. Louis, etc., R. Co. v. Edwards*, 26 Kans. 72; s. c., 7 Am. & Eng. R. R. Cas. 547; *St. Louis, etc., R. Co. v. Shoemaker*, 27 Kans. 677; s. c., 11 Am. & Eng. R. R. Cas. 379; *Union Pac. R. Co. v. Harris*, 28 Kans. 206; s. c., 11 Am. & Eng. R. R. Cas. 431; *St. Louis, etc., R. Co. v. Curl*, 28 Kans. 622; s. c., 11 Am. & Eng. R. R. Cas. 458; *Mundhenk v. C. I. R. Co.*, 57 Iowa 718; s. c., 11 Am. & Eng. R. R. Cas. 463; *Cleveland, etc., R. Co. v. Newbrander*, 40 Ohio St. 15; s. c., 11 Am. & Eng. R. R. Cas. 480; *Clary v. Burlington & M. R. Co.*, 14 Neb. 232; s. c., 11 Am. & Eng. R. R. Cas. 493; *Texas & St. Louis R. Co. v. Young*, 60 Tex. 201; s. c., 13 Am. & Eng. R. R. Cas. 544; *Missouri Pacific R. Co. v. Manson*, 31 Kan. 337; s. c., 13 Am. & Eng. R. R. Cas. 540; *Heskett v. Wabash, etc., R. Co.*, 61 Iowa 467; s. c., 13 Am. & Eng. R. R. Cas. 549; *Watier v. Chicago, M. & St. P. R. Co.*, 31 Minn. 91; s. c., 13 Am. & Eng. R. R. Cas., 582; *St. Louis & San Francisco R. Co. v. Sharp*, 27 Kan. 134; s. c., 13 Am. & Eng. R. R. Cas. 595; *Whitewater R. Co. v. Bridgett*, 94 Ind. 216; *Louisville, N. A. & C. R. Co. v. Porter*, 97 Ind. 267.

Fences and Cattle-guards in Towns and Villages.—In those cases where fences and cattle-guards can be constructed in the streets of a town or village without interfering with ordinary traffic, the company is bound to construct them. *Mad-*

ison, etc., R. Co. v. Kane, 11 Ind. 375; *Jeffersonville, etc., R. Co. v. Parkhurst*, 34 Ind. 501; *Toledo, etc., R. Co. v. Howell*, 38 Ind. 447; *Toledo, etc., R. Co. v. Owen*, 43 Ind. 405; *Brace v. New York, etc., R. Co.*, 27 N. Y. 269; *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 N. Y. 427; *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510; *Cleveland & P. R. Co. v. McConnell*, 26 Ohio St. 57; *Indianapolis, Peru & C. R. Co. v. Lindley*, 75 Ind. 426; s. c., 11 Am. & Eng. R. R. Cas. 495. And see *Hays v. Central R. Co.*, 111 U. S. 228; s. c., 15 Am. & Eng. R. R. Cas. 394. But where the construction of fences and cattle-guards in a town or city will interfere with or impede the free use of the streets by the public, the railroad company is not bound to erect them. *Halloran v. New York, etc., R. Co.*, 2 E. D. Smith (N. Y.), 257; *Vanderker v. Rensselaer, etc., R. Co.*, 13 Barb. (N. Y.), 390; *Parker v. Rensselaer, etc., R. Co.*, 16 Barb. (N. Y.), 315; *Crawford v. New York Central R. Co.*, 18 Hun (N. Y.), 108; *Peoria, P. & G. R. Co. v. Barton*, 80 Ill. 72; *Towns v. Cheshire R. Co.*, 21 N. H. 363.

Road Operated under Lease.—It is always the duty of a railroad company operating a railroad to see that proper cattle-guards exist wherever its railroad enters or leaves improved or fenced land, whether such railway company owns the railroad or is simply operating it under a lease. *Missouri Pac. R. Co. v. Morrow*, 132 Kan. 217; s. c., 19 Am. & Eng. R. R. Cas. 630.

Proper Cattle-guards.—Proper cattle-guards are such as will prevent cattle from passing along the right of way of the railway company into an improved or fenced field. *Cleveland, etc., R. Co. v. Newbrander*, 40 Ohio St. 15; s. c., 11 Am. & Eng. R. R. Cas. 480.

The term "cattle-guards," as employed in the statute, means such an appliance as will prevent animals from going upon the land adjoining the right of way. A pit under the track does not meet the requirement of the law, and, where the

owner of land erects fences up to the right of way, it is the duty of the railroad company to erect a guard or protection extending the whole width of the right of way. *Heskett v. Wabash, etc., R. Co.*, 61 Iowa, 467; s. c., 13 Am. & Eng. R. R. Cas. 549.

A cattle-guard cannot be considered as a part of a fence in such a sense that the owner of cattle killed by reason of the defective condition of the cattle-guard may recover double damages, as in the case of a defective fence. *Moriarty v. Cent. Iowa R. Co.*, 64 Iowa, 696; s. c., 20 Am. & Eng. R. R. Cas. 438.

Compensation for Maintaining Cattle-guards.—A railroad company exercising its powers subject to the provisions of the present constitution, and required by the act of 1874 (71 Ohio L. 85), passed since its incorporation, to construct and maintain cattle-guards at places on its road where public highways are or may be constructed across its track, is not entitled to compensation for making or maintaining such cattle-guards. *Lake Shore, etc., R. Co. v. Sharpe*, 38 Ohio St. 150; s. c., 7 Am. & Eng. R. R. Cas. 543.

Injury to Growing Crop.—Where a growing crop has been destroyed through the negligence of a railroad company in failing to maintain a sufficient cattle-guard, the measure of damages is the value of the crop at the time of its destruction. *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 456; *Texas, etc., R. Co. v. Young*, 60 Tex. 201; s. c., 13 Am. & Eng. R. R. Cas. 544.

Where a railroad company constructs its railroad track, and in such construction omits to make sufficient cattle-guards where the track enters and leaves an unfenced field, *held*, that the company is liable to the owner of the field for damages resulting therefrom; and this liability is not avoided by the fact that, after constructing its road, the company leased the same to another railway company, which latter company was in full possession and use of the track at the time of the happening of the injuries, and by the terms of its lease had contracted to discharge all statutory obligations and duties imposed upon the lessor company. *St. Louis, etc., R. Co. v. Cure*, 28 Kan. 622; s. c., 11 Am. & Eng. R. R. Cas. 458.

Duty to Repair.—The statutes make it the duty of a railroad company to erect and keep in repair all necessary cattle-guards, at all places at which a railway enters an inclosure, sufficient to protect everything therein from the depredations of stock of every description. If

they fail so to do, they are made liable, to any person injured by such neglect, for all damages resulting therefrom. The right is given the owner of any inclosure, in case of failure on the part of the railroad, to construct or repair such cattle-guards at the expense of said railroad. Where the railway company fails to construct or keep in repair the necessary cattle-guards; the exercise of ordinary care does not impose upon any one the necessity of assuming the risk of constructing or repairing them, by having the work done. A person through whose inclosure a railway runs may leave the whole matter of erecting or repairing cattle-guards in the hands of a railroad, without being chargeable with contributory negligence. *Texas, etc., R. Co. v. Young*, 60 Tex. 201; s. c., 13 Am. & Eng. R. R. Cas. 544.

A railroad company which neglects, when notified, to mend a cattle-guard across its road-bed is not liable for damage resulting to a crop, although it has for thirty years repaired the guard, which it built at the request of the protected landowner. *Vicksburg, etc., R. Co. v. Dixon*, 61 Miss. 119; s. c., 19 Am. & Eng. R. R. Cas. 617; *Miller v. Chicago, etc., R. Co.*, 66 Iowa, 546; s. c., 23 Am. & Eng. R. R. Cas. 235.

Unruly Horses.—A railroad company is not bound to guard against unruly horses or other animals; and, if a cattle-guard is reasonably sufficient to turn back such beasts as cattle-guards are generally designed to restrain, it is not liable for not maintaining a better one. *Smead v. Lake Shore & M. S. R. Co.*, 58 Mich. 200.

Fence Built up to Right of Way.—Where the landowner erects fences up to the right of way, it is the duty of the railroad company to erect a guard or protection extending the whole width of the right of way. *Heskett v. Wabash, St. L. & P. R. Co.*, 61 Iowa, 467; s. c., 13 Am. & Eng. R. R. Cas. 549.

Land Outside of the Right of Way.—The provisions in the Iowa Code, § 1288, requiring railroad companies to erect cattle-guards is not limited to lands outside of the right of way which are fenced for cultivation or pasture; but where the company fences its right of way, upon entering or leaving such fenced right of way, the law requires a cattle-guard. *Robinson v. Chicago, R. I. & P. R. Co.*, 67 Iowa, 292.

How Considered.—In Iowa a cattle-guard cannot be considered as a part of a fence in such a sense that the owner of cattle killed by reason of the defective condition of the cattle-guard may re-

4 *Gates and Bars*.—Railroad companies are required to make gates or bars, and suitable crossings, between adjoining fields of farmers along the road,¹ but it does not follow therefrom, as if the bars and gates when made were designed to remain open, that the company must erect cattle-guards at such crossings, or else incur liabilities absolutely to pay for stock killed upon its road.²

If the company, or its servants or customers, make gaps in the fence, even for a necessary purpose, and do not repair them in a reasonable time, or carelessly leave gates open or insufficiently fastened so that an injury happens to another's cattle, it will be liable.³

cover double damages, as in the case of defective fence. *Moriarty v. Cent. Iowa R. Co.*, 64 Iowa, 696.

Road Entering Improved Land.—A railroad company, whether it operates the road as owner or lessee, is bound to see that proper cattle-guards exist wherever the road enters or leaves improved or fenced land. *Missouri Pac. R. Co. v. Morrow*, 32 Kan. 217. But a railroad company is not required, within the limits of a city, to place guards around a cut, away from a public thoroughfare, to prevent animals, grazing there in violation of law, from falling down the bank. *Clary v. Burlington, etc., R. Co. (Neb.)*, 11 Am. & Eng. R. R. Cas. 493; 14 Neb. 232.

Unimproved Lands Afterwards Cultivated.—Where a railroad is constructed across unimproved or uninclosed lands, and the land is afterwards improved or inclosed, it becomes the duty of the company operating such road, under section 1283 of the Iowa Code, to construct cattle-guards. *Heskett v. Wabash, St. L. & P. R. Co.*, 61 Iowa, 467.

Sufficient Notice.—Service upon a station agent of the company, in a county where the land lies, of a written notice that the owner was fencing his land and desired cattle-guards placed at both ends of the company's road where it passed in and out of his land, is sufficient notice to the company under the Iowa statute. *Heskett v. Wabash, St. L. & P. R. Co.*, 61 Iowa, 467; s. c., 13 Am. & Eng. R. R. Cas. 549.

Agreement with Landowner.—When a railway company makes cattle-guards on its railroad where it enters and leaves improved or fenced land, and such cattle-guards are insufficient, and the company then enters into an agreement with the occupant of the premises, that, if he will take away his old fences near the cattle-guards and move them to another line near the railroad, so as to inclose his premises at different points than where the land was inclosed when the first cattle-guards were built, the company would erect new

cattle-guards at the places to which the fences were to be changed, and thereupon the occupant removes his fences and the company does not comply with its promise, but neglects to erect cattle-guards at the places where the road enters and leaves the land as newly fenced, it is liable for all damages sustained thereby. *Missouri Pac. R. Co. v. Lynch*, 31 Kan. 531; s. c., 13 Am. & Eng. R. R. Cas. 517.

Sufficiency a Question for the Jury.—Upon the question of whether the cattle-guards were proper and sufficient to complete the inclosure, and prevent domestic animals crossing the same, the opinions of witnesses are not admissible; but, when the facts relating to their construction and condition are shown, the jury are capable of forming a correct judgment regarding their sufficiency. *St. Louis, etc., R. Co. v. Ritz*, 33 Kan. 404; s. c., 19 Am. & Eng. R. R. Cas. 611.

1. *Mackie v. Cent. Iowa R. Co.*, 54 Iowa, 540.

2. *Cook v. Milwaukee & St. Paul R. Co.*, 36 Wis. 45; *Peoria, etc., R. Co. v. Barton*, 80 Ill. 72; *Bartlett v. Dubuque & Sioux City R. Co.*, 20 Iowa, 188. And where the owner indicates by his acts, as by fencing each end of his private lane and using the crossing therein, that he desires an open crossing, the company may assume this to be the fact and need not fence. *Tyson v. Keokuk, etc., R. Co.*, 43 Iowa, 207; s. c., 14 Am. R. Rep. 423, citing *Indianapolis, etc., R. Co. v. Shimer*, 17 Ind. 295.

Gates and Bars at Places Other than Farm Crossings.—As the statute (Pub. Acts, Mich. 1815, p. 138) does not preclude railroad companies from putting gates or bars at places other than farm crossings, they may construct them at places deemed advisable; and a fence with such other points where gates or bars may be a sufficient fence within the requirements of the statute. *Detroit, etc., R. Co. v. Hayt*, 55 Mich. 347.

3. *Fawcett v. New York, etc., R. Co.*,

So where gaps are made in the fence, or gates or bars left open by others, or breaches are made by fires, freshets, storms, etc., if the company has had actual or constructive notice of the defect and reasonable time to repair it before the injury happens, but not otherwise; the reasonableness of the time for repair depending, of course, upon the circumstances of the particular case.¹

20 L. J. Q. B. 222; Indianapolis, etc., R. Co. v. Logan, 19 Ind. 204; Chicago, etc., R. Co. v. Harris, 54 Ill. 528. Cleveland, etc., R. Co. v. Swift, 42 Ind. 119, was an action against a railroad company for killing stock. It appeared that the railroad had been fenced, but a panel of the fence had been cut out and made into the form of a gate, but not hung on hinges; and the opening was used by persons hauling wood and placing it near the railroad track; and this was done with the consent of the railroad company, or without objection from it. A subtenant of the plaintiff being one of the persons hauling wood, and, while he was so hauling, the gate was so set up that hogs of the plaintiff passed through the opening and upon the railroad and were killed, *held*, that these facts did not show such negligence on the part of the plaintiff as to prevent his recovery. Indianapolis, etc., R. Co. v. Turitt, 24 Ind. 162; Brady v. Rensselaer, etc., R. Co., 3 Thomp. & C. (N. Y.) 537; s. c., 1 Hun (N. Y.), 378; Spinner v. New York, etc., R. Co., 67 N. Y. 153.

1. Chicago, etc., R. Co. v. Umphenour, 69 Ill. 198; Chicago, etc., R. Co. v. Saunders, 85 Ill. 288; Toledo, etc., R. Co. v. Daniels, 21 Ind. 256; Indianapolis, etc., R. Co. v. Hall, 88 Ind. 368; Toledo, etc., R. Co. v. Cohen, 44 Ind. 444. A railroad company is required to use reasonable care and diligence in keeping up bars leading through the fence inclosing its right of way; and if, by reason of its failure to use such care, stock passes onto its road and are injured, it is liable in action therefor. But it would not be liable for such injuries if the bars through which the cattle passed on the track had been left down by the plaintiff or a third person, unless they had continued for such a length of time, or under such circumstances, in this condition as to justify the inference of negligence on the part of the company in not seeing and putting them up. Perry v. Dubuque, Southwestern R. Co., 36 Iowa, 102; Aylesworth v. Chicago, etc., R. Co., 30 Iowa, 459; Davis v. Chicago, etc., R. Co., 40 Iowa 292; Robinson v. Grand Trunk R. Co., 32 Mich. 322; Toledo, etc., R. Co. v. Eder, 45 Mich. 329; Grand Rapids,

etc., R. Co. v. Monroe, 47 Mich. 152; Harrington v. Chicago, etc., R. Co., 71 Mo. 384; Clardy v. St. Louis, etc., R. Co., 73 Mo. 576; Munch v. New York, etc., R. Co., 29 Barb. (N. Y.) 647; Morrison v. New York, etc., R. Co., 32 Barb. (N. Y.) 568; Wheeler v. Erie R. Co., 2 Thomp. & C. (N. Y.) 364; Hodge v. New York, etc. R. Co., 27 Hun (N. Y.), 394; Lande v. Chicago, etc., R. Co., 33 Wis. 640; Goddard v. Chicago, etc., R. Co., 54 Wis. 548. See Davidson v. Cent. Iowa R. Co., 39 N. W. Rep. 163.

Gates Allowed at Farm Crossings.—Where gates are allowed at farm crossings for the convenience of an adjoining landowner, he is bound to keep them closed; and if fails to do so, and his animals pass through them to the railroad and are injured or killed, he cannot recover from the company on the ground that it has neglected to fence its track as required by the statute. Bond v. Evansville & Terre Haute R. Co., 100 Ind. 301; s. c., 23 Am. & Eng. R. R. Cas. 200; Evansville, etc., R. Co. v. Mosier, 17 N. E. Rep. 109; Payne v. Kansas City R. Co., 35 Am. & Eng. R. R. Cas.; s. c., 39 N. W. Rep. 633. But see Pennsylvania Co. v. Spaulding, 39 N. W. Rep. 269.

Liability of Company for Injuring Animals Entering Right of Way through Open Gate.—Where a gate is put in fence erected by a railroad company in pursuance of the provisions of the statute, for the convenience of owners of the land adjoining the right of way, and such gate is continually left open by the servants or agents of the company, or by those doing business with it, the fence is not maintained within the true intent and meaning of the statute, and the company is liable for any injury occasioned thereby. Spinner v. New York Central, etc., R. Co., 6 Hun (N. Y.), 600; 67 N. Y. 153; 4 Thomp. & C. (N. Y.) 595. Where the evidence tended to show that a cow got upon a railway track through the negligence of the company's servants in failing to keep a gate at a farm crossing in repair, it was held that a verdict finding the company liable would not be disturbed. Toledo, etc., R. Co. v. Nelson, 77 Ill. 160. But where an animal passes through an upon gate upon a railway track and is injured, the

company is not liable unless it is shown that the gate was open so long as to raise a presumption that the employees of the company knew it. *Chicago, etc., R. Co. v. Magee*, 60 Ill. 529.

Where an injury resulted to a flock of sheep from the act of some person opening, and leaving open, the gate to a pasture in which the sheep were, thus permitting them to enter upon the defendant company's right of way, it is held that if the gate was opened, or left open through the negligence or carelessness of the servants of the defendant, it is liable from any injury resulting therefrom; but if it was opened and so left by any other person through negligence or design, the defendant is not liable. *Lemon v. Chicago & G. T. R. Co.*, 59 Mich. 618.

Gate Left Open by Landowner.—Of course the company is not liable if the gate is left open by the landowner or his servants. This is the rule when his cattle go through the gates and are injured. *Koutz v. Toledo, etc., R. Co.*, 54 Ind. 515; *Hook v. Worcester, etc., R. Co.*, 58 N. H. 251; *Richardson v. Chicago, etc., R. Co.*, 56 Wis. 347. It is the duty of the adjacent landowner to be vigilant in noting open gates or defective fences, and in giving notice thereof to the company. He has no right to fold his arms and permit his cattle to stray upon the track through known deficiencies in the fence or gate which the company are bound to maintain. *Poler v. New York Central, etc., R. Co.*, 16 N. Y. 476, 481; *Chicago, etc., R. Co. v. Seirer*, 60 Ill. 295.

Imputed Contributory Negligence of Third Persons.—While the landowner's neglect to close a gate is contributory negligence which will defeat a recovery by him for injuries to his cattle straying upon the track through the gate, it is not so as to third persons whose cattle go upon the track through the gate. As forcibly stated by Mr. Beach (*Contributory Negligence*, § 32): "The rule . . . is, that the contributory negligence of third persons constitutes a valid defence to the plaintiff's action, only when that negligence is legally imputable to the plaintiff. There must, in order to create this imputability, be some connection which the law recognizes, between the plaintiff and the third person, from which the legal responsibility may arise. The negligence of the third person, and its legal imputability, must concur. It is clear that there is no justification for the negligent misconduct of the defendant in that some third person, a stranger, was also in the wrong. Where the defendant

pleads the negligence of a party other than the plaintiff in bar of the action, it must appear, not only that such third person was in fault, but that the plaintiff ought to be charged with fault."

While a railroad company is not liable for killing stock belonging to one who has been permitted to erect a gate at a private crossing for his own convenience, where the cattle entered upon the track through the gate, yet it is liable in such case for killing stock belonging to a third person. *Wabash R. Co. v. Williamson*, 105 Ind. 154; s. c., 23 Am. & Eng. R. R. Cas. (Ind.) 203.

In an action against a railroad company for damages for killing two mules, where it appeared that plaintiff was an employee of the railroad company's contractor, and that the mules were used in the construction of a side track and embankment; that the principal track was fenced, but, for the convenience of the contractor and his employees in passing back and forth, two gaps had been made by them in the fence, about 400 feet apart; that between these two gaps was another gap, not used by them, through which plaintiff's mules escaped upon the track, and were injured by defendant's train. *Held*, that, as the mules escaped upon the track through a gap which the defendant might properly have stopped, the railroad company was liable for the injury if it had knowledge of the gap. *Accola v. Chicago, B. & Q. R. Co.*, 70 Iowa, 185.

Question for the Jury.—When it is shown, in a suit for damages for injury to stock, that the railroad company had fenced its tracks on both sides, and had opened a gap on one side for its own convenience, and that through this gap the stock had strayed on the track and were killed while attempting to escape through the gap, there being no other means of egress, the jury should be allowed to say whether that degree of care which these circumstances called for had been exercised by those in charge of the train. *Tyler v. Ill. Cent. R. Co.*, 61 Miss. 445; s. c., 19 Am. & Eng. R. R. Cas. 519; 61 Miss. 445. See *Wait v. Burlington, etc., R. Co. (Iowa)*, 37 N. W. 159.

Doctrine of Reasonable Time.—The law provides that gates shall have latches or hooks; and a rail or stick laid over the top of the gate occasionally is no compliance with the law; and the doctrine that a reasonable time must elapse after the gate or fence gets out of repair, in which defendants may discover its condition, has, in such a case, no application. *Duncan v. St. Louis, etc. R. Co.*, 91 Mo. 68.

5. *Defective Fences*.—When fences have once been properly erected and afterwards get out of repair by some occurrence beyond the immediate control of the company, responsibility does not attach under the statute if the repair is made within a reasonable time, nor until a reasonable time for repairs has elapsed.¹

But, before the company can incur liability for defects happening in their fences, when once properly erected, they must have notice of such defects, with intervening reasonable time thereafter to enable them to repair, or else sufficient time must have elapsed after the defects occur to raise the presumption of notice against the company, and also reasonable time thereafter for repairs.²

If the adjoining proprietor is satisfied with a sliding panel or gate at his farm-crossing instead of a gate hung and fastened with a latch or hook as prescribed by section 43, no one else has a right to complain. A railroad company is not liable, under this section, for the killing of stock which come upon the track through a gate left open by some one else without the consent of the company. *Harrington v. Chicago, etc., R. Co., Appellant, 71 Mo. 384 (April Term, 1880).*

1. *Rorer on Railroads, 641*, citing *Indianapolis, P. & C. R. Co. v. Smith, 24 Ind. 162; Ill. Cent. R. Co. v. Swearingen, 33 Ill. 289; Indianapolis, etc., R. Co. v. Hall, 88 Ill. 368; 21 Am. R. Rep. 311; Aylesworth v. C. R. I., etc., R. Co., 30 Iowa, 459; Lemmon v. Chicago, etc., R. Co., 32 Iowa, 151; Davis v. Chicago, etc., R. Co., 40 Iowa, 292; 8 Am. R. Rep. 407; Dunnigan v. Chicago, etc., R. Co., 18 Wis. 28; Brown v. Mil. & Prairie du Chien R. Co., 21 Wis. 39; Antisdel v. Chicago, etc., R. Co., 26 Wis. 145; s. c., 7 Am. Rep. 44; Lande v. Chi. & N. Western R. Co., 33 Wis. 640; Jones v. Chicago, etc., R. Co., 44 Wis. 352; s. c., 1 Am. & Eng. R. R. Cas. 61. But such defence must be pleaded and proved. *Jeffersonville, etc., R. Co. v. Sullivan, 38 Ind. 262; s. c., 10 Am. R. Rep. 279.**

When an accident occurs to a fence, a railroad company is entitled to a reasonable time to discover the defect before it can be held liable for an injury occurring in consequence. *Spinner v. New York C. & H. R. R. Co., 67 N. Y. 153; Great Western R. Co. v. Helm, 27 Ill. 198; Chicago & N. W. R. Co. v. Barrie, 55 Ill. 226; Chicago & A. R. Co. v. Saunders, 85 Ill. 288; Indianapolis & St. L. R. Co. v. Hall, 88 Ill. 368; Norris v. Androscoggin R. Co., 39 Me. 274; Murray v. New York, etc., R. Co., 4 Keyes (N. Y.), 274; Brown v. Milwaukee, etc., R. Co., 21 Wis. 39; Walthers v. Missouri Pacific R. Co., 78 Mo. 617; Fitterling v. Missouri Pac. R. Co., 79 Mo. 504.*

No lapse of time is of itself conclusive that the company knew or ought to have known of the defect in the fence. Each case depends on its own circumstances. The company is bound to repair only within a reasonable time after the defect becomes apparent, all the circumstances being taken into account. *Toledo, etc., R. Co. v. Cohen, 44 Ind. 444; Cleveland, etc., R. Co. v. Brown, 45 Ind. 91; McDowell v. New York, etc., R. Co., 37 Barb. (N. Y.) 196; Perry v. Dubuque, etc., R. Co., 36 Iowa, 102; Jeffersonville, etc., R. Co. v. Nichols, 30 Ind. 321; Chicago, etc., R. Co. v. Harris, 54 Ill. 528; Henderson v. Chicago, etc., R. Co., 43 Iowa, 620; Chicago, etc., R. Co. v. Barrie, 55 Ill. 227. But see *Missouri Pac., etc., R. Co. v. Metzger (Neb.)*, 38 N. W. Rep. 27.¹*

2. *Aylesworth v. Chicago, etc., R. Co., 30 Iowa, 459; Perry v. Dubuque S. W. R. Co., 36 Iowa, 102; Hilliard v. Chicago & N. W. R. Co., 37 Iowa, 442; Davis v. Chicago, R. I. & P. R. Co., 40 Iowa, 292; McCormic v. Chicago, R. I. & P. R. Co., 41 Iowa, 193; Hammond v. Chicago & N. W. R. Co., 43 Iowa, 168; Toledo, W. & W. R. Co. v. Cohen, 44 Ind. 444; Pittsburgh, C. & St. L. R. Co. v. Elby, 55 Ind. 567; Chicago & A. R. Co. v. Umphe-nour, 69 Ill. 198; Illinois Central R. Co. v. Swearingen, 47 Ill. 206; Toledo, W. & W. R. Co. v. Nelson, 77 Ill. 160; Chicago, etc., R. Co. v. Barrie, 55 Ill. 227; Varco v. C. M. & St. P. R. Co., 30 Minn. 18; s. c., 11 Am. & Eng. R. R. Cas. 419; Fritz v. Kansas City, etc., R. Co., 61 Iowa, 323; s. c., 13 Am. & Eng. R. R. Cas. 558; Pittsburgh, etc., R. Co. v. Smith, 38 Ohio, 410; s. c., 13 Am. & Eng. R. R. Cas. 579. Thus it is held, under the statutes requiring railroad companies to fence their roads, or be liable for live stock injured or killed by their trains, and to keep such fences up and in repair, although it becomes the special duty of such companies to be vigilant in discovering and repairing defects and deficiencies*

that may from time to time occur in the fences, gates, or bars, and to be careful to keep the latter closed, yet it is impracticable for the company to keep constant watch at every gate and at all parts of the line of the fence, and it is none the less the duty of the adjacent owner to be vigilant in that respect also, and to give notice to the company if defects are found. They have no right to quietly fold their arms and permit their cattle to stray upon the railroad track by reason of known deficiencies of fences which the corporation is bound to maintain. *Poler v. N. Y. Cent. R. Co.*, 16 N. Y. 476, 481; *Chicago, etc., R. Co. v. Seirer*, 60 Ill. 295.

When Negligence Inferred from Lapse of Time During Which Fence is in Bad Repair.—Where a fence has once been properly constructed and subsequently falls into disrepair, the company cannot be held liable unless it is shown that they had notice of the defect, or such a time has elapsed that they ought to have informed themselves of it. *Norris v. Androscoggin R. Co.*, 39 Me. 274; *Brady v. Rensselaer, etc., R. Co.*, 1 Hun (N. Y.), 373; *Wheeler v. Erie R. Co.*, 2 N. Y. S. C. 636; *Murray v. New York, etc., R. Co.*, 4 Keyes (N. Y.), 274; *Murray v. New York, etc., R. Co.*, 3 Abb. App. Dec. (N. Y.) 343; *Chicago, etc., R. Co. v. Barrie*, 55 Ill. 227; *Chicago, etc., R. Co. v. Umphenour*, 69 Ill. 198; *Robinson v. Grand Trunk R. Co.*, 32 Mich. 323; *Stephenson v. Grand Trunk R. Co.*, 33 Mich. 323; *Brown v. Milwaukee, etc., R. Co.*, 21 Wis. 39; *Hilliard v. Chicago, etc., R. Co.*, 37 Iowa. 442; *Davis v. Chicago, etc., R. Co.*, 40 Iowa. 292; *Henderson v. Chicago, etc., R. Co.*, 43 Iowa. 620; *Chicago, etc., R. Co. v. Sanders*, 85 Ill. 288; *Jones v. C. & N. W. R. Co.*, 49 Wis. 352; s. c., 1 Am. & Eng. R. R. Cas. 61; *Varco v. C. M. & St. P. R. Co.*, 30 Minn. 18; s. c., 11 Am. & Eng. R. R. Cas. 419.

Negligence Inferred from Maintaining Defective Fence.—To allow a patent defect in a fence to remain unfixed for two weeks is presumptive evidence of negligence. *Varco v. Chicago, etc., R. Co.*, 30 Minn. 18; s. c., 11 Am. & Eng. R. R. Cas. 419. See also *Baltimore, etc., R. Co. v. Schultz*, 43 Ohio St. 270; s. c., 23 Am. & Eng. R. R. Cas. 211; *Jebb v. Chicago & G. T. R. Co. (Mich.)*, 31 Am. & Eng. R. R. Cas. 532.

Where Cattle Break Through Fence.—The company is only bound to use proper diligence to keep its fences in repair. If, in spite of this, cattle break through, the company is not liable. *Case v. St. Louis, etc., R. Co.*, 75 Mo. 668; s. c., 13 Am. & Eng. R. R. Cas. 564.

Where Fence is Washed Away by Flood.—The company is in fault in not restoring, within two months, fences washed away by a flood. *Fritz v. Kansas City, etc., R. Co.*, 13 Am. & Eng. R. R. Cas. 564.

Where Fences are Thrown Down by Strangers.—When the company uses diligent effort to maintain fences, but strangers throw them down, the company is not liable for injuries to cattle occasioned in consequence. *Mo. Pac. R. Co. v. Walther*, 78 Mo. 617; s. c., 19 Am. & Eng. R. R. Cas. 662.

Contributory Negligence.—Contributory negligence is generally considered a complete defence to a claim against a railroad company for injury to cattle occasioned by a breach of the company's statutory duty to keep the fences in repair. *Munger v. Tonawanda R. Co.*, 4 N. Y. 350; *Hance v. Cayuga, etc., R. Co.*, 26 N. Y. 428; *Murray v. New York, etc., R. Co.*, 4 Keyes (N. Y.), 274; *Williams v. New Albany, etc., R. Co.*, 5 Ind. 114; *Indianapolis, etc., R. Co. v. Shimer*, 17 Ind. 295; *Toledo, etc., R. Co. v. Thomas*, 18 Ind. 215; *Browne v. Providence, etc., R. Co.*, 12 Gray (Mass.), 55; *Eames v. Boston & Prov. R. Co.*, 14 Allen (Mass.), 151; *Pittsburg, etc., R. Co. v. Methven*, 21 Ohio St. 586; *Rockford, etc., R. Co. v. Irish*, 72 Ill. 405; *Chicago, etc., R. Co. v. Seiros*, 60 Ill. 295; *Kansas City, etc., R. Co. v. McHenry*, 24 Kan. 501; s. c., 6 Am. & Eng. R. R. Cas. 581; *Kansas Pacific R. Co. v. Landis*, 24 Kan. 406; s. c., 6 Am. & Eng. R. R. Cas. 581; *Van Horn v. Burlington, etc., R. Co.*, 69 Iowa. 239; s. c., 7 Am. & Eng. R. R. Cas. 591; *Washington v. B. & O. R. Co.*, 17 W. Va. 190; s. c., 10 Am. & Eng. R. R. Cas. 749; *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562; s. c., 11 Am. & Eng. R. R. Cas. 469. But in *Indiana* the contrary rule prevails. *Jeffersonville, etc., R. Co. v. Ross*, 57 Ind. 549.

The landholder cannot be deprived of the right to make a proper use of his land, by the failure of the railroad company to perform their statutory duty of keeping the fence in repair. He is not therefore guilty of contributory negligence, in placing cattle in a field where he knows the fence is not in good repair. *Rogers v. Newburyport R. Co.*, 1 Allen (Mass.), 16; *Shepard v. B. N. Y. & E. R. Co.*, 35 N. Y. 641; *Hammond v. C. & N. W. R. Co.*, 43 Iowa. 168; *McCoy v. California, etc., R. Co.*, 40 Cal. 532; *Wilder v. Maine Central R. Co.*, 65 Me. 332; *Toledo, etc., R. Co. v. Cory*, 39 Ind. 218.

It has been intimated that under certain circumstances such conduct may be contributory negligence for the jury. *Poler*

The company are held to a higher degree of diligence in repairing such deficiencies—not to an impossible or unreasonable extent, yet exceeding that which prudent men usually exercise in their own affairs.¹

6. *Sufficiency of Fence*.—A wire fence constructed in accordance with the provisions of Gen. St. Minn. 1878, ch. 18, § 2, would be a compliance with Gen. St. 1878, ch. 34, § 54, requiring railroads to fence their roads.² Under the *Michigan* act of 1881, fences are to be approved and regulated by the railroad commissioners; but under the act of 1873, reasonable partition fences four and a half feet in height, and fairly adapted, so far as strength and mode of construction is concerned, to keep animals from getting on the track, were required.³ Under Code, *Iowa*, § 1289, a railroad company fully performs its duty as to fencing when it erects a fence that is reasonably sufficient to prevent live stock from coming upon the track.⁴ In *Kansas*, building fences along the side of a railroad is not alone sufficient; the railroad must be “inclosed” with fences or other barriers; and whenever, for that purpose, cattle-guards are necessary at the crossings of public highways or other places, they must be used.⁵

v. New York, etc., R. Co., 16 N. Y. 476.

The doctrine above laid down is strictly confined to breach of statutory duty on the part of the railroad company to fence. *Terry v. New York, etc., R. Co.*, 22 Barb. (N. Y.) 575.

1. *Rorer on Railroads*, 641, citing *Antisdel v. Chicago & N. W. R. Co.*, 26 Wis. 145; *Poler v. N. Y. Cent. R. Co.*, 16 N. Y. 476; *Hammond v. Chicago, etc., R. Co.*, 43 Iowa, 168; 14 Am. R. Rep. 412; *Lemmon v. C. & N. W. R. Co.*, 32 Iowa, 151; *Aylesworth v. C. R. I. & P. R. Co.*, 30 Iowa, 459; *Robinson v. Grand Trunk R. Co.*, 32 Mich. 322; *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665; *Henderson v. Chicago, etc., R. Co.*, 43 Iowa, 620; *Estes v. Atlantic & E. R. Co.*, 63 Me. 309; *Clardy v. St. Louis, etc., R. Co.*, 73 Mo. 576; s. c., 7 Am. & Eng. R. R. Cas. 555; *Varco v. C. M. & St. P. R. Co.*, 30 Minn. 18; s. c., 11 Am. & Eng. R. R. Cas. 419; *Evans v. St. Paul, etc., R. Co.*, 30 Minn. 489; s. c., 13 Am. & Eng. R. R. Cas. 653; *Stephenson v. Grand Trunk R. Co.*, 34 Mich. 323.

2. *Halverson v. Minneapolis, etc., R. Co.*, 32 Minn. 88; s. c., 19 Am. & Eng. R. R. Cas. 526.

3. *Davidson v. Michigan Cent. R. Co.*, 49 Mich. 428.

4. *Shellabarger v. Chicago, etc., R. Co.*, 66 Iowa, 18.

5. *Atchison, etc., R. Co. v. Shaft*, 34 Kan. 711.

Sufficiency of—Burden of Proof.—In a

suit against a railroad company for killing an animal on account of the want of a sufficient fence, if the company relies upon the fact that its road could not be fenced at the place in question, it has the burden of proof as to that matter. *Louisville, etc., R. Co. v. Clark*, 94 Ind. 111; s. c., 19 Am. & Eng. R. R. Cas. 623.

Wire Fence—Nuisance.—In this case it was held, in the face of 46 Vic. ch. 18, sec. 490, sub-secs. 15, 16 (O.), which seemed to sanction them, and empower municipalities to provide against injury resulting from them, barbed wire fences constructed by the defendants upon an ordinary country road along the line of their railway could not be treated as a nuisance, no by-law of the locality in which the accident complained of in this case having been passed respecting fences of the kind; and that the defendants were not therefore liable for the loss of the plaintiff's colt, which, while following its dam, as the latter was being led by the plaintiff's servant, ran against the fence and received injuries resulting in its death. *Held*, also, that the colt in question, five weeks old, following its dam, could not be said to be running at large, the universal custom of the country, which ought to govern, being for colts thus to follow the dam. *Held*, also, that evidence of the common use of fences of the kind in other townships, and that other municipalities held out inducements to erect them, should have been rejected as showing that they were not considered

7. *Sufficiency of, as to Trespassers.*—A railroad company is not required to fence its tracks against trespassers. Fences are required to protect animals, not rational beings.¹

dangerous or a nuisance. *Hillyard v. G. T., etc., R. Co.*, 8 Ontario Q. B. Div. 583; s. c., 23 Am. & Eng. R. R. Cas. 154.

Fencing Against Swine.—The *Missouri* railroad stock law of 1874 imposes an obligation upon railroad companies to fence their tracks against all animals, including hogs, against which a good and lawful fence would be a protection. The statute is in the nature of a police regulation, intended to protect domestic animals generally, and to promote the security of persons and property passing over the road, and is not designed merely for the benefit of the adjoining landowner. The railroad company is therefore under a general obligation to the public; and, in an action under the statute, the mere fact that the animals were trespassers upon the adjoining land, from which they went onto the unfenced railroad track and were killed, will not, where they escaped from the plaintiff's inclosure without his fault, defeat a recovery. But where the owner of animals voluntarily places them on the track, or purposely exposes them to danger, no recovery for their injury can be had. *Missouri Pac. R. Co. v. Roads*, 33 Kan. 640; s. c., 23 Am. & Eng. R. R. Cas. 165; *Halverson v. Minneapolis, etc., R. Co.*, 32 Minn. 88; s. c., 19 Am. & Eng. R. R. Cas. 526; *Ohio, etc., R. Co. v. Brubaker*, 47 Ill. 462; *Toledo, etc., R. Co. v. Cole*, 50 Ill. 185; *Lee v. Minneapolis, etc., R. Co.*, 66 Iowa, 13; s. c., 20 Am. & Eng. R. R. Cas. 476.

In an action for double damages for killing plaintiff's hog, the petition alleged that the hog was killed at a point on defendant's railroad track where the same was not inclosed by a lawful fence sufficient to prevent the hog from getting on the track, and that plaintiff's damage was caused by the failure of defendant to erect and maintain lawful fences sufficient to prevent the hog from straying on the track. *Held*, that this sufficiently showed that the animal came upon the track by reason of the company's failure to fence; and the petition was good after verdict. *Morris v. Hannibal, etc., R. Co.*, 79 Mo. 367; s. c., 19 Am. & Eng. R. R. Cas. 666.

Company not Required to Maintain a Hog-tight Fence in Kansas, When.—In an action to recover damages from a railroad company for the killing of two hogs in a

township where hogs are not permitted to run at large, and the findings of fact show that they were kept in an inclosed field surrounded by a hog-tight fence; that the company constructed and operated its road through the said field; that the hogs were killed within the limits of the field, by the engine and trains of the company in the operation of the road, and that the road was not inclosed with a fence to prevent the animals in the field from getting on the road;—*held*, that the company was not required to maintain a hog-proof fence in said township; and, as the construction of a lawful fence would have been of no benefit to prevent such animals from being on the road, therefore the mere failure to inclose its track with a good and lawful fence did not make the company liable to the owner of the animals killed. *Atchison, etc., R. Co. v. Yates*, 21 Kan. 613.

When Fence not Defined by Statute.—As to what kind of a fence will meet the requirements of the law, when no particular description of the fence is given in the statute requiring railroad companies to fence their roads, it is held that in such case the ordinary statute defining a lawful fence may be resorted to as a test of sufficiency. Thus, where, by the statute, railroad companies are required to "make and maintain a good and sufficient fence" for the inclosure of their roads, and no definition or description is given of what will be deemed such a fence, it is held that the ordinary and general statute of the State defining a lawful fence is to be referred to as a rule of decision in respect to sufficiency. *Enright v. San Francisco, etc., R. Co.*, 33 Cal. 230; *Corwin v. N. Y., etc., R. Co.*, 13 N. Y. 42; *Toledo, etc., R. Co. v. Thomas*, 18 Ind. 215.

1. *Nolan v. N. Y., etc., R. Co.*, 53 Conn. 461; s. c., 25 Am. & Eng. R. R. Cas. 342.

A railroad company cannot be held liable, under a statute subjecting it to a certain liability for failing to fence its road, for an injury to an infant child caused by the absence of such fence alone. *Walkenhauer v. Chicago, etc., R. Co.*, 17 Fed. Rep. 136; s. c., 15 Am. & Eng. R. R. Cas. 490. See also *Morrissey v. Providence, etc., R. Co.* (R. I.), 3 Atl. Rep. 10; *Smith v. Tripp*, 13 R. I. 152.

In *Fitzgerald v. St. Paul, etc., R. Co.*, 29 Minn. 336; s. c., 8 Am. & Eng. R. R.

8. *Injury to Animals.*—(1) *Where no Fence Required.*—A railroad company has the same right, at common law, to the exclusive possession of its track as any other owner has to his land, and is under no greater obligation to fence it.¹ In the absence, therefore, of any statute or agreement binding the company to fence its road, it is liable for injuries to cattle straying there only to the same extent that any other owner of land would be liable. In those States in which the common-law rules requiring the owner of domestic animals to keep them from straying, at his peril, is recognized, it is generally the rule, where there is no statute prescribing a different liability, that a railroad company is not liable for injuries to such animals trespassing upon its track, unless they are due to wanton or wilful misconduct, or to such gross negligence as to amount to a wantonness or wilfulness.²

Cas. 310, statutes requiring railroad companies to fence their roads, and making them liable for all damages sustained for failure so to do, *held*, inapplicable to the case of an infant straying on an unfenced railroad track. But where a child playing in a public park strayed upon the railway and was injured, *held*, that it was a question of fact for the jury whether the absence of a fence was the cause of the mishap. It is not necessary, in order to charge the company with the responsibility, that its negligence should be the efficient cause of the injury; if the injury would not have occurred but for such negligence, that is enough. *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228; s. c., 15 Am. & Eng. R. R. Cas. 394. See also *Isabel v. H. & St. J. R. Co.*, 60 Mo. 475; *Hayes v. Michigan Central R. Co.*, 111 U. S. 228; s. c., 15 Am. & Eng. R. R. Cas. 394; *Keyser v. Chicago, etc., R. Co.*, 56 Mich. 559; s. c., 19 Am. & Eng. R. R. Cas. 91, where the contrary doctrine is maintained.

Where there is no statute requiring a railroad company to fence its track for the protection of personal injuries, a charge that, if the construction of a fence would have prevented the accident and saved the child, it was negligent in the defendant not to have had a fence there, is all that can be asked on that point in an action against the company. *Marcott v. M., H. & O. R. Co.*, 49 Mich. 99; s. c., 8 Am. & Eng. R. R. Cas. 306.

1. *Shearm. & Redf. Neg.* § 545.

2. *Lafayette, etc., R. Co. v. Shirner*, 6 Ind. 141; *Indianapolis, etc., R. Co. v. Caldwell*, 9 Ind. 397; *Indianapolis, etc., R. Co. v. McClure*, 26 Ind. 370; *Williams v. New Albany, etc., R. Co.*, 5 Ind. 111; *Pittsburg, etc., R. Co. v. Stuart*, 71 Ind. 504; *Louisville, etc., R. Co. v. Ballud*, 2 Metc. (Ky.) 165; *Knight v.*

New Orleans, etc., R. Co., 15 La Ann. 185; *Perkins v. Eastern R. Co.*, 29 Me. 307; *Battimore, etc., R. Co. v. Lamborn*, 12 Md. 257; *Maynard v. Boston, etc., R. Co.*, 115 Mass. 458; *McDonnell v. Pittsfield, etc., R. Co.*, 115 Mass. 564; *Darlin v. Boston, etc., R. Co.*, 121 Mass. 118; *Williams v. Michigan, etc., R. Co.*, 2 Mich. 259; *Woolson v. Northern R. Co.*, 19 N. H. 267; *Vandergrift v. Rediker*, 22 N. J. L. 185; s. c., 2 Am. L. J. 116; *Price v. New Jersey, etc., Co.*, 31 N. J. L. 229; s. c., 32 N. J. L. 19; *Clark v. Syracuse, etc., R. Co.*, 11 Barb. (N. Y.) 112; *Talmadge v. Rensselaer, etc., R. Co.*, 13 Barb. (N. Y.) 493; *Spinner v. New York, etc., R. Co.*, 67 N. Y. 153; s. c., 1 Am. L. Reg. 97; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101; *Stucke v. Milwaukee, etc., R. Co.*, 9 Wis. 202; *Galpin v. Chicago, etc., R. Co.*, 19 Wis. 604; *Bennett v. Chicago, etc., R. Co.*, 19 Pa. St. 145. In many of these cases it is broadly laid down that the owner of cattle injured or killed by a train, while straying on the track, cannot recover therefor, as though even wanton injury would not warrant a recovery. *New York, etc., R. Co. v. Skinner*, 19 Pa. St. 298; s. c., 1 Am. L. Reg. 97; *Baltimore, etc., R. Co. v. Lamborn*, 12 Md. 257; *Perkins v. Eastern R. Co.*, 29 Me. 307; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101; *Woolson v. Northern R. Co.*, 19 N. H. 267. But it is clear that no more is intended than to declare that there can be no recovery for an injury by mere negligence. In *Clark v. Syracuse, etc., R. Co.*, 11 Barb. (N. Y.) 112, it is held that there can be no recovery for an injury by gross negligence in such a case. The principle which defeats the recovery in such cases is, that the owner of the cattle permitting them to be at large, so that they stray

The prevailing doctrine, however, especially in those States in which the common-law rule as to the duty of an owner of animals to keep them up is not in force, is that a railroad company is bound to ordinary care, skill, and diligence in the management of its trains, to prevent injury to cattle on its uninclosed track, whether they are rightfully there or not, and is liable for damages resulting from its want of such care, skill, and diligence, and for nothing more, unless it is required by law or contract to fence its track.¹

upon the track is guilty of contributory negligence, and it is therefore negligence against negligence, unless there is evidence of wantonness or wilfulness. *Cincinnati, etc., R. Co. v. Street*, 50 Ind. 225; *Jeffersonville, etc., R. Co. v. Underhill*, 48 Ind. 389; *Jacksonville, etc., R. Co. v. Huber*, 42 Ind. 173; *Indianapolis, etc., R. Co. v. Harter*, 38 Ind. 557. And the assumption is, when animals are at large, it is with the owner's permission. *Atchison, etc., R. Co. v. Heguir*, 21 Kan. 622.

As to the measure of duty on the part of the company, to cattle thus trespassing, the authorities are decidedly at variance. Some cases hold that it is liable only in case of wilful or gross negligence on the part of its employees in the running of its trains. *Fisher v. Farmers' Loan & T. Co.*, 21 Wis. 73; *O'Bannon v. Louisville, C. & L. R. Co.*, 8 Bush (Ky.), 348; *Jeffersonville, M. & I. R. Co. v. Underhill*, 48 Ind. 589; *Darling v. Boston & A. R. Co.*, 121 Mass. 118; *Tower v. Providence & W. R. Co.*, 2 R. I. 304; *Price v. New Jersey R. & T. Co.*, 3 Vroom (N. J. L.), 19; *Drake v. Phila. & E. R. Co.*, 51 Pa. St. 240; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Spinner v. N. Y. Cent. & Hud. River R. Co.*, 67 N. Y. 153; *Bowman v. Troy & B. R. Co.*, 37 Barb. (N. Y.) 516.

Other cases hold that the company is bound in such case to exercise ordinary care and prudence. *Isbell v. N. Y. & N. H. R. Co.*, 27 Conn. 393; *Needham v. San Francisco & St. J. R. Co.*, 37 Cal. 409; *Baltimore, etc., R. Co. v. Mulligan*, 45 Md. 486; *Toledo, W. & W. R. Co. v. McGinnis*, 71 Ill. 346; *Witherell v. Mil. & St. P. R. Co.*, 24 Minn. 410; *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150; *Cincinnati & O. R. Co. v. Smith*, 22 Ohio St. 227; *Pacific R. Co. v. Brown*, 14 Kan. 469.

At common law it is undoubtedly the duty of the owner of land adjacent to a railroad to so fence the same as to prevent live stock straying upon the track. If he fails so to fence, it is negligence on his part. This rule prevails in *Indiana*,—*Indianapolis, etc., R. Co. v. McClure*, 26

Ind. 370; *Indianapolis, etc., R. Co. v. Harter*, 38 Ind. 558; *Cincinnati, etc., R. Co. v. Street*, 50 Ind. 225;—in *Maryland*,—*Keech v. Baltimore, etc., R. Co.*, 17 Md. 33;—in *Minnesota*, *Locke v. First Div. St. Paul, etc., R. Co.*, 15 Minn. 351; in *Michigan*,—*Williams v. Michigan, etc., R. Co.*, 2 Mich. 260;—in *New Jersey*,—*Price v. New Jersey, etc. R. Co.*, 32 N. J. L. 19;—in *New York*,—*Torry v. New York, etc., R. Co.*, 22 Barb. (N. Y.) 575;—in *Pennsylvania*,—*Reeves v. Delaware, etc., R. Co.*, 30 Pa. St. 455;—in *Wisconsin*,—*Galpin v. Chicago, etc., R. Co.*, 19 Wis. 604;—in *Kentucky*,—*Louisville, etc., R. Co. v. Ballard*, 2 Metc. (Ky.) 177;—in *New Hampshire*,—*Giles v. Boston, etc., R. Co.*, 55 N. H. 522;—in *Massachusetts*,—*McDonnell v. Pittsfield, etc., R. Co.*, 115 Mass. 564;—and in *Vermont*,—*Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150.

In *Indiana*, *New Jersey*, *New York*, *Pennsylvania*, *Minnesota*, *Massachusetts*, *Vermont*, and *Maryland*, the act of the owner in permitting cattle thus to stray constitutes such contributory negligence on his part as to preclude him from recovering in any case against the railroad company, except indeed in case of gross or wilful misconduct. In many States, however, such act of the landowner is not held to exempt the railroad company from the obligations to take reasonable care. *McPheeters v. Han. & St. J. R. Co.*, 45 Mo. 22; *Georgia R. & B. Co. v. Neely*, 56 Ga. 540; *Kaes v. Mo. Pacific R. Co.*, 6 Mo. App. 397; *Rowe v. Greenville & C. R. Co.*, 7 S. Car. (N. S.) 167; *Coyle v. Balt. & Ohio R. Co.*, 11 W. Va. 94; *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351; *Chicago & A. R. Co. v. Engle*, 84 Ill. 397; *Smith v. Chicago, R. I. & P. R. Co.*, 34 Iowa, 506; *Kuhn v. Chicago, R. I. & P. R. Co.*, 42 Iowa, 420; *New Orleans, J. & G. N. R. Co. v. Field*, 46 Miss. 573; *Mobile & O. R. Co. v. Williams*, 53 Ala. 595; *Marietta & C. R. Co. v. Stephenson*, 24 Ohio St. 48; *Laws v. N. C. R. Co.*, 7 Jones L. (N. Car.) 468.

1. *Shearm. & Redf. Neg. sec. 454*; 1 *Thomp. Neg.* 497, 498; *Baltimore, etc.,*

An adjacent owner having agreed with a railway company to erect and maintain the fence required of it by law cannot recover for injuries to his cattle entering upon the track through defects in the fence.¹

R. Co. v. Mulligan, 45 Md. 486; Locke v. First Div., etc., R. Co., 15 Minn. 350; Witherell v. Milwaukee, etc., R. Co., 24 Minn. 410; Vicksburg, etc., R. Co. v. Patton, 31 Miss. 156; Mississippi, etc., R. Co. v. Miller, 40 Miss. 45; Memphis, etc., R. Co. v. Blakeney, 43 Miss. 218; Raiford v. Mississippi, etc., R. Co., 43 Miss. 233; New Orleans, etc., R. Co. v. Field, 46 Miss. 573; Gorman v. Pacific R. Co., 26 Mo. 441; Laws v. North Carolina R. Co., 7 Jones L. (N. Car.) 468; Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172; s. c., Thomp. Neg. 472; Cleveland, etc., R. Co. v. Elliott, 4 Ohio St. 474; Cincinnati, etc., R. Co. v. Smith, 22 Ohio St. 227; Trow v. Vermont, etc., R. Co., 24 Vt. 487; Jackson v. Rutland, etc., R. Co., 25 Vt. 150; Hurd v. Rutland, etc., R. Co., 25 Vt. 123; Morse v. Rutland, etc., R. Co., 27 Vt. 49; Bemis v. Connecticut, etc., R. Co., 42 Vt. 375; Trout v. Virginia, etc., R. Co., 23 Gratt. 619; Blaine v. Chesapeake, etc., R. Co., 9 W. Va. 252; Baylor v. Baltimore, etc., R. Co., 9 W. Va. 270; Washington v. Baltimore, etc., R. Co., 17 W. Va. 190; Chicago v. Taylor, 8 Ill. App. 108; Illinois, etc., R. Co. v. Baker, 47 Ill. 295; Toledo, etc., R. Co. v. Bray, 57 Ill. 514; Rockford, etc., R. Co. v. Lewis, 58 Ill. 49; Toledo, etc., R. Co. v. Ingraham, 58 Ill. 120; Toledo, etc., R. Co. v. Barlow, 71 Ill. 640; Rockford, etc., R. Co. v. Rafferty, 73 Ill. 58; Balcom v. Dubuque, etc., R. Co., 21 Iowa, 102; Searles v. Milwaukee, etc., R. Co., 35 Iowa, 490; Little Rock R. Co. v. Finley, 37 Ark. 562; Isbell v. New York, etc., R. Co., 27 Conn. 393; Macon, etc., R. Co. v. Davis, 13 Ga. 68; Macon, etc., R. Co. v. Lester, 30 Ga. 911; Georgia, etc., R. Co. v. Neely, 56 Ga. 540.

The fact that a railway track is unfenced, where no law or agreement requires a fence, is certainly not such negligence as to render the company liable for injuries to trespassing stock. Cleveland, etc., R. Co. v. Elliott, 4 Ohio St. 474. It balances the negligence of the owner of the cattle in suffering them to wander upon the track. 1 Thomp. Neg. 472; Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172. It is said in Gorman v. Pacific R. Co., 26 Mo. 441, that the fact that the road is unfenced must be taken into consideration in determin-

ing the degree of care required. And what constitutes ordinary care in the particular case may depend somewhat upon the place where the injury occurs, as where it happens in the streets of a village, where animals are permitted by ordinance to run at large. Fritz v. First Division, etc., R. Co., 22 Minn. 404; Chicago, etc., R. Co. v. Engle, 84. Ill. 397.

Where a railway company, without having obtained a legal right of way, ran its road through the plaintiff's land by his permission, it was held that it was bound to prevent injury to his cattle, and would be liable for an injury thereto, even though the injury was unavoidable after the cattle were discovered on the track. Matthews v. St. Paul, etc., R. Co., 18 Minn. 392; Missouri Pac. R. Co. v. Dunham (Tex.), 31 Am. & Eng. R. R. Cas. 530.

Where an animal, wrongfully upon a highway at a railroad crossing, is injured by a train the company is not liable, unless its servants after discovering its peril failed to do something which would have prevented the injury. Palmer v. No. Pac. R. Co. (Minn.), 31 Am. & Eng. R. R. Cas. 544.

When animals are killed at crossing, in consequence of the engineer's failure to give statutory signals, the company is liable. Kansas City, etc., R. Co. v. Turner, 19 Am. & Eng. R. R. Cas. 506.

1. Indianapolis, etc., R. Co. v. Petty, 25 Ind. 413; Warren v. Keokuk, etc., R. Co., 41 Iowa, 484; Cincinnati, etc., R. Co. v. Watterson, 4 Ohio St. 424; Talmadge v. Rensselaer, etc., R. Co., 13 Barb. (N. Y.) 493; Pittsburgh, etc., R. Co. v. Smith, 26 Ohio St. 124. In New Albany, etc., R. Co. v. Maiden, 12 Ind. 10, it was held, however, that a railroad company cannot divest itself of responsibility by making private contracts with the land-holders along the road, by which the latter separately agree to make and keep up fences.

Where the owner of land through which a railroad runs agrees with the railroad company, for a valuable consideration to build and keep up good and sufficient fences on both sides of the road through his lands and fails to do so, and on account of the insufficiency of such fences his animals stray upon the track and are injured, he is not entitled to recover for such injury, although the insufficiency of the fences was caused by

Where cattle come upon the track at a point where the railroad company is not, bound by statute to fence, it is not, in the absence of negligence, liable for injuries to them.¹

casualty and without negligence on his part, unless such injury is shown to have been intentional, or the result of gross carelessness on the part of the agents and servants of the company. *Pittsburgh, etc., R. Co. v. Smith*, 26 Ohio St. 124. Neither can the tenant of such owner recover where he enters with knowledge of the agreement and himself repairs the fence, especially if his animals are breachy. *St. Louis, etc., R. Co. v. Washburn*, 97 Ill. 253; *Indianapolis, etc., R. Co. v. Petty*, 25 Ind. 413; *Com. v. Great Western, etc., R. Co.*, L. R. 72 B. 322. But the existence of such an agreement is no defence in an action by a third person for injuries to his cattle by reason of defects in the fence. *Gill v. Atlantic, etc., R. Co.*, 27 Ohio St. 240; *Cincinnati, etc., R. Co. v. Ridge*, 34 Ind. 39.

Where compensation is awarded and paid to the owner of the land for building the fence when the right of way is taken, it is held also that he cannot recover for injuries to his cattle through neglect to fence. *Georgia, etc., R. Co. v. Anderson*, 33 Ga. 110; *Rockford, etc., R. Co. v. Lynch*, 67 Ill. 149; *Toledo, etc., R. Co. v. Pense*, 71 Ill. 174; *Terre Haute, etc., R. Co. v. Smith*, 16 Ind. 102. *Contra*, *Baltimore, etc., R. Co. v. Johnson*, 59 Ind. 188; *Pittsburgh, etc., R. Co. v. Heiskell*, 38 Ohio St. 666; s. c., 13 Am. & Eng. R. R. Cas. 555, and note; *Silver v. Kansas City, etc., R. Co.*, 78 Mo. 528; s. c., 19 Am. & Eng. R. R. Cas. 642; *Louisville, etc., R. Co. v. White*, 94 Ind. 257; s. c., 20 Am. & Eng. R. R. Cas. 449, *Indianapolis, etc., R. Co. v. Koons*, 105 Ind. 507; s. c., 24 Am. & Eng. R. R. Cas. 376.

An owner of land through which a railroad passes agreed with the railroad company to maintain and keep in repair a line of fence on the south side of the road, and the company agreed to do the like on the north side. Afterwards the company, for its own convenience in rebuilding a bridge over a stream of water there situate, removed a portion of the fence on the south side of the road, and when the bridge was completed, instead of restoring the portion of fence removed, constructed, as a substitute therefor, wing fences from the abutments of the bridge, over its right of way, to the ends of the old fence, so as to prevent the passage of stock from the adjacent fields to the railroad. The portions of

fence thus substituted for the part of the old fence which had been removed were accepted by the land-owner as an inclosing fence to his fields. *Held*: 1. By accepting the new wing fences as a part of the line of fence inclosing his adjacent fields, it became the duty of the land-owner to keep the same in repair. 2. Occasional repairs of the new wing fences by the company did not release the land-owner from his duty to keep the same in repair. 3. Such land-owner is without remedy where his stock passes, by neglect to make such repairs, to the track of the railroad, and is killed by a passing train, unless it be shown that the killing was caused by negligence in running the train. 4. The burden of proving such negligence rests on the plaintiff. It cannot be inferred from the fact of killing. *Railroad Co. v. McMillen*, 37 Ohio St. 554; *Pittsburgh, etc., R. Co. v. Heiskell*, 38 Ohio 666; s. c., 13 Am. & Eng. R. R. Cas. 555; *Terre Haute, etc., R. Co. v. Flanigan*, 94 Ind. 336; s. c., 20 Am. & Eng. R. R. Cas. 452.

A parol agreement to maintain fences does not run with the land, but affects the parties to the agreement only. But a written agreement showing an intention to charge the land runs with it, and is enforceable against subsequent grantees. An action may be maintained against a railroad company by proof of default in its obligation to keep a fence at a particular point by which plaintiff's cattle came on the track and were injured. *Ky. Cent. R. Co. v. Kinney*, 82 Ky. 154; s. c., 20 Am. & Eng. R. R. Cas. 458.

When the company neglects to build or maintain a fence, and it is assented and agreed to by the owner of the land adjoining the railroad, whose cattle have been killed in consequence of such neglect, the case is one in which such land-owner has contributed to the very act of negligence of which he complains. The act may be said to be his own, as well as that of the company, and by his participation in it he disentitles himself to recovery for its consequences. *Whittier v. Chicago, etc., R. Co.*, 24 Minn. 394; *Hurd v. Rutland, etc., R. Co.*, 25 Vt. 116. *Contra*, *Cincinnati, etc., R. Co. v. Hildreth*, 77 Ind. 504. But a stranger is in no way bound by such agreement or assent by the owner of the land. *Berry v. St. Louis, etc., R. Co.*, 65 Mo. 172.

1. *Davis v. Burlington & M. R. Co.*, 26 Iowa, 549; *Indianapolis, etc., R. Co. v.*

(a) *Stations and Yards.*—Railway companies are not required to fence their track at stations and sidings where freight or passengers are received or discharged, and are not liable to pay for cattle or other animals which may wander upon the track at such places, and be killed without negligence on the part of such companies.¹

Warner, 35 Ind. 515; Jeffersonville, etc., R. Co. v. Huber, 42 Ind. 173; Great Western R. Co. v. Morthland, 30 Ill. 451; Illinois Central R. Co. v. Bull, 72 Ill. 537; Smith v. Chicago, etc., R. Co., 34 Iowa, 506; Peoria, etc., R. Co. v. Barton, 80 Ill. 72; Schneur v. Chicago, etc., R. Co., 40 Iowa, 337; Wier v. St. Louis, etc., R. Co., 48 Mo. 558; Jeffersonville, etc., R. Co. v. Lyon, 72 Ind. 107; s. c., 2 Am. & Eng. R. R. Cas. 648; Snider v. St. Louis, etc., R. Co., 73 Mo. 465; s. c., 7 Am. & Eng. R. R. Cas. 558; Nance v. St. Louis, etc., R. Co., 79 Mo. 196; Asher v. St. Louis, Iron Mt. & S. R. Co., 79 Mo. 432; Louisville, N. A. & C. R. Co. v. Quade, 91 Ind. 295; Louisville, N. A. & C. R. Co. v. Hall, 93 Ind. 254; Louisville, etc., R. Co. v. Harrigan, 94 Ind. 245; Wabash, etc., R. Co. v. Tretts, 96 Ind. 450.

In an action against a railroad company to recover damages for alleged negligence in killing a mule, there being no fence and no statute requiring the company to fence its tracks, the plaintiff offered no evidence to prove negligence by the servants of the defendant. *Held*, that the simple fact of injury to the animals by the trains of the company, unaccompanied by anything which tends to show positive negligence or misconduct of the agents of the railroad, is insufficient to charge the company. This is the rule in those States where the company is not bound to fence its track, and where the stock is permitted to run at large upon uninclosed lands without thereby subjecting the owner to liability as a trespasser. *Bethje v. Houston, etc., R. Co.*, 26 Tex. 604; *C., P. & St. L. R. Co. v. McMillan*, 37 Ohio, 554; s. c., 7 Am. & Eng. R. R. Cas. 588; *McKissock v. St. L., K. C. & N. R. Co.*, 73 Mo. 456; *Mobile, etc., R. Co. v. Hudson*, 50 Miss. 572.

The mere fact of the killing or injury does not constitute any presumption of negligence; the specific negligent act complained of must be proved by the plaintiff. *Atchison, T. & S. F. R. Co. v. Walton (New Mex.)*, 9 West. C. Rep. 112, citing *Lyndsay v. Conn., etc., R. Co.*, 27 Vt. 643; *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 198; *Great Western R. Co. v. Morthland*, 30 Ill. 451; *Schnur v. C., R. I. & P. R. Co.*, 40 Iowa, 337;

Indianapolis, etc., R. Co. v. Means, 14 Ind. 30; *New Orleans R. Co. v. Enochs*, 42 Miss. 603; *Mobile, etc., R. Co. v. Hudson*, 50 Miss. 572; *Grand Rapids R. Co. v. Judson*, 35 Mich. 507; *Brown v. Hannibal, etc., R. Co.*, 33 Mo. 309; *Scott v. Wilmington R. Co.*, 4 Jones L. (N. Car.) 432; *Walsh v. Virginia, etc., R. Co.*, 8 Nev. 111; *Flattes v. Chicago, etc., R. Co.*, 35 Iowa, 191; *Kentucky, etc., R. Co. v. Tabot*, 78 Ky. 421; *Whit-tier v. C., M. & St. Paul R. Co.*, 26 Minn. 484; *Little Rock, etc., R. Co. v. Henson*, 39 Ark. 413; *Little Rock, etc., R. Co. v. Holland*, 40 Ark. 336.

1. *Indianapolis, etc., R. Co. v. Oestel*, 20 Ind. 231; *Jeffersonville, etc., R. Co. v. Beatty*, 36 Ind. 15; *Indianapolis, etc., R. Co. v. Christy*, 43 Ind. 143; *Pittsburg, C. & St. L. R. Co. v. Bowyer*, 45 Ind. 496; *Ohio & M. R. Co. v. Rowland*, 50 Ind. 349; *Indianapolis, P. & C. R. Co. v. Crandall*, 58 Ind. 365; *Cincinnati, R. & Ft. W. R. Co. v. Wood*, 82 Ind. 593; *Chicago, etc., R. Co. v. Campbell*, 47 Mich. 265; s. c., 7 Am. & Eng. R. R. Cas. 545; *Beckdolt v. Grand Rapids, etc., R. Co. (Ind.)*, 15 N. E. Rep. 686.

In an action against a railroad company for damages for killing two horses by defendant's train, at a point on its railroad where the road was not fenced, but where the right to fence existed, it appeared from the evidence that the horses were killed at a point on the main line, 140 feet west of the switches or side tracks, at the town of De Soto, Iowa. The right of way south of the track was fenced, as well as a portion on the north side between the place of the killing and the south boundary of the town plat, and cattle-guards were placed at the western boundary of the town about 1,000 feet west of where the horses were killed. The depot grounds, switches, and side-tracks were all east of the point where the animals were killed. *Held*, that the place where the horses were killed was not a part of the company's depot grounds used for the convenience of the public; that the duty to fence existed, and hence the company was liable. *Payton v. Chicago, etc., R. Co. (Iowa)*, 30 N. W. Rep. 877.

Switch Limits.—Where stock trespasses on the tracks of a railroad company

(b) *Public Crossings*.—When animals are killed at crossing through the negligence of the company, the owner may recover damages, though he has suffered them to run at large in violation of herd-law.¹

2. *Where Company Bound to Fence*.—The general effect of the statutes is to make railway companies which fail to erect or maintain fences as required, liable for injuries to cattle entering upon the track where so unfenced, without regard to any question of negligence or the degree of care used in the management of the train, or to the fact that the cattle are trespassers.²

within the switch limits of a station, the company is only liable for a failure on the part of its servants to use ordinary care to avoid injury to such stock after discovering its peril. *Young v. H. & St. J. R. Co.*, 79 Mo. 341; *Wallace v. St. Louis R. Co.*, 74 Mo. 597.

1. *Ala. G. S. R. Co. v. McAlpine*, 71 Ala. 545; s. c., 15 Am. & Eng. R. R. Cas. 544.

When cattle are killed at a crossing by a hand-car, the speed of which was not diminished by reason of a defective brake until too late to avoid the injury, the company was held liable. *Mo. Pac. R. Co. v. King*, 31 Kan. 500; s. c., 15 Am. & Eng. R. R. Cas. 529; *Union Pac. R. Co. v. Blum (Neb.)*, 36 N. W. Rep. 589.

2. *Williams v. New Albany, etc., R. Co.*, 5 Ind. 111; *Lafayette, etc., R. Co. v. Shriner*, 6 Ind. 141; *New Albany, etc., R. Co. v. Fix*, 12 Ind. 485; *Jeffersonville, etc., R. Co. v. Demlop*, 29 Ind. 426; *Toledo, etc., R. Co. v. Cory*, 39 Ind. 218; *Jeffersonville v. Ross*, 37 Ind. 545; *Shearm. & Redf. Neg.*, sec. 456; 1 *Thomp. Neg.* 514; 1 *Redf. Railw.* 487; *Rulkley v. New York, etc., R. Co.*, 27 Conn. 480; *Chicago, etc., R. Co. v. Umphenour*, 69 Ill. 198; *Hopkins v. Kansas, etc., R. Co.*, 18 Kan. 462; *Whittier v. Chicago, etc., R. Co.*, 24 Minn. 394; *Gillam v. Sioux City, etc., R. Co.*, 26 Minn. 268; *Gorman v. Pacific R. Co.*, 26 Mo. 441; *Burton v. North Missouri R. Co.*, 30 Mo. 372; *Miles v. Hannibal, etc., R. Co.*, 35 Mo. 407; *Morris v. St. Louis, etc., R. Co.*, 58 Mo. 78; *Cory v. St. Louis, etc., R. Co.*, 60 Mo. 213; *Collins v. Atlantic, etc., R. Co.*, 65 Mo. 230; *Smith v. Eastern R. Co.*, 35 N. H. 365; *Suydam v. Moore (N. Y.)*, 8 Barb. 358; *Corwin v. New York, etc., R. Co.*, 13 N. Y. 42; *McCall v. Chamberlain*, 13 Wis. 637; *Brown v. Milwaukee, etc., R. Co.*, 21 Wis. 39; *Sika v. Chicago, etc., R. Co.*, 21 Wis. 370; *Curry v. Chicago, etc., R. Co.*, 43 Wis. 665; *Veerhusen v. Chicago, etc., R. Co.*, 53 Wis. 689; *Dunkirk, etc., R. Co. v. Mead*, 90 Pa. St. 454; s. c., 1 Am. & Eng. R. R. Cas. 166.

When stock is killed at a point where the railroad is unfenced a *prima facie* presumption of negligence arises. *Wymore v. Hannibal, etc., R. Co.*, 79 Mo. 247; s. c., 13 Am. & Eng. R. R. Cas. 524; *Varco v. Chicago, etc., R. Co.*, 30 Minn. 18; s. c., 11 Am. & Eng. R. R. Cas. 419.

The company is liable for killing swine at point where it has failed to fence its road. No proof of negligence is necessary, though swine were running at large contrary to law. *Lee v. Minneapolis, etc., R. Co.*, 66 Iowa, 131; s. c., 20 Am. & Eng. R. R. Cas. 476. See also *Krebs v. Minneapolis, etc., R. Co.*, 64 Iowa, 670; s. c., 20 Am. & Eng. R. R. Cas. 478.

When an animal is killed, having entered on track at place not fenced on either side, but where it is practicable to fence on one side only, the company is not liable under the statute. *Indiana, etc., R. Co. v. Leak*, 89 Ind. 596; s. c., 13 Am. & Eng. R. R. Cas. 521.

Where the evidence fails to show that cattle strayed on the track at a point where the company was bound to fence and failed to do so, there can be no recovery. *Bremmer v. Green Bay, etc., R. Co.*, 61 Wis. 114; s. c., 19 Am. & Eng. R. R. Cas. 575.

The material point to be averred and proved is whether the road was fenced at the point where the animals got on the track. *Wabash, etc., R. Co. v. Tretts*, 96 Ind. 450; s. c., 19 Am. & Eng. R. R. Cas. 601.

It is the place of entry of the animal upon the track that determines the liability of the company. *Jeffersonville, etc., R. Co. v. Lyon*, 72 Ind. 107; s. c., 2 Am. & Eng. R. R. Cas. 648.

Where an animal is killed by cars, having entered upon the railroad at a place not fenced on either side, but where it is practicable to fence only on one side, the railroad company is not liable under the statute. *Indiana, etc., R. Co. v. Leak*, 89 Ind. 596; s. c., 13 Am. & Eng. R. R. Cas. 521.

In a herd-law county, an animal be-

longing to plaintiff strayed upon the railroad track of defendant, and was killed by one of its trains. The track was unfenced. Plaintiff had picketed the animal in an enclosed field, and had taken reasonable precautions to keep it confined and prevent it from running at large, but it had broken loose without any fault or neglect on his part. *Held*, that the company was liable for the value of the animal. *Kansas Pacific R. R. Co. v. Wiggins*, 24 Kans. 418; s. c., 2 Am. & Eng. R. R. Cas. 651.

Under the act of June 20, 1867, a railroad company is liable for stock killed upon its track while running at large in the night-time at a point where the company was required but failed to fence its track, notwithstanding stock is prohibited by statute from running at large in the night time. *Burlington, etc., R. Co. v. Brinckman*, 14 Neb. 70; s. c., 11 Am. & Eng. R. R. Cas. 438.

Owing to the neglect of a railroad company to fence a part of its track, a horse of the plaintiff strayed upon the track and was injured. The horse was what is called a "crazy" horse, i. e., did not possess sufficient natural intelligence to preserve itself from injury. *Held*, that this fact had nothing to do with determining the liability of the company; that it is required to fence its track for the protection of "crazy" horses as well as for the protection of animals possessing good "horse sense." *Liston v. Cent. Iowa R. Co.*, 70 Iowa, 714; s. c., 26 Am. & Eng. R. R. Cas. 593. *Compare Smead v. Lake Shore, etc., R. Co.*, 58 Mich. 458; s. c., 23 Am. & Eng. R. R. Cas. 241.

Injuries not Resulting from Contact with Moving Train.—The company is not liable for an injury to cattle caused by failure to erect statutory fence, unless the animal was injured by a collision or contact with the engine or cars of the train. *Croy v. Louisville, etc., R. Co.*, 97 Ind. 126; s. c., 19 Am. & Eng. R. R. Cas. 608; *Burlington, etc., R. Co. v. Shoemaker*, 18 Net. 369; s. c., 22 Am. & Eng. R. R. Cas. 369; *Knight v. N. Y., L. E. & W. R. Co.*, 99 N. Y. 25; s. c., 23 Am. & Eng. R. R. Cas. 188; *Holder v. Chicago, etc., R. Co. (Tenn.)*, 11 Lea, 176; s. c., 13 Am. & Eng. R. R. Cas. 567; *Moore v. Burlington, etc., R. Co. (Iowa)*, 31 Am. & Eng. R. R. Cas. 572; *Penna Co. v. Dunlap*, 31 Am. & Eng. R. R. Cas. 512.

A railroad company is not liable for an injury to an animal caused by the animal running on the track through fright at the train, and being injured on a trestle and not by contact with the locomotive or cars. *International, etc., R. Co. v.*

Hughes (Tex.), 31 Am. & Eng. R. R. Cas. 569.

Where a colt belonging to plaintiff ran from the highway upon lands adjoining defendant's road, which did not belong to the plaintiff, and from thence through a gap, where a length in the fence on the side of the road was down, on to the track and upon a bridge designed for the passage of railroad trains only, with the spaces between the ties open, and the colt's legs were caught in the open spaces and broken, *held*, that the defendant was not liable. *Knight v. N. Y., L. E. & W. R. Co.*, 99 N. Y. 25; s. c., 25 Am. & Eng. R. R. Cas. 188. *Compare Liston v. Cent. Iowa R. Co.*, 70 Iowa, 714; s. c., 26 Am. & Eng. R. R. Cas. 593. In this case the court held that where the defendant company has neglected to fence, the fact that the train did not strike the horse and that the horse was injured by running in front of the train into a bridge, does not relieve the company of liability.

Notice of Defect.—Before a railroad company can be held liable under the 43d section of the railroad law for the killing of stock occasioned by defective fencing, it must appear that the company knew, or, by the exercise of reasonable diligence, could have known of the defect, and that a reasonable time for making the necessary repairs had elapsed after the acquisition of such knowledge, or after the time at which such knowledge should have been acquired. *Clardy v. St. Louis, etc., R. Co.*, 73 Mo. 576; s. c., 7 Am. & Eng. R. R. Cas. 555.

When Cattle Stray on Track at Point where Company is not Bound to Fence and Stray to where it is, Company is not Liable.—When the animal got upon the track at a point where the company was not bound to fence, and strayed on the track to an unfenced point where there should have been a fence, and was there killed, the company was not held liable. *Great Western R. Co. v. Morthland*, 30 Ill. 451; *Snider v. St. Louis, etc., R. Co.*, 73 Mo. 465; s. c., 7 Am. & Eng. R. R. Cas. 558.

But if the cattle come upon the track at one point and wander to another when they are killed, the necessity and sufficiency of the fence at the place of entry and not at the place of killing determine the liability. *Jeffersonville, etc., R. Co. v. Lyon*, 72 Ind. 107; *Witthouse v. Atlantic R. Co.*, 64 Mo. 523; *Snider v. St. Louis, etc., R. Co.*, 73 Mo. 465.

If a fence is required, but is wanting or defective at the place of entry, but there is a sufficient fence or no fence is required at the place of killing, the com-

(a) *Private Crossings*.—Where a private road extends across the track and right of way of a railroad company, and connects with a public highway, the company is required to maintain across such private road suitable fences, or provide other protection against injuries which may result from animals passing from such highway through the private road on or along the railroad track.¹

(b) *Contributory Negligence*.—According to the course of recent decisions, the contributory negligence of the owner of domestic animals in allowing them to run at large,² even in violation of

pany is nevertheless liable. *Wabash R. Co. v. Forshee*, 77 Ind. 158; *Razor v. St. Louis, etc., R. Co.*, 73 Mo. 471.

On the other hand, if the cattle enter at a public crossing, where no fence is required, but are killed at a point where a fence is required but is wanting, the company is not liable under the statute. *Missouri, etc., R. Co. v. Leggett*, 27 Kans. 323.

So where the track is wholly unfenced. *Atchison, etc., R. Co. v. Cash*, 27 Kans. 587.

1. *Pittsburg, etc., R. Co. v. Cunningham*, 39 Ohio St. 327; s. c., 13 Am. & Eng. R. R. Cas. 529; *Indianapolis, etc., R. Co. v. Thomas*, 84 Ind. 194; s. c., 11 Am. & Eng. R. R. Cas. 491.

But where a railroad company has no right by fencing in its track to exclude proprietors from their private passage to the highway, it is not liable under the statute for injury to cattle. *Croy v. Louisville, etc., R. Co.*, 97 Ind. 126; s. c., 19 Am. & Eng. R. R. Cas. 608.

Duty of Company to those for whose Benefit it is maintained—Evidence.—In an action to recover damages for the killing of two colts, which entered the defendant's right of way through the north one of two gates maintained for the benefit of the plaintiff and four other persons who owned a pasture adjoining the defendant's road, the court after stating the case proceeded substantially as follows: "It is true that the place of entry is the important question, but it is not true that it must be shown by positive evidence; it is sufficient if circumstances are proved from which the fact can be legitimately inferred. *Indianapolis, etc., R. Co. v. Collingwood*, 71 Ind. 476; *Indianapolis, etc., R. Co. v. Thomas*, 84 Ind. 194; *Louisville, etc., Co. v. Kiouss*, 82 Ind. 357; *Whitewater R. Co. v. Bridgett*, 94 Ind. 216.

The plaintiff has the burden of showing that the place where his animals entered was not securely fenced; but where the railroad company asserts that the place was one which it was not bound to fence,

it must affirmatively establish that fact. *Fort Wayne, etc., Co. v. Herbold*, 99 Ind. 91, and authorities cited; *Baltimore, etc., Co. v. Kreiger*, 90 Ind. 380.

It was for the appellant, therefore, to show that the place where the animals of the appellee entered was one which it was not bound to fence. The general rule is that railroad companies are bound to maintain fences at private crossings. *Indianapolis, etc., Co. v. Lowe*, 29 Ind. 545; *Cincinnati, etc., Co. v. Ridge*, 54 Ind. 39; *Indianapolis, etc., R. Co. v. Thomas*, 84 Ind. 194; *Baltimore, etc., Co. v. Kreiger*, 90 Ind. 380; *Railroad Co. v. Cunningham*, 39 Ohio St. 327. To this general rule there are exceptions: the duty to fence is not owing to one who has undertaken to maintain the fence, nor to one for whose benefit the private crossing is maintained. *Terre Haute, etc., Co. v. Smith*, 16 Ind. 102; *Indianapolis, etc., Co. v. Shimer*, 17 Ind. 295; *Bond v. Evansville, etc., Co.*, 100 Ind. 301.

"The decision in the case last cited controls here, for although the appellant used the south crossing, still the north one was maintained for the benefit of those with whom he was united in interest, and it is impossible to sever their interests. All were interested in the crossing, and no one of them can maintain an action for a loss resulting from the failure to keep the gate constantly closed. The duty of the railroad company to those for whose benefit it permits the crossing to be maintained is very different from that which it owes to other persons and the public. So far as concerns those for whose benefit the private way is maintained, its duty does not extend so far as to require it to exercise constant vigilance to keep the gate closed." *Evansville & T. H. R. Co. v. Mosier*, 101 Ind. 597.

2. *Quackenbush v. Wis., etc., R. Co.*, 37 N. W. Rep. (Wis.) 834; *Horner v. Williams (N. C.)*, 5 S. E. Rep. 734; *Inman v. Chicago, etc., R. Co.*, 60 Iowa, 459; *Smith v. Kansas City, etc., R. R. Co.*, 66 Iowa, 131; *Missouri Pac., etc.,*

statute law,¹ and even though they were straying upon land which

R. Co. v. Bradshaw, 33 Kan. 533; Grand Rapids, etc., R. Co. v. Cameron, 45 Mich. 451; McDonald v. Chicago, etc., R. Co., 51 Mich. 628; Burlington, etc., R. Co. v. Fronzen, 15 Neb. 335.

The owner of a horse which is killed on the ground of another, where it is at large in the night-time in violation of the night-herd law, by a railroad train, without fault or negligence of the railroad company, at a point where it had a right to fence but did not, may recover therefor, in an action against the company, under section 1289 of the Code. Krebs v. Minneapolis, etc., R. Co., 64 Iowa, 670; s. c., 20 Am. & Eng. R. R. Cas. 478.

A railroad company is liable for swine killed on its track while running at large at a point where the company had a right to fence its road, and had not provided a sufficient fence, without proof of negligence on the part of the company, although such swine were running at large contrary to law. Lee v. Minneapolis, etc., R. Co., 66 Iowa, 131; 20 Am. & Eng. R. R. Cas. 476.

The railroad company owned a strip of land 250 feet wide by 2400 feet long, which is used for station grounds. The plaintiff owned a steer, which he permitted to run at large near the station grounds. This animal passed along the highway and onto the station grounds, and wandered along the same until it passed upon the company's right of way and upon the railroad track, where it was killed. Neither the railroad track, nor the right of way, nor the station grounds was inclosed with a fence. A fence, however, extended along one end and a part of the two sides of the station grounds. The place where the animal was killed, though used as a part of the defendant's station grounds, was not necessary for such use. *Held*, that, assuming that land necessarily used for station grounds need not be fenced, still, as the place where the animal was killed was not necessary in the present case for the use of the railroad company as a part of its station grounds, the same should have been fenced. Atchison, etc., R. Co. v. Shaft, 34 Kan. 711; s. c., 19 Am. & Eng. R. R. Cas. 53.

It was stipulated that hogs were killed by a passing train of defendant at a point on its road not within the limits of any city, town, or village, and at a point where said road was not fenced on either side; that said hogs had escaped from the inclosure of the plaintiff and were at

large without the actual fault of the plaintiff, in the daytime, at the time they were killed, but that they were killed without any negligence on the part of said defendant, and its agents and employees, other than what may be implied from the neglect to fence the line of its road. *Held*, that the company were liable for the value of the hogs. Union Pac. R. Co. v. High, 14 Neb. 14.

The farm of S. was bisected by the line of the railroad. The company fenced its line as required by the act of June 22, 1867. S. used the railroad fence on the south side of the road as the north fence of his inclosed pasture and corral. The corral consisted of about three acres, into which in the evening of the night in question he turned his twenty-three head of cattle. At the same time he looked along the line of the railroad fence, part of the inclosure, and it was all up and apparently in good condition. In the morning a board was found broken off his part of the fence, by means of which three of the cattle had escaped, gone onto the railroad track, and two of them had been killed and the other crippled by a passing train. The testimony as to the condition of the fence as to soundness was conflicting. *Held*, that the plaintiff was entitled to recover. Union Pac. R. Co. v. Shwenck, 13 Neb. 478. See, *contra*, Rockford, etc., R. Co. v. Irish, 72 Ill. 405; Browne v. Providence, etc., R. Co., 12 Gray, 55; Mentges v. New York, etc., R. Co., 1 Hilt. (N. Y.) 425; Hance v. Cayuga, etc., R. Co., 26 N. Y. 428; Eames v. Boston, etc., R. Corp., 14 Allen (Mass.), 151; Richardson v. Chicago & N. W. R. Co., 56 Wis. 347; s. c., 13 Am. & Eng. R. R. Cas. 654.

1. Lee v. Minneapolis, etc., R. Co., 66 Iowa, 131; Mo. Pac. R. Co. v. Bradshaw, 33 Kan. 533. Where the plaintiff's horse was at large in the night-time on the premises of another, in violation of the night-herd law, which was then in force in the country, and was killed by the defendant's train without fault or negligence of defendant, at a point where it had the right to fence but did not, *held*, that defendant was liable, under the statute, for the value of the horse, in the absence of any showing that the plaintiff, by any wilful act, contributed to the injury. Krebs v. Minneapolis, etc., R. Co., 64 Iowa, 670; Missouri, etc., R. Co. v. Roads, 33 Kan. 740.

But where a person pastures a bull, over one year old, on his own inclosed premises, through which a railroad is con-

did not belong to their owner, and were hence technically trespassing,¹ does not relieve the company's liability, especially when the land through which the road ran belonged to the owner of the cattle, and they got upon the track through the failure of the company to fence, and not through any fault of the owner.²

structed and operated, and the railroad company has not inclosed its road with a fence, as required by the provisions of the railroad stock law, and the bull is killed by the railroad company in the operation of its road, *held*, that the bull was not so running at large, within the meaning of section 38, article 5, of the act relating to stock, as to prevent the owner from recovering for its value under the provisions of said railroad stock law of 1874. And so held although the railroad company may own the strip of land upon which its track is located and where the animal was killed. *Gooding v. Atchison*, etc., R. Co., 32 Kan. 150; s. c., 20 Am. & Eng. R. R. Cas. 466; *Spence v. C. & N. W. R. Co.* 25 Iowa, 139. *Gilmore v. Sioux City R. Co.*, 62 Iowa, 99; 13 Am. & Eng. R. R. Cas. 538. *Compare O'Conner v. Chicago*, etc., R. Co. 27 Minn. 166; *Chicago*, etc., R. v. Sims, 17 Neb. 691.

1. *Keliher v. Connecticut R. Co.*, 107 Mass. 411; *McCall v. Chamberlain*, 13 Wis. 637; *Toledo*, etc., R. Co. v. Cary, 37 Ind. 172; *Dunkirk*, etc., R. Co. v. Mead, 90 Pa. St. 454; *Prickett v. Atchison*, T. & S. F. R. Co., 34 Kans. 713. Where animals that are breachy or unruly escape from an inclosed field into another field (of the same farm), which abuts on a railroad, and between which and the railroad the railroad company has neglected to construct a fence, as required by the statute, and while straying upon the railroad track are killed or injured by a passing train, their owner may recover from the company for the loss or injury, provided the animals were at large without his fault, and he has used that reasonable care and precaution in restraining them which a prudent and cautious man would use who had knowledge of their breachy or unruly character. *Railway Co. v. Howard*, 40 Ohio St. 6; s. c., 11 Am. & Eng. R. R. Cas. 488.

2. *Wilder v. Maine Cent. R. Co.*, 65 Me. 332; *Cincinnati*, etc., R. Co. v. Hildreth, 77 Ind. 504; *Rogers v. Newburyport R. Co.*, 1 Allen (Mass.), 16; *Corry v. Great Western R. Co.*, 6 Q. B. Div. 237; s. c., 7 Q. B. Div. 322; *McCoy v. California Pac. R. Co.*, 40 Cal. 532; *Veerhusen v. Chicago*, etc., R.

Co., 53 Wis. 689; *Hinman v. Chicago*, etc., R. Co., 28 Iowa, 491; *White v. Concord R. R.*, 30 N. H. 188; *Kerch v. Baltimore*, etc., R. Co., 17 Md. 32; *Missouri Pac. R. Co. v. Roads*, 33 Kans. 640; *Shepard v. Buffalo*, etc., R. Co., 35 N. Y. 645.

In a case for the killing of cows by a train on defendant's railroad, it appeared that the cows, when killed, were lying on the track in plaintiff's meadow, through which the road ran, and into which plaintiff had turned the cows to graze, and that the road, although it had then been in partial operation about a month, was there still unfenced. *Held*, that, under § 47, ch. 28, Gen. Sts., the duty of defendant was absolute to erect and maintain fences along its road; and that therefore question as to contributory negligence on the part of plaintiff in turning his cows into the meadow did not arise. *Mead v. Burlington*, etc., R. Co., 52 Vt. 278; s. c., 7 Am. & Eng. R. R. Cas. 550. *Compare Atchison*, etc., R. Co. v. Riggs, 31 Kan. 22; *Van Horn v. Burlington*, etc., R. Co., 59 Iowa, 33.

One who, knowing that a severe storm on Saturday had prostrated fences, on Monday evening turned his cattle upon uninclosed lands without inquiry as to whether the railroad fences abutting thereon were uninjured, was guilty of such contributory negligence as would defeat his recovery for injuries received by such cattle on the railroad track; and such facts appearing from his own evidence, a nonsuit should have been granted. *Carey v. Chicago*, etc., R. Co., 61 Wis. 71; s. c., 20 Am. & Eng. R. R. Cas. 469.

The owner of land cannot be deprived of the ordinary and proper use thereof for pasturing cattle by reason of the fact that a railroad company whose road passes through his land has failed to perform the statutory duty to fence. He will not therefore be held guilty of contributory negligence because he turns his cattle loose upon his land, although knowing that the company has failed to perform its duty. *Wilder v. Maine Central R. Co.*, 65 Me. 332; *Rogers v. Newburyport R. Co.*, 1 Allen (Mass.), 16; *Terry v. New York*, etc., R. Co., 22 Barb. (N. Y.) 575; *Shepard v. Boston*, N. Y. & E. R. Co., 55 N. Y. 641;

Some previous authority is found supporting the doctrine of these courts, that the contributory negligence of the owner of the animals, in allowing them to escape or to run at large, will be no defence to the railway company in an action under such a statute.¹

McCoy v. California, etc., R. Co., 40 Cal. 532; Toledo, etc., R. Co. v. Cary, 39 Ind. 218; Hammond v. Chicago & N. W. R. Co., 43 Iowa, 168; C., C. & I. R. Co. v. Scudder (Ohio), 13 Am. & Eng. R. R. Cas. 562; Pittsburg, etc., R. Co. v. Smith, 38 Ohio St. 410; s. c., 13 Am. & Eng. R. R. Cas. 579; Watier v. Chicago, M. & St. P. R. Co., 31 Minn. 91; s. c., 13 Am. & Eng. R. R. Cas. 582; Evans v. St. Paul, etc., R. Co., 30 Minn. 489; s. c., 13 Am. & Eng. R. R. Cas. 643; Atchison, T. & S. F. R. Co. v. Riggs, 31 Kan. 622; s. c., 15 Am. & Eng. R. R. Cas. 531; Cressly v. Northern R. Corp., 59 N. H. 564; s. c., 15 Am. & Eng. R. R. Cas. 540; Congdon v. Central Vt. R. Co., 56 Vt. 390; Donovan v. Hannibal, etc., R. Co., 89 Mo. 147; s. c., 26 Am. & Eng. R. R. Cas. 508. But see, *contra*, Poler v. New York, etc., R. Co., 16 N. Y. 476.

Cattle Running at Large in Violation of Statute.—Permitting animals to run at large in violation of Statute is held in some States not to be such contributory negligence as will defeat an action brought against a railroad company for the killing of such cattle occasioned by failure to construct a statutory fence. Schwarz v. Hannibal & St. Jo. R. Co., 58 Mo. 207; Owens v. Hannibal & St. Jo. R. Co., 58 Mo. 387; Mumpower v. Hannibal, etc., R. Co., 59 Mo. 245; Fernow v. Dubuque & S. W. R. Co., 22 Iowa, 528; Spence v. Chicago, etc., R. Co., 25 Iowa, 139; Stewart v. Chicago, etc., R. Co., 27 Iowa, 282; Fritz v. Milwaukee, etc., R. Co., 34 Iowa, 338; Burlington & M. R. Co. v. Brinkman, 14 Neb. 76; s. c., 11 Am. & Eng. R. R. Cas. 438; Atchison, T. & S. F. R. Co. v. Riggs, 31 Kan. 622; s. c., 15 Am. & Eng. R. R. Cas. 531; Lee v. Minneapolis & St. L. R. Co., 66 Iowa, 131; s. c., 20 Am. & Eng. R. R. Cas. 476; Krebs v. Minneapolis & St. L. R. Co., 64 Iowa 670; s. c., 20 Am. & Eng. R. R. Cas. 478; Watier v. Chicago, etc., R. Co., 38 Ohio St. 410; s. c., 13 Am. & Eng. R. R. Cas. 582.

But in some States a contrary doctrine is held. Rockford, etc., R. Co. v. Irish, 72 Ill. 405; Cairo, etc., R. Co. v. Woolsey, 85 Ill. 370; Central Branch R. Co. v. Lea, 20 Kan. 353; Pittsburg, Ft. W. & C. R. Co. v. Methven, 21 Ohio St. 586; Perkins v. Eastern R. Co., 29 Me. 307; Pitzner v. Shinnick, 39 Wis. 129; Peoria, P. & G. R. Co. v. Champ, 75 Ill. 577; Denver & Rio Grande R. Co. v. Olsen, 4

Colo. 239; Atchison, etc., R. Co. v. Heguir, 21 Kan. 622; Kansas Pacific R. Co. v. Landis, 24 Kan. 406; Van Horn v. Burlington, C. R. & N. R. Do., 59 Iowa, 33; s. c., 7 Am. & Eng. R. R. Cas. 591.

Company is Liable in any Event unless Injury is Probable Result of Owner's Act.

—But in no event can the railroad company protect itself from liability on the ground that the owner of the cattle has failed to perform his statutory duty, unless the injury has been the natural and probable result of the owner's act in allowing the cattle to run at large. Lafayette, etc., R. Co. v. Shriner, 6 Ind. 141; Ewing v. Chicago, etc., R. Co., 72 Ill. 25; Rockford, etc., R. Co. v. Irish, 72 Ill. 404; Cairo & St. L. R. Co. v. Murray, 82 Ill. 76; Cairo, etc., R. Co. v. Woolsey, 85 Ill. 370; Spence v. Chicago & N. W. R. Co., 25 Iowa, 139; Stewart v. Chicago & N. W. R. Co., 27 Iowa, 282; Stewart v. Burlington & M. R. Co., 32 Iowa, 561; Fritz v. Milwaukee & St. P. R. Co., 34 Iowa, 337; Watier v. Chicago, M. & St. P. R. Co., 31 Minn. 91; s. c., 13 Am. & Eng. R. R. Cas. 582.

Cattle Straying Without Owner's Fault.

—And where the cattle have strayed without the owner's fault, it has been held that the statute has no application. Pearson v. Milwaukee & St. P. R. Co., 45 Iowa, 497.

1. Corwin v. New York, etc., R. Co., 13 N. Y., 42; Munch v. New York, etc., R. Co. 29 Barb. (N. Y.) 647; Duffy v. New York, etc., R. Co., 37 Barb. (N. Y.) 195; Jeffersonville, etc., R. Co. v. Ross, 37 Ind. 549. The contrary was subsequently decided in Hance v. Cayuga, etc., R. Co., 26 N. Y. 428; Sheaf v. Utica, etc., R. Co., 2 Thomp. & C. (N. Y.) 388; Flanning v. Long Island R. Co., 2 N. Y. 585; Rhodes v. Utica, etc., R. Co., 5 Hun (N. Y.) 344; Flint, etc., R. Co. v. Lull, 28 Mich., 510; Williams v. New Albany, etc., R. Co., 5 Ind. 114; Western Md. R. Co. v. Carter, 59 Md. 306; s. c., 11 Am. & Eng. R. R. Cas. 482.

Letting Cattle Stray at Large.—According to some authorities, the turning loose of cattle or permitting them to stray constitutes contributory negligence which will defeat recovery even though they stray upon the track through a broken or defective fence. Chapin v. Sullivan R. Co., 39 N. H. 564; Mayberry v. Concord R. Co., 47 N. H. 391; Giles v. Boston, etc., R. Co., 55 N. H. 552; Trow v. Vermont, etc., R.

But in the States where the common law prevails, the contributory negligence of the owner of domestic animals, in failing to restrain them, will prevent a recovery from the railway company upon whose tracks they have been killed or injured.¹

Co., 24 Vt. 488; *McDonnell v. Pittsfield*, etc., R. Corp., 115 Mass. 564; *Staats v. Hudson River R. Co.*, 3 Keyes (N. Y.), 196; *Munger v. Tonawanda*, etc., R. Co., 4 N. Y. 350; *Wilder v. Maine*, etc., R. Co., 65 Me. 333; *Hance v. Cayuga*, etc., R. Co., 26 N. Y. 428; *Jones v. Sheboygan*, etc., R. Co., 42 Wis. 306; *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562; s. c., 11 Am. & Eng. R. R. Cas. 469; *Kansas City*, etc., R. R. Co. v. *McHenry*, 24 Kan. 501; s. c., 6 Am. & Eng. R. R. Cas. 581; *Van Horn v. Burlington*, etc., R. Co., 59 Iowa, 33; s. c., 7 Am. & Eng. R. R. Cas. 591; *Washington v. B. & O. R. Co.*, 17 W. Va. 190; 10 Am. & Eng. R. R. Cas. 749.

1. *McDonnell v. Pittsfield*, etc., R. Corp., 115 Mass. 564; *Eames v. Salem*, etc., R. Co., 98 Mass. 560; *Chapin v. Sullivan R. Co.*, 39 N. H. 564; *Towns v. Cheshire R. Co.*, 21 N. H. 364; *Woolson v. Northern R. Co.*, 19 N. H. 267; *Trow v. Vermont*, etc., R. Co., 24 Vt. 488; *Maybury v. Concord R. Co.*, 47 N. H. 391; *Giles v. Boston*, etc., R. Co., 55 N. H. 552.

Kansas.—In Kansas the mere fact that the owner permitted his animals to run at large is not such contributory negligence as will prevent his recovery in the event of injury resulting from a failure to fence. *Atchison*, etc., R. Co. v. *Shaft*, 34 Kan. 711; s. c., 19 Am. & Eng. R. R. Cas. 530; *Missouri Pac. R. Co. v. Bradshaw*, 33 Kans. 533.

Michigan.—In Michigan the statutory liability of a railroad company for injuries to cattle, resulting from failure to fence its track, is not affected by the contributory negligence of the owner of the cattle.—*Grand Rapids*, etc., R. Co. v. *Cameron*, 45 Mich. 451;—and where a servant was driving four horses home and they ran upon the track through openings in the fence, and were struck and killed by a train it was held that, the owner could recover notwithstanding the negligence of his servant in allowing them to escape upon the track; but that, if he had purposely driven them on the track, the company would not be liable unless there was gross and reckless misconduct in the management of the train. *McDonald v. Chicago*, etc., R. Co., 51 Mich. 628.

Minnesota.—In Minnesota the contributory negligence of the owner is a defence, but the question of contributory negligence

is generally a question for the jury.—*Johnson v. Chicago*, etc., R. Co., 29 Minn. 425,—and it is not conclusive evidence of contributory negligence for one to allow his domestic animals to run in his pasture adjoining a railroad, although he knew the dividing fence, which the company was bound to maintain, to be defective. *Evans v. St. Paul*, etc., R. Co., 54 Wis. 522.

Nebraska.—A railroad company which fails to fence its track at a place where by statute it is required to fence, is liable for stock killed or injured on its track by its engines or cars, and the mere negligence of the owner is no defence. *Burlington*, etc., R. Co. v. *Franzen*, 15 Neb. 365; *Burlington*, etc., R. Co. v. *Webb*, 18 Neb. 215; *Union Pac. R. Co. v. High*, 14 Neb. 14.

Massachusetts.—If the owner of sheep negligently suffers them to stray on a railroad track, where they are killed by a passing train, the railroad corporation is not liable in damages. *Evaus v. Salem*, etc., R. Co., 98 Mass. 560; *McDonnell v. Pittsfield*, etc., R. Co., 115 Mass. 564.

New Hampshire.—*Chapin v. Sullivan R. Co.*, 39 N. H. 564; *Towns v. Cheshire R. Co.*, 21 N. H. 364; *Woolson v. Northern R.*, 19 N. H., 267; *Mayberry v. Concord R.*, 47 N. H., 391; *Giles v. Boston*, etc., R. Co., 55 N. H. 552.

Vermont.—*Trow v. Vermont*, etc., R. Co., 24 Vt. 488.

Cattle not Lawfully on Adjoining Lands.—Aside from the question of contributory negligence, it is held in some jurisdictions that railway fence laws are for the benefit of owners of land adjoining railway tracks, and that there can be no recovery for an injury, from a neglect to maintain a proper fence, to cattle not lawfully on the adjoining land, whether it be a highway or the land of a third person. *Rickets v. East*, etc., R. Co., 12 Eng. L. & Eq. 520; *Manchester*, etc., R. Co. v. *Wallis*, 14 Com. B. 213; s. c., 23 L. J. C. P. 201; 16 Jur. 1072; *Eames v. Salem*, etc., R. Co., 98 Mass. 560. *Contra*, *Brown v. Providence R. Co.*, 12 Gray (Mass.), 55; *Ells v. Pacific R. Co.*, 55 Mo. 278; *Towns v. Cheshire R. Co.*, 21 N. H. 363; *Cornwall v. Sullivan R.*, 28 N. H. 161; *Chapin v. Sullivan R. Co.*, 39 N. H. 53, 564; *Giles v. Boston*, etc., R. Co., 55 N. H. 552; *Jackson v. Rutland*, etc., R. Co., 25 Vt. 150; *Morse v. Rutland*, etc., R. Co., 27 Vt. 49. But the prevailing doctrine

(3) *Action, under the Statute.*—No negligence need be alleged in an action under the statute: the liability is for not fencing.¹ If, in a justice's court, in an action against a railroad company for injury to or killing of live stock, where the ground of liability is for omitting to fence, it is not necessary to set out or plead the notice and affidavit which are required by the statute, in order to recover double damages. Whatever the requirements may be in a court of record, there being no necessity at all for a written declaration or complaint in a justice's court in Iowa, it therefore follows that, in such justice's court, the affidavit and notice need not be pleaded, and that the same may go in evidence without any previous notice thereof.² If the proceeding be in a court of record, then the petition, or declaration, as the case may be according to the local practice, must allege everything necessary to make a case, under the statute, against the company.³

is the other way. Indianapolis, etc., R. Co. v. Townsend, 10 Ind. 38; New Albany, etc., R. Co. v. Aston, 13 Ind. 545; Indianapolis, etc., R. Co. v. Guard, 24 Ind. 222; Kaes v. Missouri, etc., R. Co., 6 Mo. App. 397; Corwin v. New York, etc., R. Co., 13 N. Y. 42; Munch v. New York, etc., R. Co., 29 Barb. (N. Y.) 647; Sheaf v. Utica, etc., R. Co., 2 Thomp. & C. (N. Y.) 388; Marietta, etc., R. Co. v. Stephenson, 24 Ohio St. 49; Dunkirk, etc., R. Co. v. Mead, 90 Pa. St. 454; McCall v. Chamberlain, 31 Wis. 637; Curry v. Chicago, etc., R. Co., 43 Wis. 665. Where animals are on the adjacent land by permission of the owner,—Sawyer v. Vermont, etc., R. Co., 105 Mass. 146;—or lawfully on the adjacent highway,—Midland R. Co. v. Daykin, 17 Com. B. 126.

1. Biglow v. North Mo. R. Co., 45 Mo. 510.

2. Rorer on Railroads, 648, citing Brandt v. Chi., Rock Island, etc., R. Co., 26 Iowa, 114; Norton v. Hannibal, etc., R. Co., 48 Mo. 387.

3. Cecil v. Pacific R. Co., 47 Mo. 246; Norton v. Hann. & St. Joe. R., 48 Mo. 387.

In an action, under the statute, to recover damages for the killing of an animal, it must be distinctly alleged in the plaintiff's complaint that the cause of the accident was defendant's failure to fence, as required by law. Baltimore, etc., R. Co. v. Wilson, 31 Ohio St. 550.

Plaintiff's cow strayed upon the defendant company's track and was killed by a passing train. She might have stayed on the track either at the company's station grounds, where they were not bound to erect a fence, or at other points, where a fence should have been constructed, though the company had failed to do so. In an

action to recover for the loss of the cow, *held*, that the plaintiff's case was fatally defective in that it failed to show that the cow had strayed on the track at a point where the company was bound by statute to construct a fence. Bremmer v. Green Bay, etc., R. Co., 61 Wis. 114; s. c., 19 Am. & Eng. R. R. Cas. 375.

To a complaint, under the statute, for killing the plaintiff's mare, the road not being fenced, etc., it was answered: 1. That the plaintiff was the defendant's servant; that, as such, it was his duty to keep the railroad track, near a certain station, free from trespassing animals; that, in violation of such duty, he turned his mare out at such a place, near which the track was not fenced, whereby, etc. 2. That a certain station was a public place, with sidetracks and switches, where large shipments of goods were made and received, and that plaintiff turned his mare loose in that immediate vicinity, and she went upon the track at a place where it was not securely fenced, etc. *Held*, that both paragraphs were bad on demurrer: the first, for not averring that at the place where the animal entered upon the track and was killed, the employee was required by contract to keep off trespassing animals; and the second, for failure to show that the animal was killed at the station where no fence was required. Louisville, etc., R. Co. v. Skelton, 94 Ind. 222; 10 Am. & Eng. R. R. Cas. 542.

Pleading in Illinois—Statutory Exceptions to Duty of Fencing.—In the State of Illinois, in an action to recover damages for an injury to cattle occasioned by a failure on the part of a railroad company to fence its road, the complaint must aver that the place of injury was a point where the company was bound to fence, and not at a

To subject a railroad company to pay double the value of the property killed, under the provisions of the statute making such companies liable absolutely as for want of fence where they have a right to fence and fail to do so, the notice served upon the company, under said statute, by the owner of the live stock killed, must be a written one, and must also be "accompanied by an affidavit of the injury or destruction of the property." Therefore, the mere reading the notice and affidavit to the company's agent is insufficient. The notice and affidavit are to be delivered to the company, and it is entitled to have the originals thereof. The statute is in the nature of a penal one, and the courts may not dispense with the required conditions of its enforcement. The company have a right to the originals as a means of knowing that such affidavit has actually been made, and that it is not imposed upon by the semblance of such, when no real one, in fact, exists.¹

But it is sufficient if the notice embraces all things required under the statute as to the notice and affidavit, and be verified by affidavit, and be served upon the company instead of preparing and serving, as distinct documents, a separate notice and affidavit.²

point where, by the express exceptions of the same clause of the statute, the company is not bound to fence. *Chicago, etc., R. Co. v. Carter*, 20 Ill. 390; *Ohio, etc., R. Co. v. Brown*, 23 Ill. 94; *Galena, etc., R. Co. v. Sumner*, 24 Ill. 631; *Illinois, etc., R. Co. v. Williams*, 27 Ill. 48; *Great Western R. Co. v. Bacon*, 30 Ill. 347; *Great Western R. Co. v. Hanks*, 36 Ill. 281; *Toledo, etc., R. Co. v. Lavery*, 71 Ill. 522.

Pleading in Indiana—Statutory Exceptions to Duty of Fencing.—In Indiana it seems that the petition need not negative the exceptions. The fact that the case falls within any of them is matter of defence. *Jeffersonville, etc., R. Co. v. Brevoort*, 30 Ind. 325; *Jeffersonville, etc., R. Co. v. Lyon*, 72 Ind. 107; *Wabash R. Co. v. Forshee*, 77 Ind. 158; *Louisville, etc., R. Co. v. Krous*, 82 Ind. 357; *Terre Haute & Indianapolis R. Co. v. Penn*, 90 Ind. 284; s. c., 15 Am. & Eng. R. R. Cas. 561.

Pleading Implied Exceptions, and Exceptions in Separate Clause of Statute.—According to the decisions in the State of *Illinois*, it appears that the complaint need not negative an exception contained in another clause of the statute or which is implied merely. *Chicago, etc., R. Co. v. Carter*, 20 Ill. 390; *Great Western R. Co. v. Helm*, 27 Ill. 98; *Toledo, etc., R. Co. v. Lavery*, 71 Ill. 522.

Pleadings in Missouri as to Duty of Fencing.—As to what is a sufficient complaint under the laws of Missouri, to permit a recovery for a failure to erect and maintain a fence as required by statute, see the following authorities: *Rowland v. St.*

Louis, I. Mt. & S. R. Co., 73 Mo. 619; s. c., 7 Am. & Eng. R. R. Cas. 566; *Bates v. St. Louis, I. Mt. & S. R. Co.*, 74 Mo. 60; *Bowen v. Hannibal & St. Jo. R. Co.*, 75 Mo. 426; *Sloan v. Missouri Pacific R. Co.*, 74 Mo. 47; *Morrow v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 82; *Luckie v. Chicago & Alton R. Co.*, 76 Mo. 245; *Cunningham v. Hannibal & St. Jo. R. Co.*, 70 Mo. 202; *Johnson v. St. Louis, K. C. & N. R. Co.*, 76 Mo. 553; *Mumpower v. Hannibal & St. Jo. R. Co.*, 59 Mo. 245; *Schulte v. St. Louis, etc., R. Co.*, 76 Mo. 325; *Edwards v. Railroad Co.*, 74 Mo. 117; *Williams v. Railroad Co.*, 74 Mo. 453; *Scott v. Railroad Co.*, 75 Mo. 136; *Belcher v. Railroad Co.*, 75 Mo. 515; *Terry v. Railroad Co.*, 77 Mo. 254; *Kronski v. Railroad Co.*, 77 Mo. 362; s. c., 13 Am. & Eng. R. R. Cas. 652; *Farrell v. Union Trust Co.*, 77 Mo. 475; s. c., 13 Am. & Eng. R. R. Cas. 552; *Turner v. Missouri Pacific R. Co.*, 77 Mo. 254; *Perriquez v. Missouri Pac. R. Co.*, 78 Mo. 91; *Wade v. Missouri Pac. R. Co.*, 78 Mo. 362; *Campbell v. Missouri Pac. R. Co.*, 78 Mo. 639; *Rozelle v. Hannibal & St. Jo. R. Co.*, 79 Mo. 349; *Dryden & Smith*, 79 Mo. 525; *Clare v. Chicago, R. I. & P. R. Co.*, 79 Mo. 39; *Nance v. St. Louis, Iron Mt. & S. R. Co.*, 79 Mo. 196; *St. Louis, Iron Mt. & S. R. Co. v. Asher*, 79 Mo. 532; *Blakely v. Hannibal & St. Jo. R. Co.*, 79 Mo. 388; *Hudgens v. Hannibal & St. Jo. R. Co.*, 79 Mo. 418.

1. *Rorer on Railroads*, 649, citing *McNaught v. Chi. & N. W. R. Co.*, 30 Iowa, 336.

2. *Mendell v. Chi. & N. W. R. Co.*, 20 Iowa, 9, 11.

(a) *Evidence*.—In an action for injuries to stock, the owner must prove that the company was bound to fence at the point where the animals got upon the track,¹ and, where there is nothing in the evidence to show that it did not go upon the depot grounds where the company was not required to fence, he may be nonsuited.²

On Whom Service may be Made.—In an action for killing or injuring stock, service may be made upon any ticket agent or station agent employed by the company; and proof thereof may be made by the regular return of the sheriff, or proper officer making the same, or by affidavit of such service by a deputy. Rorer on Railroads, 650; 2 Parsons on Contracts, 637; Brandt v. Chicago, etc., R. Co., 26 Iowa, 114; Bacon v. Charlton 7 Cush. (Mass.) 581; Boyden v. Moore, 5 Mass. 365.

Tender forms no part of defence against a recovery for damages. Brandt v. Chi., Rock Island, etc., R. Co., 26 Iowa, 114. In an action for killing live stock, brought against a railroad company under such a statute rendering such companies liable so for want of a fence, the plaintiff must aver, in his declaration or petition, that the killing occurred at such place or places on the road as are by the statute required to be fenced; that is, that the occurrence did not take place at a road crossing, or within the limits of a town, city, or village, when those places are excepted in the statute, and a petition or declaration omitting so to do is bad upon demurrer to the merits. Chicago, etc., R. Co. v. Carter, 20 Ill. 390.

1. Louisville, etc., R. Co. v. Goodbar, 102 Ind. 596; Wabash, etc., R. Co. v. Tretts, 96 Ind. 450; s. c., 19 Am. & Eng. R. R. Cas. 601:—"The place of entry is the material question." This is the ruling in many cases. Fort Wayne, etc., Co. v. Herbold, 99 Ind. 91; Lake Erie, etc., R. Co. v. Kneadle, 94 Ind. 454; s. c., 19 Am. & Eng. R. R. Cas. 568; Louisville, etc., Co. v. R. Co. Quade, 91 Ind. 295; s. c., 19 Am. & Eng. R. R. Cas. 595; Louisville, etc., R. Co. v. Overman, 88 Ind. 115; s. c., 13 Am. & Eng. R. R. Cas. 648; Jeffersonville, etc., Co. v. Lyon, 72 Ind. 107; Toledo, etc., Co. v. Howell, 38 Ind. 447.

Bennett v. Chicago, etc., R. Co., 19 Wis. 145; Morrison v. New York, etc., R. Co., 32 Barb. (N. Y.) 568; Cecil v. Pacific R. Co., 47 Mo. 246; Bellefontaine R. Co. v. Suman, 29 Ind. 40; Jeffersonville, etc., R. Co. v. Brevoort, 30 Ind. 324; Toledo, etc., R. Co. v. Howell, 38 Ind. 447; Jeffersonville, etc., R. Co. v. Lyon, 72 Ind. 107; s. c., 2 Am. & Eng. R. R. Cas. 648.

2. Bremmer v. Green Bay, S. P. & N. R. Co., 61 Wis. 114. But see, *contra*, Fickle v. St. Louis, etc., R. Co., 54 Mo. 219; Walther v. Pacific R. Co., 53 Mo. 276; Smith v. Chicago, etc., R. Co., 60 Iowa, 512.

Circumstances Showing Place where Injury Took Place.—Direct evidence that the animal passed through a gap in a fence which the defendant was required to maintain is not required. Where it appeared that the fence had been down for a month or more at a place where the railroad passed along cultivated fields, that defendant had notice of the condition of the fence, and that plaintiff's cattle grazed at that place, *held*, that these circumstances were sufficient from which to deduce the conclusion that the animal got upon the track at a place where the defendant was required to fence, and that the animal got upon the track because of the failure to repair the fence after ample notice.

When it appeared that plaintiff's cattle were seen upon the defendant's railroad track in the forenoon, and the afternoon of the same day blood was seen on the track, with the trace of it leading to a gap in the fence, and the heifer was found dead not more than a quarter of a mile off, with a leg broken, *held*, that there was evidence from which to find the fact that the heifer was injured by the defendant's cars, and that she died from the effects of that injury. Mayfield v. St. Louis & San F. R. Co., 91 Mo. 296.

Place of Injury.—In an action for double damages for the killing of stock, brought against a railroad company under Rev. St. Mo. § 809, the fact that the injury occurred in the township in which the action is brought, or in the adjoining township, as required by Rev. St. Mo. § 2839, must be proved; and, in the absence of such proof, the defendant is entitled to an instruction in the nature of a demurrer to the evidence. King v. Chicago, etc., R. Co., 90 Mo. 526.

Proof of Failure to Fence.—Proof that the railroad company failed to fence as required by law makes out a *prima facie* case of negligence. Union Pac. R. Co. v. High, 14 Neb. 14.

Burden of Proof.—The burden of proof is on the railroad company to establish the building of a good and sufficient

(b) *Damages*.—The measure of damages for injury to a domestic animal is usually its reduced value at the time of the accident.¹ Interest on the value of the property lost or destroyed may be properly included in the damages.²

fence, as the statute makes the proof of the fact of killing of cattle on the track *prima facie* evidence of negligence on the part of the company. *Bretner v. Chicago, etc., R. Co.*, 68 Iowa, 530; s. c., 19 Am. & Eng. R. R. Cas. 448.

Defective Gate.—Evidence of condition of defective gate two or three days after the accident, *held*, not improper. *Mackie v. Cent. R. Co.*, 54 Iowa, 540.

Sufficiency of Fence.—Where one of the issues in an action is whether a fence is sufficient to turn stock, it is error to permit witnesses, who show no other qualification than that they had seen the fence, to give to the jury their opinions as to the sufficiency of the fence to turn stock. *Baltimore, etc., R. Co. v. Schultz*, 43 Ohio St. 270.

In an action to recover double damages against a railroad company for killing cattle, caused by a defective fence, by one of its trains, evidence of the character and kind of fence where it was claimed the cattle escaped from is not admissible, unless it is shown to be at the time of the injury, or a reasonable time before it. *Brentner v. Chicago, etc., R. Co.*, 68 Iowa, 430; s. c., 7 Am. & Eng. R. R. Cas. 574.

Cattle-guards.—Upon the question of whether the cattle-guards were proper and sufficient to complete the inclosure, and prevent domestic animals crossing the same, the opinions of the witnesses are not admissible. *Smead v. Lake Shore, etc., R. Co.*, 58 Mich. 200; *St. Louis, etc., R. Co. v. Edwards*, 26 Kan. 72; s. c., 7 Am. & Eng. R. R. Cas. 547. But when the facts relating to their construction and condition are shown, the jury are capable of forming a correct judgment regarding their sufficiency. *St. Louis, etc., R. Co. v. Ritz (Kan.)*, 6 Pac. Rep. 533.

1. *Davidson v. Michigan Cent. R. Co.*, 49 Mich. 428.

2. *Varco v. Chicago, etc., R. Co.*, 30 Minn. 18. But a plaintiff who recovers double damages for the killing of his stock by a railroad company is not entitled to interest, on the amount of damages recovered, as a part of the verdict. *Brentner v. Chicago, etc., R. Co.*, 68 Iowa, 530; *Atchison, etc., R. Co. v. Gabbert*, 34 Kan. 132. See also *St. Louis, etc., R. Co. v. Ritz*, 33 Kan. 404;

Schimmele v. Chicago, etc., R. Co., 34 Minn. 216.

What may be Included in the Damages.

—In an action for injury to crops caused by failure to erect cattle-guards, plaintiff may include in the damages the value of his services in driving out and herding the trespassing stock. *St. Louis, etc., R. Co. v. Sharp*, 27 Kan. 134; s. c., 13 Am. & Eng. R. R. Cas. 595.

Good Qualities of Cow.—Good qualities of cow affecting its market value may be shown to increase the damages. *St. Louis, etc., R. Co. v. Dudgeon*, 28 Kan. 283; s. c., 13 Am. & Eng. R. R. Cas. 649.

Expense of Curing Injured Animal.—

The owner of live stock wrongfully injured may recover such reasonable expenses as were necessarily incurred in taking care of and curing the injured stock. *I. & G. N. R. Co. v. Cocke*, 64 Tex. 151; s. c., 23 Am. & Eng. R. R. Cas. 226.

Attorney's Fee May be Included.—The legislature may authorize the recovery of an attorney's fee in suits against railroad companies for killing cattle occasioned by failure to fence. *Peoria, etc., R. Co. v. Duggan*, 109 Ill. 537; s. c., 20 Am. & Eng. R. R. Cas. 489.

Under *Kansas* stock law, an attorney's fee may be recovered. *St. Louis, etc., R. Co. v. Byron*, 24 Kan. 350; s. c., 2 Am. & Eng. R. R. Cas. 651.

When animal is injured through negligence and failure to fence, the owner may recover compensation and attorney's fee. *Central, etc., Co. v. Nichols*, 24 Kan. 242; s. c., 2 Am. & Eng. R. R. Cas. 648.

Assessment of Damages by Arbitration.

—**Attorney's Fee**.—An act of the legislature providing that, where stock is killed or injured by railroads, the damages shall be assessed by arbitration, and, if either party refuses to abide by the award, and takes the case before the courts, and shall not recover a more favorable judgment than the award, such party shall be assessed a reasonable attorney's fee for the opposing litigant, is unconstitutional. *St. Louis, etc., R. Co. v. Williams (Ark.)*, 31 Am. & Eng. R. R. Cas. 555.

Damages for Failure to Fence and Locate Depot.—See *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55; s. c., 24 Am. & Eng. R. R. Cas. 641.

9. *Fencing at Angular Approaches to Highway Crossings*.—Where a railroad approaches the crossing of a public highway at an acute

Damages Cannot Include Interest.—Recovery can be had only for the value of the stock at the time of killing. No interest can be added. *Houston, etc., R. Co. v. Muldrow*, 54 Tex. 233; s. c., 6 Am. & Eng. R. R. Cas. 580; *Atchison, etc., R. Co. v. Gabbert*, 34 Kan. 132; s. c., 22 Am. & Eng. R. R. Cas. 621.

Contrary View.—The verdict may include the value of the stock killed, with interest thereon from the date of the loss to the time of the trial. *Ala. G. S. R. Co. v. McAlpine*, 75 Ala. 113; s. c., 22 Am. & Eng. R. R. Cas. 602; *Baltimore, etc., R. Co. v. Schultz*, 43 Ohio St. 270; s. c., 23 Am. & Eng. R. R. Cas. 270; *Jebb v. Chicago & Grand Trunk R. Co.* (Mich.), 31 Am. & Eng. R. R. Cas. 532.

Measure of Damages for Killing Cow.—The measure of damages for killing a cow is the difference between her value alive and that of the beef. *Roberts v. Richmond, etc., R. Co.*, 88 N. Car. 560; s. c., 20 Am. & Eng. R. R. Cas. 473.

Excessive Damages.—When the jury gives excessive damages for killing cattle, the court may require a *remittitur*, or, in default thereof, grant a new trial. *St. Louis, etc., R. Co. v. Hagan*, 42 Ark. 122; s. c., 19 Am. & Eng. R. R. Cas. 446.

Consequential Damages.—Consequential damages resulting from fright to animals, not caused by actual collision, or any negligence or wilful misconduct on the part of the servants of the company, are not recoverable under *Nebraska* statute. *B. & M. R. Co. v. Shoemaker*, 75 Mo. 668; s. c., 13 Am. & Eng. R. R. Cas. 564.

Value of Cattle Killed Deducted from Damages.—Where the owner of the cattle killed uses or gives carcass away, the value thereof will be deducted from the damages. *Case v. St. Louis, etc., R. Co.*, 75 Mo. 668; s. c., 13 Am. & Eng. R. R. Cas. 564.

When Exemplary Damages not Recoverable.—Where the killing is done through the wilful and wanton negligence of the servants, exemplary damages are not recoverable. *Chicago, etc., R. Co. v. Jarrett*, 59 Miss. 470; s. c., 11 Am. & Eng. R. R. Cas. 470.

Double Damages—Missouri Law not Unconstitutional.—The Missouri law imposing a penalty of double damages for killing cattle is not unconstitutional. *Phillips v. Mo. Pac. R. Co.*, 86 Mo. 540; s. c., 24 Am. & Eng. R. R. Cas. 368; *Spealman v. Mo. Pac. R. Co.*, 71 Mo. 434; s. c., 2 Am. & Eng. R. R. Cas. 636.

See also *Stanley v. Mo. Pac. R. Co.*, 84 Mo. 625; s. c., 29 Am. & Eng. R. R. Cas. 250; *Mo. Pac. R. Co. v. Humes*, 115 U. S. 512; s. c., 22 Am. & Eng. R. R. Cas. 557.

When Railroad not Liable.—A railroad is not liable in double damages when the stock is killed in an attempt to extricate it from a trestle. *Seibert v. Missouri, etc., R. Co.*, 72 Mo. 565; s. c., 6 Am. & Eng. R. R. Cas. 584.

Defective Cattle-guard.—Double damages may be recovered for injury to cattle caused by defective cattle-guard. *Moriarty v. Cent. R. Co.*, 68 Iowa, 530; s. c., 19 Am. & Eng. R. R. Cas. 448.

Plaintiff cannot recover interest on value of animal killed, besides double damages. *Mo. Pac. R. Co. v. Wade*, 78 Mo. 362; s. c., 19 Am. & Eng. R. R. Cas. 586; *Brentner v. Chicago, etc., R. Co.*, 68 Iowa, 530; s. c., 19 Am. & Eng. R. R. Cas. 448.

Arkansas Statute.—In Arkansas the statute giving double damages for stock killed by railroad trains, where the stock is not posted as required by the statute, does not except from the benefit of that clause the owner who has actual notice of the killing without the posting; and the court cannot except him. It is not settled by any practice whether double damages should be assessed by the jury, or only single damages, to be doubled by the court. Neither mode would be reversed in the supreme court. *Memphis, etc., R. Co. v. Carley*, 39 Ark. 246; s. c., 20 Am. & Eng. R. R. Cas. 653. Petition for double damages will not prevent a recovery of single damages. *Scott v. St. Louis, etc., R. Co.*, 75 Mo. 136; s. c., 13 Am. & Eng. R. R. Cas. 651.

Right of Assignee to Recover Double Damages.—The assignee of a right of action against a railroad company for killing stock may, by complying with the statutory provisions as to serving notice, recover double damages upon the same showing as the original owner of the stock. *Everett v. Cent. Iowa R. Co.* (Iowa), 31 Am. & Eng. R. R. Cas. 550.

The fact that a railroad corporation is in the hands of a receiver is no defence to an action against the company, under the act of 1874, to recover double the value of a fence, built along the railroad track by an adjoining landowner on the failure of the company to build. *Ohio & Miss., etc., R. Co. v. Russel*, 115 Ill. 52; s. c., 2 Am. & Eng. R. R. Cas. 149.

angle, so that one line of its right of way laps over onto the highway before arriving at the place of actual crossing thereof, it is not sufficient, to avoid liability under the statute in reference to fencing of railroads in *Iowa*, that the railroad be fenced up only to the point where the two roads first interfere with each other; but, to avoid such liability, the fencing must be continued on obliquely, along the line of the highway, up to the actual crossing, so as to properly connect with such cattle-guards. In other words, so much of the railroad as is not actually in the highway must be fenced flush up to the crossing; and cattle-guards must then be erected, and so connected with the fences as to prevent live stock going onto the railroad from the public highways.¹

10. *Partition Fences*.—Statutes in reference to partition fences between adjoining landholders do not apply to adjoining occupants of lands where one of them is a railroad company, exercising rights growing out of a mere easement, or right of way over lands; nor to a turnpike company, plank road company, or the public highways of the country.²

III. FENCE AS AN ELEMENT OF DAMAGES IN EMINENT DOMAIN PROCEEDINGS.—When a railway seeks the right of way through inclosed lands through condemnation proceedings, the cost of such fences as will necessarily have to be built to enable the owner to use his land after the railway is built will be taken into consideration in estimating the damage;³ but when fences will not have to be built and the land will be fully inclosed without additional fences, if the right of way at the entrance be fenced, then this does not enter into the estimate, but it is the duty of the railway company to keep this part of the inclosure safe, and on this the owner of the land does and may rely. In cases in which the right of way is acquired by agreement, with or without compensation paid other than such benefits as may result from the construction and operation of the road, the same things may be supposed to influence the parties and to form the consideration by a jury, or board, in estimating damages.⁴

1. Rorer on Railroads, 644; *Andre v. Chicago, etc., R. Co.*, 30 *Iowa*, 107.

2. Rorer on Railroads, 644, citing *Henry v. Dubuque, etc., R. Co.*, 2 *Iowa*, 288; the matter of *Rensselaer, etc., R. Co.*, 4 *Paige Ch.* 553; *Corwin v. N. Y., etc., R. Co.*, 13 *N. Y.* 42; *Quinnby v. Vermont Cent. R. Co.*, 23 *Vt.* 387.

3. *Houston, etc., R. Co. v. Adams*, 63 *Tex.* 200; s. c., 20 *Am. & Eng. R. R. Cas.* 246.

4. In *Baltimore, etc., R. Co. v. Lansing*, 52 *Ind.* 229, an instruction was held to be correct which directed the jury to consider as damages any additional amount of fencing necessary to a safe and proper use of the farm or fields already inclosed, as the law does not impose on the company any obligation to

fence their right of way, except so far as they may choose to do so for the protection of their own interests; the law simply imposing on them the obligation to pay for animals killed by them on their track where it is not, but might be, securely fenced. "It is settled in this State that damages may be given for cutting fields into inconvenient shapes, destroying the conveniences and advantages of water for stock to a portion of the farm, and rendering an additional amount of fencing necessary to a safe and proper use thereof. *White Water Valley R. Co. v. McClure*, 29 *Ind.* 536; *Montmorency G. R. Co. v. Rock*, 41 *Ind.* 263; *Montmorency G. R. Co. v. Stockton*, 43 *Ind.* 328; *City of Logansport v. McMullen*, 49 *Ind.* 493; *Grand Rapids, etc., R.*

FERMENTED.—See INTOXICATING LIQUORS, and the various kinds of liquors.¹

Co. v. Horn, 41 Ind. 479." See also *Baltimore, etc., R. Co. v. Johnson*, 59 Ind. 188, when in affirming this prior line of decisions the court held that, in an action for damages for stock killed through the lack of fences, the company could not demur that an allowance for fencing had been made when the land was condemned. Such an award leaves it to the option of the landowner to fence his land, about which he may consult his own convenience. It is still the duty of the road, to the public, to keep the road fenced, and this duty to the public is the object of the law.

In *Raleigh, etc., R. Co. v. Wicker*, 74 N. Car. 220, the court held that every planter of cultivated land is required to keep it inclosed by a sufficient fence, and, if the road makes necessary additional fencing to inclose the cleared land of the defendant, it is to be considered in estimating the damages to him from the road, citing *Freedle v. N. C. R. Co.*, 4 Jones L. (N. Car.) 89. But it further remarks: "As to the expense of fencing uncleared or uncultivated land, that should not be taken into consideration. The owner is not required by law to inclose such land, and it is not usually done. No damage in this respect is done to the land in its present condition, and any damage by reason of the necessity of fencing, in case the land shall at any future time be cleared, is too remote and uncertain to be capable of estimation. Moreover, the legislature has thought proper not to impose on railroads in this State the duty of fencing their lines of road. If, however, it should be held that every owner of wild land through which the road passes could recover as damages the cost of such fencing, a heavier burden would be imposed on the companies than if they were required to make the fences themselves. And as the fences would rarely be built, neither the company nor the public would receive the benefit which their erection is intended to secure." See also *Northeastern, etc., R. Co. v. Sineath*, 8 Rich. L. (So. Car.) 185; *First Parish v. Plymouth*, 8 Cush. (Mass.) 475.

In *New York, etc., R. Co. v. Stanley*, 35 N. J. Eq. 283; s. c., 10 Am. & Eng. R. R. Cas. 345, it was held that the expense of making and maintaining additional fences made necessary by the construction of a railroad through the premises, should be included in damages to be awarded for the land, where the ex-

pense thereof falls upon the landowner. See also *Readington v. Dilley*, 4 Zab. (N. J.) 209.

In *Leavenworth, etc., R. Co. v. Paul*, 28 Kan. 816; s. c., 10 Am. & Eng. R. R. Cas. 490, the court remarked: "We think that the cost of constructing a fence, if the construction of a fence was reasonable and proper under the circumstances in which the defendant's road ran through the farm, was a proper matter for the consideration of the jury. The plaintiff had testified that he had already constructed a fence along the line of the right of way; and in view of the manner in which, as he states, the road ran through his orchard and other parts of his farm, we think the building of a fence was reasonable and proper." It was accordingly held that the allowance of damages for the cost of constructing a fence should be made. See also *St. Louis, etc., R. Co. v. Kirby*, 104 Ill. 347; s. c., 10 Am. & Eng. R. R. Cas. 214; *St. Louis, etc., R. Co. v. Anderson*, 39 Ark. 167; s. c., 17 Am. & Eng. R. R. Cas. 97; *Houston, etc., R. Co. v. Adams*, 63 Tex. 200; s. c., 20 Am. & Eng. R. R. Cas. 246; *Pittsburg, etc., R. Co. v. McCloskey* (Pa.), 23 Am. & Eng. R. R. Cas. 86; *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55; s. c., 24 Am. & Eng. R. R. 641; *California, etc., R. Co. v. Southern Pacific R. Co.*, 67 Cal. 59; s. c., 20 Am. & Eng. R. R. Cas. 309; *St. Louis, etc., R. Co. v. Walbrink* (Ark.), 26 Am. & Eng. R. R. Cas. 604; *Winona & St. Peter, etc., R. Co. v. Denman*, 10 Minn. 208; *Alton, etc., R. Co. v. Baugh*, 14 Ill. 211; *Tonica, etc., R. Co. v. Unsicker*, 22 Ill. 221; *Vandegrift v. Delaware, etc., R. Co.*, 2 Houst. (Del.) 287; *Greenville, etc., R. Co. v. Partlow*, 5 Rich. L. (S. Car.) 452; *Carpenter, etc., R. Co. v. Sims*, 3 Leigh (Va.), 675; *Danville, etc., R. Co. v. Gearhart*, 81 Pa. St. 260; *Watson v. Pittsburg, etc., R. Co.*, 37 Pa. St. 469; *East Pennsylvania R. Co. v. Heaster*, 40 Pa. St. 53; *Montour R. Co. v. Scott*, 11 Weekly Notes Cas. (Pa.) 51; *Butte County v. Boydston*, 64 Cal. 110.

1. Fermented cider is within the meaning of the terms "spirituous, malt, brewed, fermented, and vinous liquors," in a statute regulating sales of liquors by druggists. *People v. Foster* (Mich.), 31 N. W. Rep. 596.

Fermented beer is not necessarily strong, or spirituous, liquor. The term may include spruce beer, ginger beer, and the like. *Nevin v. Ladue*, 3 Den. (N. Y.) 450.

FERRIES.

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I. Definition.—A ferry is a place where persons and things are taken across a river or stream in boats or other vessels.¹

There can be no ferry without some kind of a boat or vessel in which men or things are carried.²

A public ferry is a public highway of special description, and its termini must be in places where the public have rights as towns or vills, or highways leading to towns or vills. The right of the grantee is, in the one case, an exclusive right of carrying from town to town; in the other, of carrying from one point to another, all who are going to use the highway to the nearest town or vill to which the highway leads on the other side.³

II. Franchise.—A ferry franchise is neither more nor less than a right conferred to land at a particular place and secure toll for the transportation of passengers and property from that point across a stream.⁴

And, as a general rule, fermented liquors are not spirituous liquors. *State v. Adams*, 31 N. H. 568; *Fritz v. State*, 57 Tenn. 15.

For the use of the terms "fermented liquor" and "malt liquor" as synonyms in a statute, see *United States v. Dooley*, 21 Int. Rev. Rec. 115.

Under an indictment for selling "fermented liquors" on Sunday, whether ale is a fermented liquor or not is a question for the jury. *Bach v. State*, 8 Mo. 497, and see *Harris v. Jenus*, 9 C. B. N. S. 152.

Under an act declaring that "all fermented drinks and wines" shall be considered intoxicating, one who sells a fermented liquor, whether as a matter of fact intoxicating or not, without a license, is guilty of so selling intoxicating liquors. *State v. Temp.*, 16 Mo. 389.

1. *Akins v. Western R. R. Co.*, 30 Barb. (N. Y.) 311; *Bouv. L. Dict.*

2. *The Pres.*, etc., *v. Frailey*, 13 S. & R. (Pa.) 424.

3. *Huzzy v. Field*, 2 Crompt. M. & R. 442.

A ferry is nothing more than the continuation of a road; and, as far as regards the authority of the State and general

governments, does not differ from a toll-bridge. *Steamboat, etc., v. Newberry*, Adm., 251.

4. A ferry is a highway for all the queen's subjects paying toll. *Ferry Co. v. Barker*, 2 Exch. 149.

A ferry is a liberty, by prescription or by the king's grant, to have a boat for passage upon a great stream, for carriage of horses and men for reasonable toll. *State v. Freeholders of Hudson Co.*, 3 Zab. (N. J.) 206.

Ferry, in the law of *England*, is the right of carrying by boat, across a river or arm of the sea, and of exacting a reasonable toll for such carriage. It belongs, like the right of fair and market, to the class of rights called, in the *English* law, franchises. Its origin must be by statute, or royal grant, or prescription. *Encyc. Britannica*.

Where a stream crosses a public highway, the continuity of the highway is not broken; it does not end on the one side of the stream and begin again on the other, but continues across the stream; and the public, for the purpose of travel, have the same right to go on the water over the highway that they have to pass along other portions of it. But as a physi-

Such a franchise is the creature of a sovereign power, and no one can exercise it without the consent of the State.¹ It is not a matter of mere right, but is within the control of the government.²

1. *How Acquired and Established.*—In the *United States*, the right to keep ferries is established by legislative authority.³ In *England*, it is a right granted by the crown, or it is founded upon prescription, which is in turn presumed to be founded upon a grant.⁴

A State, by right of eminent domain, has power to establish ferries wherever it is deemed necessary for the public convenience, without regard to the ownership of the soil, on making just compensation.⁵ It has also been held that, from long uses, a grant or legal origin may be presumed as against a wrong-doer.⁶

A ferry franchise is real estate, and must be conveyed, if assign-

cal obstruction intervenes, it is necessary that some convenient means of transportation shall be furnished, and the simplest and most economical, in many cases, is a ferry. *Cooper, J., in Sullivan v. Lafayette Co. Supervisors*, 58 Miss. 799.

A line of boats, adapted to carry travelers, with their horses and vehicles, and other property, running from pier 18, Hudson river, N. Y. City, to various points on the shore of Staten Island and the New Jersey coast, and return, the round trip making 24 miles, held, to constitute a ferry. The distance is not so great as to preclude the idea of a ferry, and the business does not lose that character because the boats stop at points on the New Jersey as well as Staten Island shore. *Mayor, etc., of N. Y. v. N. J. Steamboat Co.*, 106 N. Y. 28.

1. *Miss. River Bridge Co. v. Loneragan*, 91 Ill. 513.

Bell v. Clegg, 25 Ark. 26; *Prosser v. Wapello*, 18 Iowa, 327; *Enfield Toll, etc., v. Hartford, etc., R. Co.*, 17 Conn. 64.

The franchise of a public ferry is, like a right of common or advowson, a right in gross. *Haithcock v. Swift Island Mfg. Co.*, 72 N. Car. 410.

2. *Mills v. St. Clair, etc.*, 8 How. (U. S.) 569.

3. The mere proprietorship and possession of the soil on a navigable stream does not necessarily entitle the owner to a public ferry franchise. Such franchise is the creature of sovereign power, and no one can exercise it without consent of the State. *Bell v. Clegg*, 25 Ark. 26. Compare *Territory v. Reyburn McCahon* (Kan.), 154; *Mills v. St. Clair Co.*, 8 How. (U. S.) 569; *McRoberts v. Washburne*, 10 Minn. 8; *Stark v. Miller*, 3 Mo. 470; *Milton v. Haelen*, 32 Ala. 30; *Prosser v. Wopello Co.*, 18 Iowa, 327; *Columbia, etc., Co. v. Geise*, 34 N. J. L. 268; *Green v. Haugabook*, 47 Ga. 282.

It is a well-settled principle of common law, that no man may set up a ferry for all passengers without prescription time out of mind or charter from the King. He may make a ferry for his own use or the use of his family, but not for the common use of all the King's subjects passing that way. *Hargrave's Law Tracts*, ch. 2, p. 6.

4. *Trotter v. Harris*, 2 Y. & J. 285; *Blissett v. Hart, Willes*, 508.

Seven years' exclusive possession and enjoyment of a ferry right creates a presumption of a grant. *Williams v. Turner*, 7 Ga. 348.

Ferries—that is, rights of carrying passengers across streams, or bodies of water, or arms of the sea, from one point to another, for a compensation paid by the way of a toll—are, by the common law, deemed franchises, and could not in *England* be set up without the King's license, and in this country without a grant of the legislature as representing the sovereign power, and do not belong to the riparian proprietors of the soil; nor does it depend upon the right to or property in the water on which it is exercised, for the right of the water may belong to one and that of the ferry to another. *Wash. on Real Prop.*, 293 (4th Ed.), citing *Fay*, petitioner, 15 Pick. (Mass.) 243; *Mills v. County Com'rs*, 3 Scam. (Ill.) 53; *McRoberts v. Washburne*, 10 Minn. 8.

5. *Mills v. County Com'rs*, 3 Scam. (Ill.) 53; *Barrington v. Neuse River Co.*, 69 N. Car. 165; *Allen v. Farnsworth*, 5 Verg. (Tenn.) 189.

6. *Harrison v. Young*, 9 Ga. 359; *Milton v. Haelen*, 32 Ala. 30.

Thirty years' use by the public, of a river crossing, authorizes the presumption of a grant. *Hudson v. Cuero Land Co.*, 47 Tex. 56; s. c., 26 Am. Rep. 289.

able at all, like other real estate.¹ While it seems to be held, perhaps, by the weight of the authorities, that such franchises are assignable,² yet a number of courts held that the grant of such franchise or special privilege to the individual is considered the bestowal of a personal trust and confidence, which cannot be assigned, nor be the subject of sale on execution.³

Upon the death of the party to whom it was granted, it descends to his heirs and legal representatives.⁴ A corporation vested with the power of establishing ferries may grant exclusive privileges, which will be binding upon themselves and the public.⁵

The grant of the privilege of landing and embarking may be presumed from use.⁶

2. *How Lost*.—The franchise may be lost by non-user⁷ or misuse, judicially ascertained.⁸

1. *Dundy v. Chambers*, 23 Ill. 312; see *Montgomery v. Multnomah R. Co.*, 11 Oreg. 344.

2. 2 Bl. Com. 37; 3 Kent. Com. 458; *Bowman's Devises v. Wathen*, 2 McLean, 376; *Felton v. Deall*, 22 Vt. 170; *Berrson v. Mayor, etc., of N.Y.*, 10 Barb. (N.Y.) 223; *Ladd v. Chotard*, 1 Minor (Ala.), 366; *Lewis v. Intendant*, 7 Ala. 85; *Peter v. Kendal*, 6 Barn. & C. 703; *Willoughby v. Harridge*, 12 C. B. 742.

In *Billings v. Breinning*, 45 Mich. 65, it was held that the franchise of keeping a ferry is property, having the valuable incidents of other kinds of property, and transferable from the original grantee to others, subject to conditions lawfully imposed, and to such government control as results from its public nature.

3. *Sullivan v. Lafayette Co. Supervisors*, 58 Miss. 791; *Seal v. Donnelly*, 60 Miss. 658, 662; *Ragan v. McCoy*, 29 Mo. 367; *The Maverick*, 1 Sprague (U.S.), 24; *Arthur v. Com. & R. Bank*, 9 S. & M. (Miss.) 394, 420; *State v. Rives*, 5 Ired. (N. Car.) 297, 307; *Amment v. Pitts. Turnpike Co.*, 13 S. & R. (Pa.) 210; *Lombard v. Cheever*, 8 Ill. 473; *Herrmon Ex.*, §§ 131-361; *Ang. Corp.*, § 191; *Redfield R. R.*, 419, 422; *Freem. Ex.*, § 179.

4. *Lippencott v. Alexander*, 27 Iowa, 460. Compare *Knott v. Frush*, 2 Oreg. 237; *Munroe v. Thomas*, 5 Cal. 470; *Thomas v. Armstrong*, 7 Cal. 286; *Wood v. Truckee, etc., Co.*, 24 Cal. 474.

5. *Costar v. Brush*, 25 Wend. (N.Y.) 628.

6. *Bird v. Smith*, 8 Watts (Pa.), 434. 7. *Maysville v. Boon*, 2 J. J. Marsh. (Ky.) 224.

When a ferry between two towns had not been used as a public ferry, and no boats kept thereat to transport passengers from 1818 to 1836, held, that this was a

non-user for a period long enough to create a legal presumption of an abandonment. *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149.

8. *Benson v. Mayor, etc., of N.Y.*, 10 Barb. (N.Y.) 223; *Phillips v. Bloomington*, 1 G. Greene (Iowa), 498.

If the proprietor of the ferry abuse or neglect the franchise, or fail to exercise it so as to meet the reasonable requirements of the public, the government may repeal the grant and deprive him thereof upon a judgment in a process of *scire facias* or *quo warranto* sued out against him, based upon such abuse or neglect. But mere negligence on the part of the proprietor does not destroy the right and property therein. 2 Wash. Real Prop. 294.

A non-user for forty years has been held to be an abandonment of the franchise. *Smith v. Harkins*, 3 Ired. (N. Car.) Eq. 613.

And where a ferry has been disused for more than three years, equity will not interfere, at the instance of the owner, to prevent others from invading the franchise, though it has not been declared forfeited on *quo warranto* or other like proceeding. *Trent v. Cartersville Bridge Co.*, 11 Leigh. (Va.) 521.

Non-user.—See *Green v. Boon*, 2 J. J. Marsh. (Ky.) 225; *Jeffersonville v. Ferryboat, etc.*, 35 Ind. 19; *Young v. Harrison*, 6 Ga. 130.

Mis-user.—People *v. Thompson*, 21 Wend. (N.Y.) 235; *Gear v. Bullerick*, 34 Ill. 74.

When the legislature, on application of the owners of a ferry, permits them to build a bridge in its place, and to take toll, the franchise of the ferry is thereby surrendered or merged, and does not revive when the bridge, according to its charter, reverts to the State. *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344; s. c., 11 Pet. (U.S.) 420.

3. *How Protected*.—The right of holding a ferry, with the privilege of taking tolls from passengers, is a franchise, in the enjoyment of which a court of chancery will protect the possessor, not only by redress for the past, but by restraining repeated disturbance, especially if his right has been established by judicial action.¹

The owner of an old-established ferry has a right of action against him who either keeps in his neighborhood a free ferry or a ferry not authorized by a proper tribunal, whereby an injury accrues to the owner of the established ferry.²

Continuous encroachments upon the enjoyment of a ferry franchise constitute a private nuisance, which courts of equity will abate by injunction.³

Any person has a right to transport himself and his property over a river in his own boat, even though there may be a ferry at the place where he crosses.⁴

A mere stranger cannot question the right of one in possession of the franchise, on the ground that the conditions on which it was granted have not been performed.⁵

4. *What it Includes*.—The essential element involved in a ferry franchise is the exclusive right to transport persons, and horses and vehicles with which they travel, as well as such personal goods as accompany them, from one shore to the other, over the intervening water, for toll; but such exclusive right does not prevent the public from using the river as a highway between the points above and below,⁶ and nothing partakes of the nature of a ferry franchise which is not for the accommodation of the public.⁷ A free ferry is an infringement on an exclusive ferry,⁸ or a free bridge,⁹ or the transportation by mail carrier in his skiff,¹⁰ or in the boats of per-

The question of a forfeiture of a ferry charter cannot be tried by indictment; the proper way is to try it by *quo warranto* proceedings. *Territory v. Reyburn*, McCahan (Kan.), 134.

1. *Newport v. Taylor*, 16 B. Mon. (Ky.) 699.

2. A ferry franchise is property clothed with the same sanctity and entitled to the same protection as other property. *Conway v. Taylor*, 1 Black (U. S.), 603.

Long v. Beard, 3 Murph. (N. Car.) 57; *Stark v. McGowen*, 1 Nott & McC. (S. Car.) 387; s. p., *Gates v. McDaniel*, 2 Stew. (Ala.) 211.

3. *Walker v. Armstrong*, 2 Kan. 198; *Newport v. Taylor*, 16 B. Mon. (Ky.) 699.

4. *Weld v. Chapman*, 2 Iowa, 524.

But if he uses banks within the granted territory, for landing his passengers, except at public highways, he will be liable as trespasser. *Hunter v. Moore*, 44 Ark. 184; *Alexandria, etc., Ferry Co. v. Wisch*, 73 Mo. 655.

5. *Harrell v. Elsworth*, 17 Ala. 576

New Albany, etc., R. Co. v. Huff, 19 Ind. 315.

In an action for disturbing a ferry, a defence that the ferry occupied by him was granted to him by a competent tribunal, is a good defence until the grant, if erroneous, is reversed. *Conner v. Paxson*, 1 Blackf. (Ind.) 168.

6. *Broadnax v. Baker*, 94 N. Car. 615; s. c., 55 Am. Rep. 633; *McRee v. Wilmington, etc., R. Co.*, 2 Jones (N. Car.), 186.

The right to use navigable waters is superior to any incident to the ownership of the shores, and this even when enlarged by grant of an exclusive ferry or other franchise annexed to them. *Lewis v. Keeling*, 1 Jones (N. Car.), 299.

7. *Hunter v. Moore*, 44 Ark. 184; s. c., 51 Am. Rep. 589.

8. *Smith v. Harkins*, 3 Ired. Eq. (N. Car.) 613; *Chiapelly v. Brown*, 14 La. Ann. 189.

9. *Gates v. McDaniel*, 2 Stew. (Ala.) 211; *Norris v. Farmers' Co.*, 6 Cal. 590; *Harrell v. Ellsworth*, 17 Ala. 576.

10. *Weld v. Chapman*, 2 Iowa, 424.

sons having a right of fishery by prescription,¹ or the free transportation, by a railroad, of persons not their passengers.²

The right to keep a ferry and to demand and receive toll, either in England or this country, has not at any time been incident or appendant to any estate in land.³

The owner of the banks of a navigable stream cannot set up and maintain ferries.

5. *When Rival can be Enjoined.*—An injunction will lie to restrain an unlicensed ferry.⁴ A license to run to one point will not authorize running to another point, also, eight hundred yards distant.⁵ There is no general rule prescribing the distance within which the keeper of a ferry is secured against the establishment of another public ferry.⁶ The fact of nearness is not conclusive against a rival ferry.⁷ If a certain distance is prohibited, it must be measured by the course of the river.⁸ Fifteen yards is so near that equity will interfere,⁹ and twenty yards,¹⁰ and four hundred yards,¹¹ and three quarters of a mile,¹² but a ferry from A to B does not prevent a person carrying passengers from A to C, a point two miles from B.¹³ A party seeking to restrain a rival ferry must have fully complied with his license.¹⁴

Equity will protect, by injunction, the owner of a ferry on the Hudson river, against infringement by a rival ferry without a license from New Jersey or New York; such infringement consisting of regular hourly trips by a ferry-boat, and the solicitation of passengers on their way to complainant's ferry.¹⁵ A ferryman asking

1. *Aikin v. Western R. Co.*, 20 N. Y. 370; *Fitch v. N. H. R. Co.*, 30 Conn. 41.

2. *Newton v. Cribbitt*, 12 C. B. (N. S.) 58; *Day v. Stetson*, 8 Me. 365; *Stark v. Miller*, 3 Mo. 470.

In *Pipkin v. Wyans*, 2 Dev. (N. Car.) 402, it was held that the exclusive right of keeping a ferry and taking tolls belongs to the sovereign, but he can grant the franchise to none but the owner of the adjacent lands, unless he refuses to exercise it; in which case it may be made to another on compensation to the owner or owners of the soil on both sides. The court distinguishes between the right and the exclusive right. The former may reside in a citizen, the latter only in the sovereign. It is the exclusive right that constitutes the franchise. The owner's ownership of the land gives him that preferable right to call for the franchise, when a ferry becomes necessary. This right is valuable, for, unless there are good reasons to the contrary, the sovereign must grant it to the owner, as sovereigns are bound to be just. A grant to another without good reasons, is void, as an act of injustice. See *Bowmen's Devises v. Wathen*, 2 McLean (U. S.), 376.

3. *McRoberts v. Washburne*, 10 Minn. 8; *Tall v. County of Sutter*, 21 Cal. 252.

4. *Owens v. Roberts*, 6 Bush (Ky.), 609; *Chard v. Stone*, 7 Cal. 117.

The neglect of the owner of a ferry to transport passengers is no cause for the establishment of another ferry within the prohibited distance. *Colton v. Houston*, 4 T. B. Mon. (Ky.) 285.

5. *Matthews v. Peache*, 5 El. & Bl. 546; see *Blair v. Carmichael*, 2 Yerg. (Tenn.) 306; *Mayor of N. Y. v. S. I. Ferry Co.*, 8 Jones & Sp. (N. Y.) 300.

6. *O'Neil v. Caddo*, 21 La. Ann. 586.

7. *Charles River Bridge v. Warren Bridge Co.*, 7 Pick. (Mass.) 344; s. c., 11 Pet. (U. S.) 420.

8. *McLeod v. Burroughs*, 9 Ga. 213.

9. *Letton v. Gooden*, L. R. 2 Eq. 123.

10. *Norwood v. Norwood*, 2 Bland Ch. (Md.) 447; s. c., 4 Har. & J. (Md.) 112.

11. *Pim v. Carrell*, 6 M. & W. 234.

12. *Churchmen v. Tunstal*, Hardres, 162.

13. *Tripp v. Frenk*, 4 T. R. 666; see *Taylor v. Wilmington R. R.*, 4 Jones (N. Car.), 277; *Newton v. Cubbitt*, 12 C. B. (N. S.) 32.

14. *Norris v. Lopsley*, 5 Cal. 47; *Walker v. Armstrong*, 2 Kan. 198; see *Mills v. Brown*, 2 Scam. (Ill.) 549.

15. *The Midland Terminal, etc.*, v. *Wilson et al.*, 1 Stew. (N. J.) 537.

an injunction against another must expressly allege that his right is exclusive.¹

6. *When Interruptions are a Nuisance.*—Continual interruptions of travel on a ferry and interference with the passengers, such a ferry having a legal franchise, are nuisances abatable by injunction.²

7. *Liability of Municipal Corporation for Granting Franchise.*—A municipal corporation is not liable to be sued in an action of tort for nonfeasance or misfeasance of its officers for establishing a ferry to the injury of one already existing, unless expressly made so liable by statute.³

III. *Duties of Owners.*—A right of ferry being in derogation of the common rights of the public, rests upon the corresponding obligation on the part of the grantee of the right to maintain the ferry at all times for the use of the public.⁴

The public grant the exclusive privileges of ferrying upon the consideration that the travelling public shall be accommodated at all reasonable hours without unnecessary delay.⁵ And it has been held that the keeper or owner of a ferry is bound to transport goods and persons across the stream even after nightfall⁶ unless there be some sufficient reason for not so doing; as, the prevalence of high winds rendering it dangerous to attempt to cross, or that the application was made after bedtime, etc.⁷ And it shall be done without unreasonable delay.⁸

The owner of a private ferry has no right to land passengers on the opposite side of the river between high and low water-marks

1. Bert v. Colbert, 24 Tex. 353.

2. Newport v. Taylor, 16 B. Mon. (Ky.) 699; Hartford Bridge Co. v. Hartford, 16 Conn. 171; Newburgh Turnpike Co. v. Miller, 5 Johns. Ch. (N. Y.) 101; Long v. Beard, N. C. Term Rep. 256; Collins v. Ewing, 51 Ala. 101; McRoberts v. Washburne, 10 Minn. 8; Walker v. Armstrong, 2 Kan. 198; 3 Bl. Com. 219.

3. Gibbs v. Town Council of Beaufort, 20 S. Car. 213; s. c., 5 Am. & Eng. Corp. Cas. 423.

We regard it as settled in this State, that a municipal corporation, instituted for the purpose of assisting the State in the conduct of local civil government, is not liable in an action of tort for nonfeasance or misfeasance of its officers in regard to their public duties. Opin. Gibbs v. Town Council of Beaufort, 20 S. Car. 213. See valuable note in 5 Am. & Eng. Corp. Cas. 428.

4. Letton v. Godden, L. R. 2 Eq. 123; State v. Peckham, 9 R. I. 1.

5. Jabing v. Midgett, 25 Ark. 475.

6. Pate v. Henry, 5 Stew. & P. (Ala.) 101.

7. Phillips v. Bloomington, 1 G. Gr. (Iowa) 498.

It is the duty of the ferryman or

a ferry company to provide a good and safe boat, suitable for the business in which they are engaged; and they are required to have all suitable and requisite accommodations for the entry upon, and the safe transportation while on board, and the departure from, the boat, of all horses and vehicles passing over such ferry. They are also required to be provided with all proper and necessary servants and agents requisite for the safe and proper conducting of the business of the ferry, and with all proper and suitable guards and barriers on the boat for the security of the property thus carried on the boat, and to prevent damage from such casualties as it would naturally be exposed to, though there was ordinary care on the part of the traveller. For neglect of duty in these respects, they will be held liable. Dewey, J., in White v. Winnisimmet Co., 7 Cush. (Mass.) 157. See Walker v. Jackson, 10 Mees. & W. 161; Richards v. Fuquas, etc., 28 Miss. 792; Hasman v. Hoboken, etc., 2 Daly (N. Y.), 130; Wyckoff v. Queens County Ferry Co., 52 N. Y. 32; s. c., 11 Am. Rep. 650; Willoughby v. Horridge, 12 C. B. 742.

8. Jabine v. Midgett, 25 Ark. 475.

at the end of the public highway, without the consent of the owner of the soil.¹

The grant of a right to keep a public ferry on a navigable river does not authorize the grantee to extend a rope across the river by which to pull the boat over.²

IV. Liabilities of Owners.—1. *As Common Carriers.*—(See CARRIERS OF GOODS; CARRIERS OF STOCK).—Ferryman, in reference to the transportation of goods, are sometimes treated as common carriers, and sometimes as merely persons furnishing the means of transportation; and this distinction is usually made by reason of the presence or absence of the owner of the goods. If the owner or custodian is present, and the goods are under his control, then the ferryman is not under the strict obligations of a common carrier.³ But if the ferryman is in the business of a common carrier, carrying

1. *Chess v. Manown*, 3 Watts (Pa.), 219; *Chambers v. Furry*, 1 Yeates (Pa.), 167.

2. *Babcock v. Herbert*, 3 Ala. 392; *Steamboat Globe v. Kentz*, 45 Greene (Iowa), 433.

3. *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.

In strictly ferry business, property is always transported only with the owner or custodian thereof; and ferrymen who do nothing but a ferry business, and have nothing but a ferry franchise, are bound to transport no other property; and, in the transportation of persons with their property, they are not under the obligations of a common carrier, but are bound only to due care and diligence. But they may combine, and usually do combine, with the ferry business, the business of a common carrier, carrying freight and merchandise without the presence of the owner or custodian, like other carriers engaged in the transportation of such freight; and, as to such freight, they assume the duties and obligations of a common carrier. As ferrymen, they are under a public duty to transport with suitable care and diligence all persons with or without their vehicles and other property, and as common carriers it is their duty to carry all freight and merchandise delivered to them. *Early, J.*, in *Mayor, etc. v. Starin, etc.*, 106 N. Y. 1.

A ferryman is not a common carrier of property retained by a passenger in his own custody and under his own control, and liable as such for all losses and injuries except those caused by the act of God and the public enemies. The cases which go the length of holding that the ferryman is chargeable as a common carrier for the absolute safety of property thus carried, and that the owner, in taking care of the property during the passage of the boat, may be regarded as agent of the ferryman,

do not stand upon any just principle, and are not within the reasons of public policy upon which the extreme liability of common carriers rests. Among the cases to this effect are *Fisher v. Clisbee*, 12 Ill. 344; *Powell v. Mills*, 37 Miss. 691, and *Wilsons v. Hamilton*, 4 Ohio St. 722; *Allen, J.*, in *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.

While ferrymen, by reason of the nature of the franchise they exercise and the character of the services they render to the public, are held to extreme diligence and care, and to a stringent liability for any neglect or omission of duty, they do not assume all the responsibilities of common carriers. Property carried on a ferry-boat, in the custody and control of the owner, a passenger, is not at the sole risk either of the ferryman or the owner. Both have duties to perform in respect to it. If lost or damaged by the act or neglect of the ferryman, he must respond to the owner. The ordinary rules governing in actions for negligence apply, and a plaintiff cannot recover if he is guilty of negligence on his part contributing to the loss. The liability of a common carrier in all its extent only attaches when there is an actual bailment and the party sought to be charged has the exclusive custody and control of property for carriage. A ferryman does not undertake absolutely for the safety of the goods carried with and under the control of the owner; but he does undertake for their safety as against the defects and insufficiencies of his boat and other appliances for the performance of his services, and for the neglect or want of skill of himself and his servants. At the same time the owner of the property retaining the custody of it is bound to use ordinary care and diligence to prevent loss or injury. *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.

freight and merchandise without the presence of the owner or custodian, like other carriers engaged in the transportation of such freight, then, as to such freight, he is under the duties and obligations of a common carrier.¹ A public ferryman is presumably

1. In *Evans v. Rudy*, 34 Ark. 385, the defendants asked the court to instruct the jury: "If you believe, from the evidence, that the ferry-boat was in good order,—suitable for the purpose for which she was used, was manned by a prudent and careful crew and captain; that the gates were securely fastened; that the captain warned the person in charge of the wagon of the danger of the mules becoming frightened while crossing the river, and directed him to unhitch them; and requested the plaintiff's wife to get out of the wagon and take her children out, but the person in charge of the wagon refused to unhitch the mules, and, insisting upon his ability to manage them, retained control of them; and the plaintiff's wife remained in the wagon with her children; that there was no negligence on the part of the captain or the crew; and that the accident would not have occurred if the captain's order to unhitch the mules had been obeyed,—the defendants were not liable, and you should find for the defendants." This was refused, and the court charged as follows: "Ferry-men are common carriers, and, as such, are insurers of all things committed to and received by them for transportation, against all harm or damages except such as may be occasioned by the act of God, the public enemy, or the wilful negligence or default of the party injured. Whether proper appliances and means were used, or the ferry-boat skilfully manned and managed, is a question of fact for the jury; and if you find, from the evidence, that such necessary and proper appliances and means were used, and the boat skilfully and properly manned and managed, and that the defendants exercised extraordinary care in the use of such appliances and means, and in the skilful management of the boat, you will find for the defendant. But if you find that such appliances and means were not used,—that the boat was not properly manned or skilfully managed, or the defendants did not exercise care in using such appliances and means, or in the skilful management of the boat,—you will find for the plaintiff. . . . If the ferry-boat was in good condition and repair, and suitable for the business in which she was employed, and was manned with a sufficient number of hands, and all proper appliances and means were in use at the time, and due care and caution were used in the

transportation of the plaintiff's property, and the falling of the mules and wagon into the river was occasioned by the neglect of the person in charge to obey the orders of the captain to unhitch the mules, and without fault on the part of the defendants, their agents or servants,—these facts may be taken into consideration in passing upon the question of negligence on the part of the plaintiff. If the plaintiff's wife, or other person in charge of the wagon and team, retained on the boat exclusive control thereof, and the defendant assumed no control of the same, and the precipitation of the wagon and team into the river occurred without negligence on the part of the person in charge of the boat, the defendants are not chargeable for the loss or damage, as a common carrier, or as an insurer, and are only answerable for actual negligence. And if loss was occasioned by the wilful wrong or negligence of the plaintiff, and would not have occurred but for it, the plaintiff is not entitled to recover unless the direct cause of the loss was the omission of the defendants, after becoming aware of the plaintiff's negligence, to use proper care to avoid the consequence of such negligence. . . . [That] ferry-men when they receive property for transportation, and have the exclusive custody of it, are held to the strict liability of common carriers, is too well settled to be questioned. But it is also well settled that if the owner retains control of the property himself, and does not surrender the charge of it to the ferrymen, such strict liability does not attach, and he is only responsible for actual negligence; and if the owner, by his own negligence, has contributed to the loss, which would otherwise not have happened, he is only liable, when the direct cause of the loss is his omission, after becoming aware of the owner's negligence, to use a proper degree of care to avoid the consequences of such negligence." *Harvey v. Rose*, 26 Ark. 3; *Wyckoff v. Queens, etc., Co.*, 52 N. Y. 32; *Whart. Neg.* 326, 335, 706-8; *Davies v. Mann*, 10 Mees. & W. 546; *Dudley v. Camden & Phil. Ferry Co.*, 13 Vroom (N. J.), 25.

Pomeroy v. Donaldson, 5 Mo. 36; *Babcock v. Herbert*, 3 Ala. 392; *May v. Hansom*, 5 Cal. 360; *Fisher v. Clisbee*, 12 Ill. 344; *Slimmer v. Merry*, 23 Iowa, 90; *Wilson v. Hamilton*, 4 Ohio St. 722; *Smith*

responsible, as a common carrier, for property received by him for transportation. The mere fact that the goods were accompanied by the owner, does not relieve him from liability; it must be shown that the owner did not intrust him with the care, but retained the exclusive management of the goods to himself.¹ A ferry company, being common carriers of passengers, are bound to furnish reasonably safe and convenient means for the passage of teams from their boats, appropriate to the nature of their business, and to exercise the utmost skill in the provision and application of the means so employed.²

It is the duty of the owner, delivering property to a ferryman which he knows requires peculiar care in its safe transportation, to make known the necessity, in order that the proper precaution may be used.³

2. *For Negligence.*—It is an act of negligence in the company, for its servants to let down the chains before the boat is properly secured to the bridge, which guard the passage from the ferryboat to the bridge; for thereby the passengers are assured that the boat is properly secured and the passageway safe for exit.⁴

v. Seward, 3 Pa. St. 342; *Sanders v. Young*, 1 Head (Tenn.), 219; *Albright v. Penn.*, 14 Tex. 290; *Cohen v. Hume*, 1 McCord (S. Car.), 444; *Miles v. James*, 1 McCord (S. Car.), 157.

1. *Harvey v. Rose*, 26 Ark. 3.

Ferryman are subject to all the responsibilities of common carriers, and, after property has been put on board their boats, it is *prima facie* in their charge, and they are responsible for it; and it makes no difference that the owner is present, unless he consent to assume the charge thereof. *Powell v. Mills*, 37 Miss. 691; *Slimmer v. Merry*, 23 Iowa, 91; *Whitmore v. Bowman*, 4 G. Gr. (Iowa), 148; *Le Barron v. East Boston Ferry Co.*, 11 Allen (Mass), 312.

2. *Le Barron v. East Boston Ferry Co.*, 11 Allen (Mass.), 312.

3. *Wilson v. Hamilton*, 4 Ohio St. 723; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85; *Pardee v. Drew*, 25 Wend. (N. Y.) 459; *Miles v. Cattle*, 6 Bing. 743. *Phillips v. Earle*, 8 Pick. (Mass.) 182; *Sleat v. Flagg*, 5 B. & Ald. 342.

4. *Ferris v. Union Ferry Co.*, 36 N. Y. 312.

The defendant ferry company landed passengers from boats upon a pontoon secured to the shore and occupying the width of the slip except some eight or twelve inches left for play on each side. On each outer edge of the pontoon was a sill six or eight inches high, surmounted by an arched rail three feet above the sill at the centre and supported by stanchions six feet apart. There was also a rail

twenty or twenty-two inches above the sill and parallel with it. A child six years old, in leaving one of the boats, fell through one of the openings in the guard and was drowned. The pontoon had been in use five or six years, and was similar to the other ferry pontoons. No similar accident had ever happened. *Held*, that the defendant was not liable. *Loftus v. Union Ferry Co.*, 84 N. Y. 455.

The plaintiff went on board one of the defendant's boats at New York, to take passage to A. He stood in front of the gangway opening, inside the bulwarks, but outside of the main part of the boat. Defendant had provided means and appliances sufficient to protect the gangway, i.e., a gate supported by stanchions, with a top rail, etc. The top bar of the gate projected at each end, which, when the gate was in place, rested in iron staples, sufficient to hold the gate in place unless it was broken.

The mate had just put the gate in place, and, as the boat started, was in the act of taking the stanchions and top rail to put them in their proper places, when a person on board, in attempting to jump ashore, fell into the water. This caused a rush of passengers to the side, who pushed the plaintiff against the gate. One end of the gate had been lifted out of the staples by some unauthorized person. The gate gave way, and plaintiff fell overboard and was injured. In an action to recover damages, *held*, that plaintiff's position near the gangway opening was not such as to charge him with contributory negligence as mat-

The keeper of a ferry is bound to keep a sufficient boat, and make provision for the reception of property, and is liable for loss of property occasioned by his default, without fault of the party losing.¹ It is negligence to order vehicles to be driven off the boat while it is at an unsafe distance above or below the level of the bridge.²

The omission to place a light on the premises is such negligence as will make it liable for damages to any passenger injured.³

As soon as a carriage is fairly on the drop or slip of a flat, though it be driven by the owner's servant, it is in the possession of the ferryman, and he is held liable for any subsequent damage that happens to it or to the horses.⁴

He must place proper barriers around his boat; and an omission to do so is negligence, though the boat has been used many years without them, and no accident was occasioned by their absence.⁵ And when they are not up, or are insufficient, he will be liable for loss sustained thereby.⁶

ter of law; but the evidence failed to show negligence on the part of the defendant; and that a refusal to nonsuit was an error. The court said: "We see no facts in proof from which it can be said that such an occurrence was reasonably to be anticipated, or that it was or should have been contemplated by the defendant as in the nature of things likely to occur. Experience had not shown that danger was to be apprehended from this source, and that it was necessary to be guarded against." *Cleveland v. N. J. Steamboat Co.*, 68 N. Y. 306. See *Gavin v. City of Chicago*, 97 Ill. 66; s. c., 37 Am. Rep. 99; *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1.

The owner of a young horse, timid and easily frightened, has a right to take him on a ferry-boat, and, if he exercise proper care in the management of the horse, the ferry company is liable for any injury or loss resulting from its negligence or that of its employees. *Clark v. Union Ferry Co.*, 35 N. Y. 485.

T., a traveller, who drives his horse and wagon on board a ferry-boat, pays the usual toll for their transportation, selects a place for himself, and retains the custody of his horse, without committing him to the care of the ferryman or his servants, or signifying any wish or purpose so to do, is bound to use ordinary care and diligence in the custody of his horse, to prevent the loss or injury of his property by his horse taking fright or becoming restless. If the traveller neglects his duty in this respect, leaving his horse without any oversight, and the horse becomes frightened at the sound of the bell of the boat, and springs against the chain stretched across the end of the

boat and attached to a hook insufficient in strength for the purpose for which it is designed, breaks the hook, and throws himself and the wagon overboard, and is drowned and the merchandise and the wagon injured, without any fault on the part of the ferryman, when, by proper care and attention on the part of the traveller, the accident would not probably have occurred, the proprietors of the ferry are not responsible for the damage for the loss of the horse, etc. *White v. Winnisimmet Co.*, 7 Cush. (Mass.) 155.

1. *Richards v. Fugua*, 28 Miss. 792.

What circumstances show negligence of agents of a ferry company, in arrangement for passengers leaving the boat, and what will exonerate a passenger in leaving, from the charge of contributory negligence, see *Hawke v. Wimans*, 42 N. Y. Super. Ct. 451.

2. *Hazemen v. Hoboken*, 50 N. Y. 53.

3. *Osborn v. Union Ferry Co.*, 53 Barb. (N. Y.) 629.

4. *Cohen v. Hume*, 1 McCord (S. Car.), 439; *Pomeroy v. Donaldson*, 5 Mo. 36.

5. *Ferris v. Union Co.*, 36 N. Y. 312; *Powell v. Mills*, 37 Miss. 661; *Clark v. Union Ferry Co.*, 35 N. Y. 485; *Willoughby v. Horridge*, 12 C. B. 742; *Walker v. Jackson*, 10 Mess. & W. 161.

6. *Wyckoff v. Queens, etc.*, 52 N. Y. 32; s. c., 11 Am. Rep. 650.

In an action against a ferryman, on his contract for the transportation of animals, which fell off the ferry-boat and were drowned through his alleged carelessness in not furnishing the boat with a barrier where they fell, evidence that just such a boat had been in use for thirty years to

Of two ferries near each other, the keeper of one leased his boat to the keeper of the other, and while in the use of the latter a team was drowned from it: the owner was not liable.¹

If he overloads the ferry, and goods are lost, the ferryman will be liable.²

Where a ferryman carries property gratuitously, he is liable for gross negligence only.³

V. Right to Toll.—The right to run a ferry includes the right to charge and take toll from them that make use of the ferry.⁴ This right, of a ferryman to his toll, is a common-law right, and every subtraction from his profits, by carrying his customers over the same stream whether for pay or not, is an injury for which he may recover.⁵ A person crossing a ferry in a boat not belonging to the ferry, and stepping into the ferry-boat in order to land, is not liable in an action for the recovery of ferriage.⁶ A custom that the inhabitants of a certain village should pass over a ferry, toll free, has been held good.⁷ Where the rates of ferriage for wagons is fixed by statute, a ferryman cannot charge for the contents of a wagon separately from the wagon, although wagon and contents belong to different persons.⁸

VI. Rights of Ferryman.—The owner of a ferry has a cause of action against every intruder who carries in the line of the ferry, whether it be done directly or indirectly.⁹ The owner of a ferry must have a right to use the land on both sides of the water, for the purpose of embarking and disembarking his passengers, but he need not have any property in the soil on either side.¹⁰ The land-

transport cattle, and that no accident had before occurred, was held inadmissible. *Lewis v. Smith*, 107 Mass. 334.

1. *Claypoll v. McAllister*, 20 Ill. 504.

Where a ferryman received an unusual number of horses and mules, which were mostly unconfined, and which he believed to be skittish, upon his ferry-boat, which was not provided with guards, and which had a spike five inches long sticking perpendicularly in the gunwale, with which a horse was killed, held, to be gross negligence, and that he was liable for the loss, notwithstanding an agreement with the owner of the beasts that he would risk the danger from the excess of numbers. *Wilson v. Shulkin*, 6 Jones (N. Car.), L. 375.

2. In *Mouse's* case it was resolved, "that if the ferryman surcharge the barge, it is lawful for any of the passengers, in time of accident and necessity, to cast the things out of the barge for safety of the lives of the passengers, and the owners shall have their remedy upon the surcharge; but if no surcharge was, but the danger occurred only by act of God—as, by tempest—no default being in the ferryman, everyone ought to bear his loss for the safeguard and life of a man for *interest re-*

publica quod homines cōservaver." 1 Add. on Torts, § 680.

3. *Dudley v. Camden & Philadelphia Ferry Co.*, 42 N. J. L. 25.

4. *Taylor v. Wilmington Railroad*, 4 Jones (N. Car.), 277.

5. *Taylor v. Wilmington Railroad*, 4 Jones (N. Car.), 277.

6. *Henry v. Turner*, 2 Port. (Ala.) 23; though he might be held responsible for the invasion of the plaintiff's franchise, or for trespass.

7. *Pain v. Patrick*, 3 Mod. 289.

8. *Kelly v. Altenus*, 34 Ark. 184; s. c., 35 Am. Rep. 6.

9. 1 Add. on Torts. § 24. Riparian proprietors may establish private ferries for the transportation of their own families and property, but not to transport other persons or their property. *People v. Mayor*, etc., of N. Y., 32 Barb. (N. Y.) 192; *Taylor v. Wilmington*, etc., R. Co., 4 Jones (N. Car.), 277; *Sparks v. White*, 7 Humph. (Tenn.) 86; *Norris v. Farmer's Co.*, 6 Cal. 590; *Cooper v. Smith*, 9 S. & R. (Pa.) 26; *Trustees v. Tatman*, 13 Ill. 27; *Johnston v. Erskine*, 9 Tex. 1; *Milton v. Haden*, 32 Ala. 30; *Hale's de Jure Maris*, 73.

10. *Peter v. Kendel*, 6 B. & C. 703; *State*

ing of passengers upon the wharf of another ferryman is a mere trespass which equity will not enjoin,¹ but an action for damages will lie. The grantee of a ferry is not authorized to place any obstruction across the stream on which the ferry is situated.² A ferryman or his agent has no right to expel a passenger from a ferry-boat for violating a regulation of the company requiring passengers to enter the boat through a certain gate, and deliver their tickets thereat, without first notifying such passengers of the existence of the regulation.³

VII. Power of States to Create, Regulate, etc.—A State legislature, by right of eminent domain, has power to establish or discontinue ferries whenever it is deemed necessary for the public easement;⁴ and in case of a boundary river between two States, either State may grant the exclusive right to ferry from its own shore.⁵ A State may erect a new ferry so near an older one as to injuriously affect the value of the latter by withdrawing its custom, unless it be protected by the grant.⁶ The act of Congress declaring the Mississippi river to be a common highway, free to all citizens of the United States, was not intended to interfere with the right of the state to create and regulate ferries.⁷ An act of the legislature merely granting the right to establish and operate a ferry across any water does not confer an exclusive right so as to deprive the legislature of power to authorize another competing ferry at or near the same place.⁸ A State may impose a license fee either directly or indirectly, or through one of its municipal corporations, upon the keepers of ferries living in the State, for boats owned by them and used in ferrying, etc.⁹

VIII. Interstate Commerce.—The transportation of passengers and freight, for hire, by a steam ferry across the Delaware River from New Jersey to Philadelphia by a corporation of New Jersey is interstate commerce, which is not subject to taxation by the State of Pennsylvania.¹⁰ And this applies to individuals as well.

v. Wilson, 42 Me. 9. Compare *Chambers v. Furry*, 1 Yeates (Pa.), 167; *Chess v. Manason*, 3 Watts (Pa.), 219.

1. *Ross v. Page*, 6 Ohio, 166; *Henry v. Turner*, 2 Port. (Ala.) 23; *Bell v. Clegg*, 25 Ark. 26; *State v. Wilson*, 42 Me. 9.

2. *Babcock v. Herbert*, 3 Ala. 392; *Steamboat Globe v. Kentz*, 4 Greene (Ia.), 433.

3. *Compton v. Van Valkenburg*, 34 N. J. L. 134.

4. *Allen v. Farnsworth*, 5 Verg. (Tenn.) 189; *Barrington v. Neuse River Co.*, 69 N. Car. 165; *Mills v. County Com.*, 3 Scam. (Ill.) 53.

And to Regulate Them.—*Mills v. County of St. Clair*, 7 Ill. 197.

To Discontinue.—See *Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 534; s. c., 17 Conn. 79.

5. *Conway v. Taylor*, 7 Black (U. S.), 603; *Columbia, etc., Co. v. Geisse*, 38

N. J. 39; *People v. Babcock*, 11 Wend. (N. Y.) 586; this is however denied in *Welt v. Chapman*, 2 Iowa, 524.

6. *Shorten v. Smith*, 9 Ga. 517; *Fanning v. Gregoire*, 16 How. (U. S.) 524; *Costar v. Brush*, 25 Wend. (N. Y.) 628; *Mayor, etc., of Columbus v. Rodgers*, 10 Ala. 37; *Piatt v. Covington, etc.*, 8 Bush (Ky.), 31.

7. *Chiapella v. Brown*, 14 La. Ann. 189; see *Marshall v. Grimes*, 41 Miss. 27.

8. *Power v. Athens*, 99 N. Y. 592; s. c., 10 Am. & Eng. Corp. Cas. 54; 3 Kent, 459; *Plank Road v. Douglas*, 9 N. Y. 444.

9. *Wiggins Ferry Co. v. E. St. Louis*, 107 U. S. 365.

10. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; s. c., 13 Am. & Eng. Corp. Cas. 365; see *Welton v. State of Mo.*, 91 U. S. 275; *County of Mobile v. Kimball*, 102 U. S. 691; *Paul*

IX. Statute Regulations.—In this country ferries are largely regulated by statutory enactments. And many decisions of the various courts of last resort are purely upon peculiar statutes, and of little value outside of the State in which they were rendered. The statutes of one State will be given in the notes,¹ and such notes of the decisions in the various States as are of the most importance.²

v. Virginia, 8 Wall. (U. S.) 168; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *Hays v. Pacific Mail Co.*, 17 How. (U. S.) 596; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *St. Louis v. Ferry Co.*, 11 Wall. (U. S.) 423; *Reading R. Co. v. Penn.*, 15 Wall. (U. S.) 282; *Com. v. Standard Oil Co.*, 101 Pa. St. 119; *Steamship Co. v. Port Wardens*, 6 Wall. (U. S.) 31.

It is true that, from the earliest period in the history of the government, the States have authorized and regulated ferries, not only over the waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the States can more advantageously manage such interstate ferries than the general government; and that the privileges of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort, and convenience of the public. Still, the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must therefore be conducted without the imposition, by the States, of taxes or other burdens upon the commerce between them. Freedom from such imposition does not of course imply exemption from reasonable charges, as compensation for the carriage of persons in the way of tolls or fares, or from ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the States, secured under the commercial power of Congress. *Field, J., in Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

1. In *Ohio* the following statutes have been passed upon the subject: "The council of any village or city shall have power to establish, regulate, and license ferries, from such corporation, or any landing therein, to the opposite shore, or from any one part of the corporation

to another; and, in granting such licenses, to impose such reasonable terms and restrictions, in relation to the keeping of such ferries, and the time, manner, and rates of carriage and transportation of persons and property, as may be proper; and to provide for the revocation of any such license, and for the punishment, by proper fines and penalties, of the violation of any ordinance prohibiting unlicensed ferries or regulating those established and licensed."

2. Revised Statutes Ohio, 1880.—SEC. 4256. *License required.*—Be it enacted, etc., That no person shall be permitted to keep a ferry across any stream running through or bounding on any county in this State without having first obtained a license from the court of common pleas of the proper county for that purpose, as hereinafter provided.

SEC. 4257. *Notice of application for license given.*—That the person applying for such license, shall produce satisfactory evidence to the court, by the affidavit of the applicant, or otherwise, of his having given notice, by advertisement, set up in at least three public places in the township or neighborhood where the ferry is proposed to be kept, twenty days prior to the sitting of the court, of his intention to apply to such court for a license to keep a ferry.

SEC. 4258. *Court may grant license for one year, and fix the price; fee of clerk.*—That the court, upon being satisfied that the notice hereby required has been given, that a ferry is needed at such place, and that the applicant is a suitable person, may grant to the applicant a license to keep the same for the term of one year, on his paying into the county treasury of the proper county a sum to be fixed by the court, not less than two nor more than fifty dollars. And on the applicant's producing the county treasurer's receipt for the payment of the sum so fixed, he shall receive from the clerk of the court a license, under the seal of the court, for the term aforesaid, for which he shall pay the clerk the sum or fifty cents.

SEC. 4259. *To whom license for ferry may be granted; carrying over small streams in floodtime.*—That the person

owning or possessing land on both sides of any stream where a ferry is proposed to be established, shall have exclusive right of a license for a ferry at such place; and when the opposite banks are owned by different persons, the right to the ferry shall be mutual. But if the owner does not apply, the court shall grant a license to any person applying for the same. Except where either of the landings is not on a public highway, the consent of the owner of the ground shall first be had in writing. But nothing herein contained shall be so construed as to prevent any person from ferrying passengers across a small stream in high water; and the court of common pleas may direct the clerk to give any person a permit for that purpose when, in its opinion, the stream is too small to justify the expense of a license. And when any person applies for a renewal of his license at the same place where he kept the preceding year, the same may be granted or renewed, without notice or petition.

SEC. 4260. *License expiring in vacation.*—That when a license expires in vacation, and the person who obtained the same procures a renewal, the latter license shall include the time from the expiration of the former, as well as the time to which it shall extend in future; and the applicant shall pay a ratable proportion for the whole time therein mentioned, and shall thereupon be exonerated from any penalty to which he would be otherwise liable. But in all applications for a license, when objections are made, the court may grant or refuse the same, at their discretion.

SEC. 4261. *As to boats and attendance; penalty for neglect; illegal ferriage.*—That every person obtaining a license to keep a ferry, shall provide, and keep in complete repair, a good and sufficient boat for the safe conveyance of persons and property; and when the stream, over which the ferry is kept, is passable, shall, with a sufficient number of hands to work and manage the boat, give due attendance from daylight in the morning, until dark in the evening; and during the day shall cross the stream at an interval of not longer than 15 minutes when any person desires passage; and shall, moreover, at any hour in the night or day that the creek or river can be passed, when called upon for that purpose, convey the United States mail or other public express across said ferry; and if any person, having obtained a license, fails or neglects, to perform the duties herein enjoined, or any of them, the person so offending shall forfeit and pay, for every such offence, a sum not exceeding five

dollars, to be recovered before any justice of the peace of the proper township, at the suit of any person prosecuting for and making due proof of such failure or neglect; and if any keeper of a ferry demand and receive a higher rate or sum for ferriages, than shall be allowed by the court of common pleas of the county wherein such ferry is kept, the person so offending shall forfeit and pay, for every such offence, a fine not exceeding ten dollars, recoverable before any justice of the peace of the proper township, by any person making due proof thereof, to be disposed of as hereinafter provided.

SEC. 4262. *Proportioning license fees.*—If the court refuses to renew the license of any ferryman he shall be exonerated from the penalties of this act by paying into the county treasury, previous to any prosecution having been commenced against him, such sum, for the time which may have elapsed between the expiration of his license and the next term of the court of common pleas, as shall bear a ratable proportion to the amount charged for the previous year.

SEC. 4263. *The rate of ferriage; rates posted up.*—That the court of common pleas, at the same time they grant a license to keep a ferry, shall also fix the rate of ferriages which the ferry-keeper may demand and receive for the transportation of persons and property; and it shall be the duty of the clerk of said court to furnish every person, on taking out a license to keep a ferry, with a list of the rate of ferriages; which list the ferry-keeper shall post up at the door of his ferry house, or some conspicuous place convenient to said ferry.

SEC. 4264. *Clerk to furnish grand jury with list of licenses; act given in charge to grand jury.*—That every clerk of the court of common pleas shall, on the first day of the term of each court, deliver to the grand jury an accurate list of all persons holding licenses within his county; and it shall be the duty of the judge to give this act in charge to the grand jury; whose duty it shall be to make inquiry and give information of any violation thereof, except in cases where jurisdiction is given to justices of the peace.

SEC. 4265. *Penalty for keeping ferry without license.*—Whoever keeps a ferry, without being duly authorized, shall be fined by any court of competent jurisdiction any sum not exceeding thirty dollars.

SEC. 4266. *Penalty against officers for not complying with this act.*—That if any justice of the peace, or other officer, shall neglect or fail to comply with the requisitions of this act, the person so offending

shall forfeit and pay, for every such offence, a sum not exceeding fifty dollars, at the discretion of any justice of the peace, before whom the same may be recovered for the use of the county.

SEC. 4267. *Prosecutions; county auditor; public informer.*—That all actions or suits brought under the provisions of this act shall be in the name of the State of Ohio; and the court taking cognizance thereof shall keep a record of all fines and forfeitures recovered under the same; sheriffs, constables, and other officers shall pay all moneys, within thirty days after receiving the same, into the county treasury; and justices of the peace and clerks of courts, before whom any fine is recovered shall present an accurate account thereof to the county auditor on or before the first day of June annually; and clerks of courts shall in like manner return a list of all licenses by them issued, and to whom, and the price of each respectively; and it shall be the duty of the county auditor to inform and prosecute all offenders against this statute; especially such offences as are cognizable before justices of the peace.

SEC. 4268.—All ferries under the control of individuals or corporations, and held as property or as a franchise, shall be liable to sale upon execution to the same extent and in the same manner as provided by law with respect to turnpikes, etc.

Alabama.—Under the statute of 1820, making ferrymen liable for neglect, the lessee of the ferry is the person subject to the penalty. But a person managing the ferry in the shares is considered the owner. *Taylor v. Rushing*, 2 Stew. (Ala.) 160.

In a suit against the owner of a ferry across a river, for the loss of a wagon which was lost in crossing a creek emptying into the river, evidence may be introduced on the part of the plaintiff to show that the defendant had at other times conveyed persons and property across the creek, to enable them to cross the river higher up, in order to show that it was an appendage to the ferry across the river. *Garner v. Green*, 8 Ala. 96.

The absence of the license of a ferry from the State is no sufficient reason for revoking the license; nor can the license in such case be revoked for the insufficiency of the bond within ten days' notice to execute a sufficient bond. *Garrett v. Ricketts*, 9 Ala. 529.

Miscellaneous.—*Wilcox County Court v. Phau*, 4 Stew. & P. (Ala.) 332; *Cox v. Easter*, 1 Port. (Ala.) 130; *Dyer v. Tuscaloosa, etc., Co.*, 2 Port. (Ala.) 296; *Risks v. Hall*, 4 Port. (Ala.) 178; *Botts v. Bridges*, 4 Port. (Ala.) 274; *Jones v. Johnson*, 2 Ala.

746; *Harris v. Plant*, 31 Ala. 639; *Collins v. Ewing*, 51 Ala. 101.

Arkansas.—When the county court permits a ferry to be established at or near a town within one mile of a ferry previously established, the question whether the public convenience required the establishment of the rival ferry, is necessarily passed upon and determined by the court. *Lindsay v. Lindley*, 20 Ark. 573.

Miscellaneous.—*Cloyes v. Keatts*, 18 Ark. 19; *Clegg v. Roane*, 21 Ark. 361; *Murray v. Menefer*, 20 Ark. 561; *Brearly v. Norris*, 23 Ark. 514; *Wells v. Steele*, 31 Ark. 219.

California.—It is within the direction of the court to grant a license for a ferry within two miles of an established ferry. *Re Hanson*, 2 Cal. 262.

A ferry-boat is not exempt from execution because the United States mail crosses the river at the ferry where it is used. *Lathrop v. Middletown*, 23 Cal. 257.

Miscellaneous.—*Webb v. Hansom*, 3 Cal. 103; *Hanson v. Webb*, 3 Cal. 236; *Norris v. Farmer's, etc.*, 6 Cal. 590; *Chard v. Harrison*, 7 Cal. 113; *Chard v. Story*, 7 Cal. 117; *Ward v. Severence*, 7 Cal. 127; *Tartar v. Finch*, 9 Cal. 276; *Fall v. Paine*, 23 Cal. 302; *People v. San Francisco*, 35 Cal. 606.

Connecticut.—*Wethersfield v. Humphrey*, 20 Conn. 218.

Georgia.—Grants of lands on water-courses from the State, with appurtenances, convey no right of public ferry. *Harrison v. Young*, 9 Ga. 359.

Illinois.—A license to keep a ferry on credit cannot be issued where the statute requires a fee to be paid. *Munsell v. Temple*, 8 Ill. 73.

A license issued for a less sum than that required by law is void. *Lombard v. Cheever*, 3 Gilm. (Ill.) 469.

Miscellaneous.—*Betts v. Menard*, 1 Ill. 395; *Trustees v. Tatman*, 13 Ill. 27; *Gales v. Anderson*, 13 Ill. 413; *Gear v. Bullerdick*, 34 Ill. 74.

Granting Franchise.—*Fitch v. Conyne*, 65 Ill. 83.

Indiana.—The petitioner for a ferry must produce some other evidence of title to the land on which the ferry is prayed to be established than the mere fact of his being in possession. *Mullis v. Cavins*, 5 Blackf. (Ind.) 77.

Miscellaneous.—*Connor v. Paxton*, 1 Blackf. (Ind.) 168; *New Albany, etc., v. Huff*, 19 Ind. 315; *Duckwell v. New Albany*, 25 Ind. 283; *Shallcross v. Jeffersonville*, 26 Ind. 193.

Iowa.—So far as the Mississippi river presents an obstruction to land-carriage, the means of overcoming it may be pro-

vided by legislation, and individuals may be allowed to establish ferries with exclusive privileges for that purpose. *U. S. v. Fanning*, 1 Morr. (Iowa) 348.

When the requirements and conditions of a lease to keep a ferry have been violated by the lessee, a court of equity may declare the same forfeited. *Phillips v. Bloomington*, 1 Greene (Iowa), 498.

Miscellaneous.—*Farming v. Gregoire*, 16 How. (U. S.) 524; *Weld v. Chapman*, 2 Iowa, 524; *Lippencott v. Allander*, 23 Iowa, 536; *Lippencott v. Allander*, 25 Iowa, 445.

Kansas.—*Granting Franchise.*—*Oxford Ferry Co. v. Sumner Co.*, 19 Kan. 293.

Kentucky.—Forcible entry and detainer will not lie for a ferry. *Rees v. Lawless*, Litt. Sel. Cas. (Ky.) 184.

To justify the establishment of a ferry across the Ohio river, the applicant must own the land on the Kentucky shore. *Trustees of Jefferson Seminary v. Wagner*, 2 A. K. Marsh. (Ky.) 379; *Givens v. Ferguson*, 6 T. B. Mon. (Ky.) 187; *Henry v. Underwood*, 1 Dana (Ky.), 245.

Miscellaneous.—*Martin v. McKinney*, Sneed (Ky.), 380; *Sanders v. Craig*, 1 A. K. Marsh. (Ky.) 196; *Givens v. Pollard*, 3 A. K. Marsh. (Ky.) 320; *Watts v. Horsely*, 3 Bibb (Ky.), 374; *Turnpike v. McMurtry*, 3 B. Mon. (Ky.) 516; *Fisher v. Higgins*, 5 T. B. Mon. (Ky.) 140; *Pentecost v. Miller*, 7 T. B. Mon. (Ky.) 312; *Cauly v. Grices*, 1 Dana (Ky.), 261; *Carter v. Kal-fus*, 6 Dana (Ky.), 43; *Hawie v. McCow-mack*, 6 Dana (Ky.), 242; *Trustees of Newport v. Taylor*, 6 J. J. Marsh. (Ky.) 134; *Walker v. Trustees of Columbus*, 4 B. Mon. (Ky.) 259; *Dover v. Fox*, 9 B. Mon. (Ky.) 200; *Brasher v. Kennedy*, 10 B. Mon. (Ky.) 28; *Newport v. Taylor*, 16 B. Mon. (Ky.) 699; *Richmond v. Rogers*, 1 Duv. (Ky.) 135; *Ballow v. Pettus*, 3 Bush (Ky.), 608; *Lawless v. Rees*, 1 Bibb (Ky.), 495; *Churchill v. Grundy*, 5 Dana (Ky.), 99.

Louisiana.—Where the grant of a right to keep a ferry at a particular place is proved to have been made by a person who was at the time governor *de facto* of the Spanish province of Louisiana, the authority to make such a grant will, in the absence of proof of a prohibition to make such grants, be presumed from the fact of its having been exercised. *Davis v. Police*, 1 La. Ann. 288.

Miscellaneous.—*Douglass v. Craig*, 2 La. Ann. 919; *Police Jury v. Shreveport*, 5 La. Ann. 661; *Murphy v. Police*, etc., 9 La. Ann. 434.

Massachusetts.—The grant of a ferry to Harvard College in 1650 by the legislature of Massachusetts was extinguished by the

legislature's granting a charter to "Charles River Bridge Company" in 1785 in the place where the ferry stood, the company to pay the college \$200 for forty years, which was afterwards extended to seventy years. The subsequent grant of a charter, in 1828, to the "Warren Bridge Co.," which was to become a free bridge in a number of years, though built not more than eight hundred feet from the Charles River Bridge, was not a grant impairing the obligation of contracts. *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420.

Miscellaneous.—*Fay*, Petitioner, 15 Pick. (Mass.) 243; *Miller v. Pendleton*, 8 Gray (Mass.), 547; *Brown v. Winnisemmet*, 11 Allen (Mass.), 326.

Minnesota.—*McRoberts v. Washburn*, 10 Minn. 8; *McLean v. Burbank*, 11 Minn. 189.

Mississippi.—*Negligence.*—*Powell v. Mills*, 37 Miss. 691.

Constitutional Law.—*Marshall v. Grimes*, 41 Miss. 27.

Missouri.—*Granting Franchise.*—*Lewis v. Nuckolls*, 26 Mo. 278.

Miscellaneous.—*Riddick v. Amelia*, 1 Mo. 5; *Wheat v. State*, 6 Mo. 455; *Rogers v. Penniston*, 16 Mo. 432.

New Jersey.—*Fixing Rates.*—*State v. Hudson*, 23 N. J. L. 206.

Negligence.—*N. J. Railroad Co. v. Palmer*, 33 N. J. 90.

New York.—*Application for Franchise.*—*Wiswall v. Wandell*, 3 Barb. Ch. (N. Y.) 312; *People v. Babcock*, 11 Wend. (N. Y.) 586; *Benson v. Mayor*, etc., of N. Y., 10 Barb. (N. Y.) 223; *People v. Mayor*, etc., of N. Y., 32 Barb. (N. Y.) 102.

North Carolina.—*Granting of Franchise.*—*Carrow v. Washington*, etc., Phil. (N. C.) 118; *Raynor v. Dowdy*, 1 Murph. (N. Car.) 279; *Anon.*, 1 Hayw. (N. Car.) 457; *Atkinson v. Foreman*, 2 Murph. (N. Car.) 55; *Barrington v. Neuse River Co.*, 69 N. Car. 165.

Ohio.—*Miscellaneous.*—*Cincinnati v. Walls*, 1 Ohio St. 222.

Oregon.—*Granting Franchise.*—*Cason v. Stone*, 1 Oreg. 39; *Stephens v. Powell*, 1 Oreg. 283; *Stephens v. Knott*, 2 Oreg. 304.

Pennsylvania.—*Construction of Franchise.*—*Cooper v. Smith*, 9 S. & R. (Pa.) 26; *Westfall v. Mapes*, 3 Grant (Pa.), 198; *Jones v. Tatham*, 20 Pa. St. 398.

South Carolina.—*Miscellaneous.*—*Clark v. State*, 2 McCord (S. Car.), 47; *Gourdine v. Davis*, 1 Bailey (S. Car.), 469.

Tennessee.—*Granting Franchise.*—*Corporation v. Overton*, 3 Yerg. (Tenn.) 387; *Cooke v. Evans*, 9 Yerg. (Tenn.) 287; *Nashville Bridge Co. v. Shelly*, 10 Yerg. (Tenn.)

FEUD—FEW—FICTION OF LAW—FIDUCIARY.

FEUD.—A fee; a grant of land by a feudal superior or lord, to be held by the grantee in return for certain services to be rendered him.¹

FEW.—An indefinite word or number, whose use is insufficient where exactness is necessary,² and whose meaning in a contract is for the jury.³

FICTION OF LAW.—An assumption of a possible thing as a fact which is not true, for the advancement of justice, and which the law will not allow to be disproved.⁴

FIDUCIARY.—See CAPACITY; TRUSTS.⁵

280; Sparks *v.* White, 7 Humph. (Tenn.) 86.

Texas.—*Granting Franchise.*—Ogden *v.* Lund, 11 Tex. 688.

Virginia.—*Granting Franchise.*—Zane *v.* Zane, 2 Va. Cas. 63; Somerville *v.* Wimbish, 7 Gratt. (Va.) 205.

1. Rapalje & L. Law. Dict., 1 Wash. Real Prop. (5th Ed.) 18; 2 Bl. Com. 45; Burgess *v.* Wheate, 1 W. Bl. 133; Wallace *v.* Harmstead, 44 Pa. 499.

In its original acceptation, feud means land which was granted to be held of a lord, as opposed to allodial land. Digby's Law of R. P. 31. It has a second meaning, viz., an estate of inheritance as opposed to an estate for life. Digby's Law of R. P. 59, n.

2. Butts *v.* Town of Stowe, 53 Vt. 600; Kerby *v.* England, 2 C. & R. 300.

Under a license to place a "few rocks" upon the vacant land of the licensor, the licensee is not entitled to cover it with huge quantities of rocks ten or fifteen feet long, piled to the height of fourteen to eighteen feet. Wheelock *v.* Noonan, 108 N. Y. 179.

3. Myers *v.* Gross, 59 Ill 436.

4. Burr. Law Dict. *Fictio*, in the civil law, was a term of pleading applied to a false averment on the part of the plaintiff, which the defendant was not allowed to traverse. Maine's Ancient Law, 25. In English law the fiction is an ancient substitute for legislation. It is "any assumption which conceals or affects to conceal the fact that a rule of the law has undergone alteration, its letter remaining unchanged, its operation being modified. . . . The fact is that the law has been wholly changed. The fiction is that it remains what it always was." Maine's Ancient Law, 26. "A fiction is an allegation in legal proceedings that does not accord with the actual facts of the case, and which may therefore be contradicted for every purpose except to defeat the beneficial end for which the fiction is invented and al-

lowed." Woodbury, J., in *Strafford Bank v. Cornell*, 2 N. H. 324.

In fictions juris subsistit æquitas. A fiction of law exists for the purpose of doing justice in the particular case. Clarke *v.* Bradlaugh, 7 Q. B. Div., 153. "Fictions of law hold only in respect of the ends and purposes for which they were invented. When they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth." Mansfield, C.J., in *Morris v. Pugh*, 3 Burr. 1243. Broom Leg. Max. 127; Low *v.* Little, 17 Johns. (N. Y.) 348. See, in general, Maine's Ancient Law, ch. 2, and 2 Cent. L. J. 382.

5. By section 33 of the Bankrupt Act of 1867, Rev. Stat. U. S. § 5117, it is provided that "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

In interpreting the words "fiduciary character," two widely different positions have been taken by the courts. On the one hand, the words are held to have the meaning placed upon the words "fiduciary capacity" in the act of 1841, by the Supreme Court of the United States in *Chapman v. Forsyth*, 2 How. U. S. 202. (See CAPACITY, vol. 2, p. 723, n.) The courts that take this view hold that the Supreme Court of the United States having determined that these general words meant only trusts of the character specified in the act of 1841, Congress deemed it unnecessary to insert the specific enumeration in the latter act, and only the general expression, whose meaning was now fixed. Accordingly, a commission merchant or factor was held not to act in a fiduciary capacity within the meaning of the act. *Owsley v. Corbin*, 15 Nat. Bank. Reg. 487; *Keime v. Graff*, 17 Nat. Bank. Reg. 319; *Woolsey v. Cade*, 54 Ala. 379; *Curtis v. Waring*, 92 Pa. St. 104; *Scott v.*

FIELD.—See note 1.

FIERI FACIAS.—See EXECUTION.

FIGHT.—See AFFRAY; ASSAULT.

Porter, 95 Pa. St. 38; Kaufman v. Alexander, 53 Tex. 562. And see Neal v. Clark, 95 U. S. 704. Nor was an agent for the collection of money. Grover v. Clinton, 8 Nat. Bank Reg. 312; Green v. Chilton, 57 Miss. 598; s. c., 34 Am. Rep. 483. Nor a partner. Maxwell v. Evans, 90 Ind. 596; s. c., 46 Am. Rep. 234. Nor a pledgee of collateral. Henniquin v. Clews, 77 N. Y. 427; s. c., 33 Am. Rep. 641. Nor one who, by articles of agreement, was to act as agent for the manufacture of goods, and who, with his employer's consent, sold the goods, the proceeds of which he retained. Barber v. Sterling, 68 N. Y. 267. Nor an attorney in fact. Woodward v. Towne, 127 Mass. 41; s. c., 34 Am. Rep. 337. Nor a depositee of money. Hervey v. Devereux, 73 N. Car. 463. Nor the surety of a guardian. Jones v. Knox, 46 Ala. 53; Reitz v. People, 72 Ill. 435. Nor a guardian as to his surety for money paid on account of his bond. Cromer v. Cromer's Adms., 29 Gratt. (Va.) 280.

On the other hand, it is held in a line of cases that the language of the act of 1867 is broader than that of the act of 1841, and extends to debts contracted by a defalcation of a bankrupt while acting in any fiduciary capacity, and is not limited to any special trusts. In the following cases, factors were held to act in a fiduciary character: *In re Seymour*, 1 Ben. (C. C.) 348; s. c., 6 Int. Rev. Rec. 60; *In re Kimball*, 6 Blatchf. (C. C.) 292; *Lemcke v. Booth*, 47 Mo. 385; s. c., 4 Am. Rep. 327; *Whitaker v. Chapman*, 3 Lans. (N. Y.) 155; *Hardinbook v. Collson*, 24 Hun (N. Y.), 475; *Duguid v. Edwards*, 50 Barb. (N. Y.) 188; *Meador v. Sharpe*, 54 Ga. 125; *In re Smith*, 18 Nat. Bank Reg. 24. So also an auctioneer,—*Jones v. Russell*, 44 Ga. 60; *Mayor v. Walker* (Ga.), 11 Nat. Bank Reg. 478;—an attorney who has collected money which he has failed to pay over to his client,—*Heffren v. Jayne*, 39 Ind. 463; s. c., 13 Am. Rep. 281;—a factor who has received money from his principal for investment, but not where the claim for the balance has been transferred to a third party,—*Desobry v. Tite*, 31 La. Ann. 809; s. c., 33 Am. Rep. 232;—a guardian as to his surety for money paid on account of his bond,—*Halliburton v. Carter*, 55 Mo. 435; s. c., 10 Nat. Bank Reg. 359.

The following have been held to be act-

ing in a fiduciary capacity within the meaning of the term as used in a fraudulent debtor's act: An agent,—*Morris v. Ingram*, 49 L. J. R. Ch. D. 123;—an auctioneer,—*Crowther v. Elgood*, 56 L. T. R. N. S. 415;—an administrator whose letters have been attached by the proponent of a will,—*Timinchi v. Smart*, 54 L. J. R. P. & D. 92.

1. A contract to convey a tract of land, to be so surveyed as to include the dwelling house of the party who is to receive the conveyance, and "also the fields and fenced lands in front of and about said house," does not by its terms include a "corrall" on the land out of which the survey is to be made. *Hearst v. Pujol*, 44 Cal. 230.

Use of Field in Legal Proceedings.—"It should seem that the term 'field' would be considered as certain a description as that of close, and might be used, but it is not a usual description in legal proceedings. It is, however, expressly named in the general act against larceny [7 & 8 Geo. IV., c. 29, § 16], where it is enacted that the stealing, to the value of ten shillings, any goods or article of silk, etc., whilst laid in progress of manufacture in any building, *field*, or other place, shall be felony." 1 Chitty's Gen. Pr. 160.

Common Field.—See COMMON, note 1.

Cultivated Field.—A town lot may be a "cultivated field." A statute of *North Carolina* makes it a misdemeanor for any person "to unlawfully and wilfully burn, destroy, pull down, injure, or remove any fence," etc., . . . "surrounding or about any yard, garden, cultivated field, or pasture." On the trial of an indictment under the act, it was held that a town lot "which had been cultivated the year preceding that in which the alleged offence was committed, and was prevented from being cultivated in the latter year by the removal of the fence," was a "cultivated field," within the meaning of the phrase as used in the act. Said the court: "Worcester says a lot is a 'piece of land,' and a field is a 'cultivated tract of land;' the term 'lot' is usually applied to parcels of land lying in cities and towns. It may consist of one acre, or more or less; and, if enclosed and cultivated, is just as much a 'field,' according to the definition, as if it lay in the country. An acre of land lying in the

FIGURES.—See ABBREVIATIONS.¹

country, fenced and cultivated, would certainly be called a field. The fact of its lying on the one side or the other side of the corporate boundary of a town would make no difference. If it is a garden, of course it should be so charged in the bill of indictment." *State v. McMinn*, 81 N. Car. 585.

Where a piece or tract of land has been cleared and fenced, and cultivated or proposed to be cultivated, and is kept and used for cultivation according to the ordinary course of husbandry, although nothing may be growing within the inclosure at the time of the trespass, it is a "cultivated field," within the description of the statute above quoted. *State v. McMinn*, 81 N. Car. 585; *State v. Allen*, 13 Ired. L. (N. Car.) 36.

Veterans who have re-enlisted in the field, as used in a vote of a town meeting, which gave bounties to persons of that description, was held to include those soldiers who re-enlisted while they were yet held to military service under a former unexpired enlistment; but not those who had been discharged and then re-enlisted. Said the court: "Soldiers in the field," "veterans in the field," "army in the field," "officers in the field" all mean persons in the military service for the purpose of carrying on the pending war." *Sargent v. Ludlow*, 42 Vt. 726.

1. Figures in Indictments.—In England.—The statute of 36 Edw. III. stat. 1, c. 15, required "that all pleas . . . shall be pleaded, shewed, defended, and answered, debated, and judged in the English tongue; and that they be entered and enrolled in Latin." On the introduction of paper pleadings, they followed in the language, as well as in other respects, the style of the record, and were therefore drawn up in Latin. Steph. Pl. App. xxiv. Arabic figures, not being Latin, could not therefore be used to express number in pleadings of any sort; but Roman figures were for many purposes sufficient. *Hawkins v. Mills*, 2 Lev. 102; cases discussed in *Berrian v. State*, 2 Zab. (N. J.) 9; 2 Hale's P. C. 170; 1 Bish. Crim. Proc. § 341. Whether, however, even Roman figures could be used in an indictment, is a question of some doubt. *Hawkins* says: "If the caption of an indictment set forth the style of the day or year in any figures but Roman, it is insufficient." 2 Hawk. P. C. 350. But Green, C. J., in *Berrian v. State*, 2 Zab. (N. J.), 9, says: "Upon a careful examination of the English cases, except the language of Probyn in *King v. Haddock*, I find no

adjudication, nor even a *dictum*, either before or after the statute of Geo. II., which countenances the idea that figures, either Roman or Arabic, may be used in an indictment." In *King v. Haddock*, the case referred to by Green, C. J., the indictment was for a nuisance, by putting and placing on the soil of the river Thames, "on the first day of August, 1732, 200 loads of brick." To this indictment there was a demurrer on several grounds, one of which was that the year when the offence was committed, and also the quantities of brick, were expressed in figures. Said Probyn, J.: "No other figures but such as are capital were ever used in the bodies of indictments; and these were never allowed but only in immaterial points; but in this case a very material part . . . is expressed in figures. Now, this is not aided by the English acts [4 & 6 Geo. II.], because these leave the matter as it was before." The court took time to advise, and no final decision was ever given, there being afterwards a new indictment brought by the prosecutor. *Andrews*, 137. The statute 4 Geo. II. c. 26, § 1, provided that after 1733 the record and pleadings should be framed in English, "and in words at length, and not abbreviated." This was subsequently amended by the statute of 6 Geo. II. c. 14, § 5, by which it was enacted that after 1733 the record and pleadings might be drawn up "with the like manner of expressing numbers by figures as has been heretofore" or is now commonly used in the said courts respectively, and with such abbreviations as are now commonly used in the English language." In the leading textbooks written since the passage of these statutes, it is said that "the whole of the indictment must be written in words, and not in figures, except in the case of such documents as are set out in fac-simile." Steph. Dig. Crim. Proc. 156; 1 Chit. Cr. L. 173; Arch. Cr. Pl. 63.

In America.—In many of the States figures have been held sufficient to express number in indictments, by the common law. *State v. Raiford*, 7 Port. (Ala.) 101; *Rawson v. State*, 19 Conn. 292; *State v. Tuller*, 34 Conn. 280; *State v. Seamons*, 1 Greene (Iowa), 418; *Winfield v. State*, 3 Greene (Iowa), 339; *State v. Reed*, 35 Me. 489; *Kelly v. State*, 3 Sm. & M. (Miss.) 518; *State v. Hodgeden*, 3 Vt. 481. In *Tennessee*, they have been held sufficient in the caption. *Barnes v. State*, 5 Verg. (Tenn.) 186; *State v. Smith*, Peck (Tenn.), 165. In *New Jersey* and *Indiana*,

FILE.—A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file.¹

however, they have been held insufficient by the common law. *Berrian v. State*, 2 Zab. (N. J.) 9; *Finch v. State*, 6 Blackf. (Ind.) 533; *State v. Voshall*, 4 Ind. 589. But in both these States, statutes have since been passed, under which figures have been held sufficient. The *New Jersey* statute, passed April 3, 1855, enacts that "no judgment given upon any indictment shall be reversed upon any imperfection, omission, defect in, or lack of form, nor for any error except such as shall or may have prejudiced the defendant in maintaining his defence upon the merits." *Johnson v. State*, 2 Dutch. (N. J.), 313. The revised statutes of 1852 of *Indiana* expressly provides that "no indictment or information may be quashed or set aside" because "dates and numbers are represented by figures." *Hampton v. State*, 8 Ind. 336; *Hizer v. State*, 12 Ind. 330. In *North Carolina*, figures have been held sufficient under an act of 1784, which provides that "every criminal proceeding by indictment, information, or impeachment shall be sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if, in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." *State v. Dickens*, 1 Hayw. (N. Car.) 468; *State v. Haddock*, 2 Hawks (N. Car.), 461; *State v. Lane*, 4 Ired. (N. Car.) 113. In *Virginia*, under a statute providing that "no indictment, or other accusation, shall be quashed or deemed invalid for omitting to state, or stating imperfectly, the time at which the offence was committed, when time is not the essence of the offence," it was held that, in an indictment for murder, it is sufficient to set out the date of the offence in figures. *Lazier's Case*, 10 Gratt. (Va.) 708. Likewise in the case of an indictment for forgery. *Cady v. Com.*, 10 Gratt. (Va.) 776. In the former case the court said: "I do not think that at this day the use of figures would be a fatal defect in an indictment, even at common law."

Figures in Indictment for Forging Bill of Exchange.—The figures in the margin of a bill of exchange are no part of the bill, and need not be set out in an indictment for forging the same. *Com. v. Bailey*, 1 Mass. 62; *Com. v. Stevens*, 1 Mass. 203; *State v. Flye*, 26 Me. 312.

Figures used in an Inquisition of Forcible Entry and Detainer to express the dates, do not vitiate it. Said the court: "The cases cited [to show that the inquisition is thereby vitiated] apply exclusively to indictments. In *New Jersey*, these inquisitions are considered as civil prosecutions." *Covenhoven v. State*, *Coxe* (N. J.), 258 (1794).

Figures in Court Records.—In *New Jersey*, a judgment of a justice of the peace, removed by *certiorari* to the supreme court, will be reversed if the amount of the judgment is entered in figures. *Cole v. Petty*, Penn. (N. J.) 60; *Robinson v. Applegate*, 6 Halst. (N. J.) 178. Likewise, if the judgment is rendered for a certain amount, "with legal costs," the amount of the costs being entered in figures. *Smith v. Muller*, 3 Halst. (N. J.) 175. But though the verdict of the jury is entered in figures, if the judgment is entered in words at length, it will not be reversed. *Stout v. Hopping*, 1 Halst. (N. J.) 125.

Figures in a Deed.—The description of the land in a deed may be by numbers of lots in figures, as lot No. 54. *Middlebury College v. Cheney*, 1 Vt. 336.

Marginal Figures in Bills and Notes.—See ALTERATION OF INSTRUMENTS, vol. 1, p. 517, note 1; BILLS AND NOTES, vol. 2, p. 329, notes 9 and 10.

1. Bouv. L. Dict.

Delivery to an Officer When He is Not at the Office.—A paper is not filed when it is put into the custody of an officer of the office in which it is to be filed, when he is not at the public office, such officer not being the one in whose custody the paper properly remains. By the bankrupt act of 7 Geo. IV. c. 57, § 10, it was provided as follows: "It shall be lawful for any person, who shall be in actual custody, to apply by petition, in a summary way, to the said court (the insolvent court), for his or her discharge from such custody, according to the provisions of this act." By section 13 it was provided that the filing of the petition . . . shall be accounted and adjudged an act of bankruptcy from the time of filing such petition." It was the practice under this act for an officer of the insolvent court to take the petition to the prisoner to be signed. After it was signed, it was carried by the officer to the public office in Lincoln's Inn Fields, attested, numbered, and handed to the officer of the town department with whom it remained. A sale under an execution issued on a

judgment against a debtor was completed at noon, October 29. The debtor signed a petition, as provided by the bankrupt act above quoted, in the afternoon of October 28. The officer of the court having the petition in charge did not return to the public office with it until the afternoon of October 29. It was held that the sale was completed before the petition was filed. Said Tindal, C. J.: "It is urged that the instrument was virtually filed as soon as D. (the court officer) had it in his possession. But it is manifest, in this case, that D. was not the person in whose custody it was to remain. . . . The instrument here cannot be said to be filed until it arrives at its destination." *Garlick v. Sangster*, 9 Bing. 46.

Depositing in the Office, Without Delivering to an Officer, is not a Filing.—The verification of a claim against an insolvent estate is not filed, within the meaning of a statute which provides that "every person having any claim against the estate declared insolvent must file the same in the office of the judge of probate" within a certain time and verified in a certain manner "or it is barred forever," when it is merely placed by the creditor's attorney in the probate judge's office, in the box appropriated to such papers, without the knowledge of the judge or his clerk, and without calling the attention of either of them to it until after the expiration of the time prescribed by the statute for the filing of claims. Said the court: "The word 'file' is derived from the Latin word 'filum,' which signifies a thread; and its present application is drawn from the ancient practice of placing papers upon a thread or wire 'for the more safe keeping and ready turning to the same.' The origin of the term indicates very clearly that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the 'string' or 'wire.'" *Phillips v. Beene's Adm'r*, 38 Ala. 248.

To Whom Delivery May be Made.—Delivery may be made to any person having charge of the office for the time being. *Oats v. Walls*, 28 Ark. 244.

Delivery to Agent of Filing Officer.—In the absence of the recorder, a deed was delivered to a deputy appointed by the recorder, for the purpose of being filed and recorded. At the time of the delivery, the deputy had the custody of the records, and was acting as recorder. It was contended that the deputy was appointed without authority of law, and that therefore a delivery to him could not constitute a filing, within the meaning of a statute that made a deed constructive notice to subse-

quent purchasers. But it was held that a delivery to the deputy was sufficient to constitute a filing, independently of the question of the legality of his appointment. Said the court: "It was sufficient to ascertain who was in the possession of the records and discharging the duties of the office. Whether the law allows a recorder to perform his duties by deputy is a question which does not properly arise here. If there is any doubt about the matter, it would be properly determined in a prosecution against him for failing to perform in person the duties of the office. Under the circumstances of this case, we are inclined to the opinion that the acts of H. (the deputy) may be held valid between these parties as the acts of an officer *de facto*." *Cook v. Hall*, 1 Gilm. (Ill.) 575; *Dodge v. Potter*, 18 Barb. (N. Y.) 193.

When Agency will be Implied.—When a paper is deposited with one who has control of the office for the time being, it does not devolve on the party depositing it to show that it was put into the hands of the filing officer, or of a deputy authorized by him to receive such papers. One in charge and performing the duties of the office has sufficient authority for such purpose. The filing officer is responsible for the acts of one thus placed in possession of the keys and papers in his office. *Oats v. Walls*, 28 Ark. 244. On the issue whether the location of land taken by the selectmen of a town for the purpose of a school-house, under the statutes of *Massachusetts*, was, as required by the statute, "filed in the office of the town clerk seven days at least" before the town meeting at which the doings of the selectmen were approved, it appeared that the town clerk prepared this location and left it in the safe, belonging to the town, at his house, which was his only office as clerk; that two days after this, and more than seven days before the meeting, a majority of the selectmen called at his house, in his absence, procured the paper from his wife, and affixed their signatures to it; and that the clerk never saw the paper from the time he deposited it, unsigned, in the safe, until he found it there on the day of the town meeting, though he was informed by his wife that the selectmen had signed it. It was held that the paper was duly filed. Said the court: "It is immaterial that he (the town clerk) was absent when they (the selectmen) called. His wife might lawfully act as his agent for the purpose of exhibiting the paper, and restoring it, when signed, to its place of deposit." *Reed v. Acton*, 120 Mass. 130.

Delivery to One in Charge of a Vacant Office.—Where the office of town clerk be-

ing vacant, a person who had charge of the office received a chattel mortgage brought to the office to be filed, indorsed it, and placed it among the chattel mortgages in the office, it was held that the mortgage was filed, within the meaning of a statute providing for the filing of such instruments. Said the court: "E., who appears to have had charge of the office, may be regarded as the town clerk *de facto* at the time, received the mortgage, marked upon it the time, and placed it among the chattel mortgages in the office. This, in my opinion, was filing it, within the meaning of the statute. . . . The filing consisted in presenting the mortgage at the office and leaving it there, and depositing it in the proper place with the papers in the office. This was done in the present case, and was all the appellant, under the circumstances, could do and the law required of him. Although there was no town clerk *de jure*, there was a town clerk's office and a town clerk *de facto*. Bishop *v. Cook*, 13 Barb. (N. Y.) 326.

The Delivery Must Be for the Purpose of Filing.—A mortgage was given to secure the payment of a note. In a suit for foreclosure, to a paragraph of the answer setting up that neither the note and mortgage, nor copies thereof, had been filed with the complaint, as required by statute, the plaintiff replied that the note and mortgage were left in the clerk's office when the complaint was filed. *Held*, on demurrer, that the reply was insufficient. Said the court: "It is said that the averment in the reply, viz., 'that the note and mortgage were left at the clerk's office when the complaint was filed,' should be considered evidence of the filing. We think differently. The provision (of the statute) . . . seems to be imperative. It requires the instrument, or a copy of it, to be filed with the pleading. The mere leaving the instrument with the complaint would not be within the intent of the statute. It should be left for a purpose, viz., as part of the case. The purpose of leaving the note and mortgage should have been stated in the reply as a fact, and not left to inference." *Lamson v. Falls*, 6 Ind. 309.

Payment of Filing-fee.—When it is provided that a filing-fee that is payable to the public must be paid in advance, the instrument is not filed until the fee be paid, though it be left in the custody of the filing officer. *Pinders v. Yager*, 29 Iowa, 468. But when the fee is payable to the filing officer for his own benefit, such officer may waive his right to prepayment; and, when the right is waived, the instrument is filed from the time it is out into the officer's custody. *Tregambo*

v. Comanche M. & M. Co., 57 Cal. 501.

Necessity of Paper Filed Remaining in the Custody of the Filing Officer.—A certificate and affidavit, required to be filed in the county clerk's office under a limited partnership act, were sent by a messenger to the clerk's office, and there presented for the purpose of being filed. The deputy clerk, to whom they were presented, instead of retaining them, by mistake added a certificate of the official character of the notary before whom they were acknowledged, and returned them to the messenger, by whom they were carried away. Several months afterwards they were returned to the county clerk's office and properly filed. As against a creditor whose debt accrued before the papers were returned to the clerk's office, it was held that the first presentation of them did not constitute a filing. "Filing a paper," said the court, "*ex vi termini*, means placing and leaving it among the files. The memorandum indorsed by the officer in whose custody it is placed, is merely evidence of the filing, and not the filing itself. Where a paper is required to be filed only for a specified purpose, or to remain on file for only a limited time, the special or limited character of such filing is usually indicated by the statute." *Pfmann v. Henkel*, 1 Bradw. (Ill.) 145.

Duties imposed upon the Filing Officer.—It has generally been held that the duties in the way of indorsing, recording, indexing, etc., imposed upon the filing officer after the paper has been put into his custody, do not constitute any part of the filing so far as the party delivering the paper is concerned. *Cook v. Hall*, 1 Gil. (Ill.) 575; *Taylor v. Moody*, 2 Blackf. (Ind.) 247; *Gorham v. Summers*, 25 Minn. 81; *Fanning v. Fly*, 2 Coldw. (Tenn.) 486; *Holman v. Chevallier*, 14 Tex. 437; *Bishop v. Cook*, 13 Barb. (N. Y.) 329; *Westcott v. Eccles*, 3 Utah, 258; *King v. Wade*, 1 B. & Ad. 861; *In re Butlin*, L. R. 8 Ch. App. 722. But the decisions in *Missouri* are at variance with this rule. By a statute of that State it is provided that the bill of exceptions in a cause must be "filed at the time or during the term of the court at which it is taken, and not after;" and that every bill properly signed "and filed in court shall form a part of the record of the cause in which it is filed." It was held that "the term 'filed,' as above employed, has a broader signification than the mere indorsement to that effect, and comprehends more especially, in its proper interpretation, the entry made by the clerk on the record, by which the fact that the bill has been allowed is announced and

FILL.—See note 1.

appropriately evidenced. *Fulkerson v. Houts*, 55 Mo. 301; *Pope v. Thomson*, 66 Mo. 661.

Evidence of Filing.—A certificate of the filing officer, entered upon a paper at the time it is filed, is the best evidence of such filing; but it is not necessary evidence. In its absence, other testimony may be properly admitted to prove that such paper was filed. *Peterson v. Taylor*, 15 Ga. 483; *Bettison v. Budd*; 21 Ark. 580; *Engelman v. State*, 2 Ind. 91.

"Filed" Included under "Returned," as Applied to Writs.—The statute 2 & 3 Will. IV. c. 39, § 10, provides that "no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith," etc., "or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus* and entered of record within" a certain time. In an action of case against an attorney, for negligence, the declaration stated that the plaintiff employed the defendant as attorney to sue H. for the recovery of a sum of money; yet the defendant did not use proper care, in this: that, having, as such attorney, sued out writs for the recovery of the said money and for the purpose of saving the statute of limitations, he did not, upon H. not being found so as to be served with such writs, "duly file" the said writs with the proper officer, according to the necessary and accustomed practice of the court of Queen's bench, whereby the action was barred by the statute. It was held that, although the statute did not in terms require such writs to be filed, yet the word "file," in the declaration might have the sense of bringing the writs to the office, and in that sense would be included in the word "returned" in the statute, and that such filing would therefore be a necessary part of the practice in saving the Statute of Limitations. *Hunter v. Caldwell*, 10 Q. B. 69.

Among the files.—Where a clerk of a board of equalization of tax assessments as return to a writ of certiorari from the supreme court, certified that certain papers transcribed were true and correct copies of original paper "among the files" in his office, it was held that, though the language was not as definite as it should be, it was sufficient to warrant the conclusion that such papers, being among the files, were themselves filed. *State v. Board of Equalization*, 7 Nev. 83.

Filing a Claim.—By the Code of Ala-

bama, "every person having any claim against the estate declared insolvent must file the same in the office of the judge of probate" within a certain time. *Held*, that it was sufficient, under the statute, to file a copy of the claim. *Erwin v. McGuire*, 44 Ala. 499.

Filed in open court.—A statute of *Arkansas* provides that "all indictments found and presentments made by a grand jury shall be presented to the court by the foreman, in the presence of such jury, and shall be there filed, and remain as records of the court." It was held that an indorsement upon an indictment by the court clerk, of "filed in open court," with the date, did not show that the indictment had been returned into the court by grand jury, as required by the statute. Said the court: "It (the indorsement) is evidence of the filing only, and in such case we are not allowed . . . to indulge the presumption that it was returned by the grand jury." *McKenzie v. State*, 24 Ark. 636.

Filed with the pleading.—By the Code of *Indiana*, "when any pleading is founded on a written instrument or account, the original, or copy thereof, must be filed with the pleading." *Held*, the copy of a written instrument upon which a pleading is founded is "filed with the pleading," within the meaning of the statute, if it is set out in the pleading itself. *Lamson v. Falls*, 6 Ind. 309.

Filed for record.—By a statute of *Arkansas*, a properly acknowledged deed, etc., is made constructive notice to all persons "from the time the same is filed for record in the recorder's office." *Held*, a mortgage filed in the recorder's office, with directions not to record it, is not filed for record within the meaning of the statute. *Bowen v. Fassett*, 37 Ark. 507.

1. Fill a Prescription.—"To fill a prescription is to furnish, prepare, and combine the requisite materials in due proportions as prescribed. It is urged that prescriptions refer to medical provision for human beings, and do not appertain to the medication of animals; or, at least, that they can proceed only from professional sources, and are not prescriptions if they emanate from common persons. Why a recipe or formula for the treatment of horses may not be called a prescription, we do not see, from whatever source it may proceed." *Ray v. Burbank*, 61 Ga. 505.

Fill Shares of Stock.—Where one subscribed for shares in an incorporated company, agreeing "to take and fill the number of shares set against his name,"

FILUM AQUÆ.—A thread of water. Used in reference to boundaries, it may mean either middle or outside line.¹ (See ACCRETION, 1 Am. & Eng. Encyclo. of Law, 136; BOUNDARIES, 2 Am. & Eng. Encyclo. of Law, 502.)

FILUM VIÆ.—The thread, or middle, of a road;² the boundary between adjoining owners. (See also BOUNDARIES, 2 Am. & Eng. Encyclo. of Law, 507.)

it was held that, although where, by the terms of the subscription, a subscriber agrees merely to take a certain number of shares, without promising to pay assessments, the only remedy against the delinquent proprietor is a sale of his shares, yet nevertheless in this case assumpsit might be maintained against the subscriber, or proprietor, to recover an assessment on his shares; the word "fill," in this connection, amounting to a promise to pay assessments. *Bangor Bridge Co. v. McMahon*, 10 Me. 478.

Filled in with brick.—Where, in a policy of insurance, a building, in which property insured was contained, was described as "a frame house filled in with brick," it was held that it was competent for the assured to prove that, by custom, as between insurers and insured, a frame house filled in with brick front and rear, bounded on one side by a wall filled in with brick of an adjoining house, and on the other side by a brick wall of another house, was considered "a frame house filled in with brick," within the meaning of the policy. Said the court: These words are "not definite and unequivocal in themselves; they may apply to the partitions, as well as to the external frame, of the house. The plaintiff's own testimony shows that they are not generally considered as requiring the gables to be filled in, but that the brick goes no higher than the eaves; they are therefore susceptible of explanation." *Fowler v. Ætna Fire Ins. Co.*, 7 Wend. (N. Y.) 270.

An Office Filled.—In no case can an office be considered as filled till an acceptance of the appointment by the person chosen. That acceptance, however, need not be signified in express terms. It is often implied from previous conduct as well as a subsequent receipt of a commission, taking the oath of office, or discharging some of its duties. *Johnston v. Wilson*, 2 N. H. 202; s. c., 7 Wheel. Am. C. L. 142.

1. Bouv. L. Dict.

2. Wharton.

The strong presumption is always that the boundary on a highway is *ad filum*

viæ. The road is a monument; the thread of that road, in legal contemplation, is that monument or abutment. *Bovastin v. Payne*, 2 Sm. Lead. Cas. x216. "The general rule is well settled that a boundary on a way public or private includes the soil to the centre of the way if owned by the grantor, and that the way thus referred to and understood is a monument which controls courses and distances, unless the deed by explicit statement or necessary implication requires different construction." Per Gray, C. J., in *Peck v. Denniston*, 121 Mass. 18; *Neuhall v. Inson*, 8 Cush. (Mass.) 595; *Fisher v. Smith*, 9 Gray (Mass.), 441; *Boston v. Richardson*, 13 Allen (Mass.), 146; *White v. Godfrey*, 97 Mass. 472; *Motley v. Sargent*, 119 Mass. 231. The same rule is stated by the supreme court of *Pennsylvania* per Mercer, J., in *Sparkman v. Steidel*, 88 Pa. St. 453. See also dissenting opinion of Redfield, J., in *Buch v. Squires*, 22 Vt. 494, and opinion of Lewis, C. J., in *Paul v. Carver*, 26 Pa. St. 223; *Nichols v. Lemcook Mfg. Co.*, 34 N. H. 345; *Fletcher v. Phelps*, 28 Vt. 261; *Wilder v. Harvey*, 1 McCord (S. Car.), 97; *Johnson v. Anderson*, 18 Me. 77; *Champlin v. Pendleton*, 13 Conn. 23; *Coxe v. Findley*, 33 Pa. St. 127; *People v. Law*, 34 Barb. (N. Y.) 503; *Adams v. S. & W. R. Co.*, 11 Barb. (N. Y.) 414; *Perkins v. Benson*, 28 Mich. 530; *Kings Co. Fire Ins. Co. v. Stearns*, 87 N. Y. 287; *Heycer v. Chicago & N. W. R. Co.*, 26 Wis. 624; *Hannibal Bridge Co. v. Schaubacker*, 57 Mo. 582; *Hughes v. Providence & Worcester R. Co.*, 2 R. I. 515; *Bangor v. Brown*, 33 Me. 315; *Palmer v. Dougherty*, 33 Me. 507; *English v. Brennan*, 60 N. Y. 609; *Chicago v. Rumsey*, 87 Ill. 348; *Higbee v. C & O. R. Co.*, 19 N. J. Eq. 276; *Smith v. Slocumt*, 75 Mass. 36; 77 Mass. 280; *Champlin v. Pendleton*, 13 Conn. 23; *Johnson v. Anderson*, 18 Me. 76; *Connor v. McDonald*, 16 S. & R. (Pa.) 390; *Union Burial Ground v. Robinson*, 5 Whart. (Pa.) 18; *Trutt v. Spotts*, 87 Pa. St. 339; *Robinson v. Myers*, 67 Pa. St. 9; *Tranlime v. Sell*, 14 W. N. C. (Pa.) 397.

FINAL.—Conclusive ; from which there is no appeal.¹

1. *Queen v. Hunt*, 6 E. & B. 409.

Final and conclusive.—Where the proceedings of an inferior court are declared by State to be final and conclusive, a superior court will not inquire whether the lower court has justly and properly exercised the powers confided to it, but will take care that it does not exercise powers which it does not legitimately possess. *Ackerman v. Taylor*, 4 Halst. (N. J.) 65.

A statutory provision that a report of commissioners, when confirmed by a court having jurisdiction, shall be final and conclusive "has reference to an appeal therefrom, not to the remedy by motion to set it aside for irregularity, fraud, or mistake." "All judgments are liable to be set aside for fraud, mistake, or irregularity."—*Matter of Application of Mayor*, etc., of N. Y., 49 N. Y. 150; but an agreement to refer, by which the referee's report was to be final and conclusive did not preclude parties from filing exceptions thereto,—*Mussina v. Hertzog*, 5 Binn. (Pa.) 387;—and in *Clarke v. Patterson*, 6 Binn. (Pa.) 128, a writ of error was allowed to a judgment which was, by statute, final and conclusive.

Final decision.—One from which there is no appeal or writ of error. *Moore v. Mayfield*, 47 Ill. 169; *Queen v. Hunt*, 6 E. & B. 409.

A statutory provision that the decision of tax-inspectors shall be final on a question of assessment, only concludes further investigation by the ministerial officers, and does not debar a party feeling himself aggrieved in the assessment of his property from the privilege of prosecuting or defending his rights in the courts. *McGehee v. Mathis*, 21 Ark. 40.

Final disposition of the matters embraced in a submission to arbitration is "such a disposition that nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation is required or can arise on the matter. It is such an award that the party against whom it is made can perform or pay it without any further ascertainment of rights or duties." *Colcord v. Fletcher*, 50 Me. 401. See notes to CAUSE, and DISPOSE OF.

Final division.—A provision in a will by which one fourth of the residuary estate is given to each of four persons, that, in case of the death of any of the legatees before "final division," his share shall go over, has reference to the year in which the law of England requires an estate to be settled; and, where a legatee died after

the expiration of a year from the death of testator, his personal representatives took, although there had been no division. *In re Wilkins*, *Spencer v. Dilworth*, 18 Ch. Div. 634; s. c., 50 L. J. R. Ch. D. 774.

Final passage.—Under a constitutional provision that "every bill shall be read on three different days in each house, and no bill shall become a law unless in its final passage it be read at length, etc.," its final passage is "the vote on its passage in either house of the general assembly, after it has received three readings on three different days in that house." *State v. Buckley*, 54 Ala. 613.

Final process.—Execution, q. v. *Amis v. Smith*, 16 Pet. (U. S.) 303.

Finally recover.—Under a statute providing that a plaintiff shall not be entitled to cost if he finally recover less than \$20, "finally recover" refers to "the ultimate judgment rendered in any court." *Fisk v. Gray*, 100 Mass. 191. The verdict is the sum finally recovered. *Joannes v. Pangborn*, 6 Allen (Mass), 243.

Final sailing.—A ship that has left port without an intention of returning, has finally sailed, within the meaning of a provision in its charter-party that an advance of freight should be made within eight days from her final sailing from port, although she was afterwards driven back by stress of weather. *Price v. Livingstone*, 53 L. J. R. Q. B. D. 118.

Final settlement.—"A final settlement is, as its terms import, a conclusive determination of all the past administration." *Sinis v. Waters*, 65 Ala. 445.

"The term 'final settlement' as applied to the administration of an estate is usually understood to have reference to the order of court approving the account which closes the business of the estate, and which finally discharges the executor or administrator from the duties of his trust, and ought to be so construed when there is nothing in the contest justifying or requiring a different construction." But in a statute providing that claims not filed at least 30 days before the final settlement of the estate shall be barred, it means presentation of the account for final settlement at the time fixed by law. *Roberts v. Spencer*, 12 Ind. 81; s. c., 13 N. E. Rep. 129.

Final trial.—This phrase in a provision in a declaration of rights, that "no person shall be compelled to pay costs except on conviction on final trial," means "that trial in a criminal case in a court of original trial jurisdiction upon which

FINAL JUDGMENTS AND DECREES, within the Meaning of the Acts of Congress Giving the Supreme Court of the United States Power to Review Final Judgments and Decrees of Inferior Courts.—The finality of a judgment or decree, within the meaning of these statutes, depends upon its effect in the particular cause in which it is rendered. If it determines that, it is final, although it may not close the litigation between the parties.¹ The judgment of nonsuit, however, seems to be an exception to this general rule. A writ of error, it has been held, will not lie on such a judgment in the circuit court.²

The decisions on the finality of judgments on the question of jurisdiction do not admit of the formulation of any general rule. A judgment of a circuit court, in a case coming originally before it on a plea to the jurisdiction, or what substantially amounts to such, deciding against its jurisdiction, is final.³ A judgment of the highest court of a State, declaring that a case is within the jurisdiction of the lower court, from which it has been removed, and remanding it to such court for further proceedings, is not final.⁴ An order of a circuit court⁵ or of the supreme court of a Territory,⁶ dismissing a writ of error, on a judgment in a lower court, for want of jurisdiction, is not final judgment within these statutes, and therefore a writ of *mandamus*, and not a writ of error, is the proper remedy. Before the passage of the act of March 3, 1875,⁷ it was held, for the same reason, that *mandamus* was also

such a sentence or judgment of conviction as is indicated could be entered." It does not apply to proceedings in an appellate court. *State v. Davis* (Fla.). 3 So. Rep. 467.

1. The city council of Charleston, exercising an authority under the State of South Carolina, enacted an ordinance by which a tax was imposed on stock of the United States; and in the court of common pleas of the Charleston district an application was made for a prohibition to restrain them from levying the tax, on the ground that the ordinance violated the Constitution of the United States. The prohibition was granted, and the proceedings in the case were removed to the highest court of the State. In that court it was held that the ordinance did not violate the constitution, and the judgment of the lower court was reversed. To this decision a writ of error was prosecuted to the supreme court of the United States. *Held*, that the judgment of the highest court of the State was a final judgment. Said Marshall, C. J.: "We think . . . that it was a final judgment in the sense in which that term is used in the 25th section of the judicial [*sic*] act. If it was applicable to those judgments and decrees only in which the right was finally decided,

and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import or than Congress could have intended. Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however deeply they might affect rights protected by the constitution, laws, or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue restraining a collector from collecting duties, and this court would not revise and correct the judgment. The word 'final' must be understood, in the section under consideration, as applying to all judgments and decrees which determine the particular cause." *Weston v. City Council of Charleston*, 2 Pet. 449.

2. *Evans v. Phillips*, 4 Wheat. 73.

3. *Ex parte Railway Co.*, 103 U. S. 794; *Ex parte B. & O. R. Co.*, 108 U. S. 566. But see *Ex parte Bradstreet*, 7 Pet. 634.

4. *Kimball v. Evans*, 93 U. S. 320; *Benjamin v. Dubois*, 118 U. S. 46.

5. *Insurance Co. v. Comstock*, 16 Wall. 258.

6. *Harrington v. Holler*, 111 U. S. 796.

7. 18 Stat. 472.

the proper remedy in the case of an order of a circuit court remanding, for want of jurisdiction, a suit removed to it from a State court.¹ It is, however, provided by section 5 of this act that such an order shall be reviewable by the supreme court on writ of error or appeal, as the case may be. But neither a writ of *mandamus* nor of error will lie on the denial, by a circuit court, of a motion for an order remanding a cause to the State court, whence it was removed.²

A judgment or decree touching the merits of a cause, to be final, must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance in the supreme court, the court below would have nothing to do but to execute the judgment or decree it had already rendered.³

1. *Railroad Co. v. Wiswall*, 23 Wall. 507.

2. *Ex parte Hoard*, 105 U. S. 578.

Said Waite, C. J.: "The distinction is obvious. An order remanding a cause is not a final judgment or decree from which ordinarily an appeal or a writ of error can be taken [See JUDGMENTS AND DECREES OF REVERSAL AND AFFIRMANCE under note 10]; and in *Ex parte Bradstreet* [7 Pet. 634] it was stated, as the reason for allowing the *mandamus*, 'that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the value of the matter in dispute exceeds the sum or value of two thousand dollars,'—now, of course, five thousand. If the cause be retained, it may go to final judgment or decree, and the reason assigned for the *mandamus* in case of dismissal does not exist. If it be improperly retained, and the objection presented on the record, the question may be brought here for review after final judgment if the amount involved is sufficient to give jurisdiction. We so held at this term in *Railroad Co. v. Koontz*, 104 U. S. 5. . . . The act of 1875 has given an appeal or a writ of error to this court for the review of orders to remand, without regard to the amount involved. *Babbitt v. Clark*, 103 U. S. 606. The same remedy has not been given if the cause is retained."

3. *Bostwick v. Brinkerhoff*, 106 U. S. 3; *Grant v. Phoenix Mut. L. Ins. Co.*, 106 U. S. 429; *St. Louis, I. M. & S. R. Co.*, 108 U. S. 24; *Ex parte Norton*, 108 U. S. 237; *Mower v. Fletcher*, 114 U. S. 127; *Dainese v. Kendall*, 119 U. S. 53. See also *Canter v. A. and O. Ins. Cos.*, 3 Pet. 507; *Holmes v. Jennison*, 14 Pet. 540; *Young v. Smith*, 15 Pet. 287; *Van Ness v. Van Ness*, 6 How. 62; *Montgomery v. Anderson*, 21 How. 386; *Wabash & Erie Canal v. Beers*, 1 Black, 54; *O'Dowd v. Russell*, 14 Wall. 402; *Crosby v. Bu-*

chanan, 23 Wall. 420; *Elliott v. Sackett*, 108 U. S. 132.

Judgments and Decrees on Demurrers.

—A judgment sustaining a demurrer to a rejoinder, and ordering that the defendants take nothing by their rejoinder, under the following circumstances, is not a final judgment: An information in the nature of a *quo warranto*, calling upon the president, directors, and company of the Miners' Bank, to show by what warrant they claimed the right to use the franchise, was filed by the United States. The defendants appeared, and pleaded that the privileges which they were exercising were conferred on them by an act of incorporation. To this plea, the plaintiff replied that the act of incorporation had been repealed. The defendants rejoined, averring that the repealing act was passed without any notice to them, or any opportunity afforded them of being heard in their defence, and without any evidence of the abuse and misuse of any of the liberties and franchises in question. To this rejoinder the plaintiff demurred, and the defendants joined in the demurrer. Said Taney, C. J.: "It is evident that this judgment is not a final one against the plaintiffs in error [the defendants below]. It merely decides that the rejoinder, and the matters therein contained, are not sufficient to bar the information, and that the demurrer ought to be sustained, and that the plaintiffs in error take nothing by their rejoinder. But there is no judgment of ouster against them, nor anything in the judgment which prevents them from continuing to exercise the liberties and privileges which the information charges them to have usurped. In order to make the decision a final one, the court, under the opinion expressed by them, should have proceeded to adjudge that the plaintiffs in error do not in any manner use the privileges and franchises in question, and that

they be forever absolutely forejudged and excluded from exercising or using the same, or any of them, in future." *Miners' Bank v. United States*, 5 How. 213. See also *De Armas v. United States*, 6 How. 103; *Holcombe v. McKusick*, 20 How. 552.

A decree overruling a plea of the Statute of Limitations and ordering the defendant to answer the bill is not a final decree. *Rutherford v. Fisher*, 4 Dall. 22.

An order directing the payment into court of a garnishee fund, claimed by a third party pending the determination of the right to it, is not a final judgment or decree. *Louisiana Bank v. Whitney*, 121 U. S. 284. To the same effect, in admiralty: *Cushing v. Laird*, 107 U. S. 69.

Injunctions.—A decree granting or refusing to grant an interlocutory injunction is not a final decree. *Lea v. Kelly*, 15 Pet. 213; *Reddall v. Bryan*, 24 How. 420. Nor is a decree dissolving an injunction without dismissing the bill. *Young v. Grundy*, 6 Cranch, 51; *Hiriart v. Ballon*, 9 Pet. 156; *McCollum v. Eager*, 2 How. 61; *Verden v. Coleman*, 18 How. 86; *Moses v. Mayor*, 15 Wall. 387; *Thomas v. Wooldridge*, 23 Wall. 283. But a decree dissolving an interlocutory injunction, and directing a sale of property, to prevent the sale of which the injunction was originally granted, has been held to be final. *Railroad Co. v. Bradleys*, 7 Wall. 575. A decree refusing to dissolve an interlocutory injunction is not a final decree. *Gibbons v. Ogden*, 6 Wheat. 448. A decree in favor of the complainant for a perpetual injunction, with costs, by which the whole law of the case before the court is settled, and nothing remains to be done unless a new application shall be made at the foot of the decree, is final. *French v. Shoemaker*, 12 Wall. 86. A decree granting a perpetual injunction in favor of the complainant as to certain matters in controversy, but leaving certain other matters open for further consideration, upon which the parties are to go on and take proof, is not final. *Brown v. Swann*, 9 Pet. 1. See also *Humiston v. Stainthorpe*, 2 Wall. 106.

Foreclosure Decrees.—In a suit brought for the foreclosure of a mortgage, a decree of foreclosure and sale is generally a final decree. Said Story, J., in *Whiting v. Bank of United States*, 13 Pet. 6: "The original decree of foreclosure and sale was final upon the merits of the controversy. The defendants had a right to appeal from that decree, as final upon those merits, as soon as it was pro-

nounced, in order to prevent an irreparable mischief to themselves; for, if the sale had been completed under the decree, the title of the purchaser under the decree would not have been overthrown or invalidated even by a reversal of the decree, and consequently the title of the defendants to the lands would have been extinguished and their redress upon the reversal would have been of a different sort from that of restitution of the land sold.

... Indeed, the ulterior proceedings are but a mode of executing the original decree, like the award of an execution at law." See also *Ray v. Law*, 3 Cranch, 179; *Perkins v. Fourniquet*, 14 How. 330; *Orchard v. Hughes*, 1 Wall. 73; *Railroad Co. v. Soutter*, 2 Wall. 440. But a decree of foreclosure and sale is not final so long as the amount due upon the debt must be determined, and the property to be sold ascertained and defined. "Until this is done," said the court in *Railroad v. Swasey*, 23 Wall. 405, "the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified. Such adjudications require the action of the court. A reference to a master to ascertain and report the facts is not sufficient. A master's report settles no rights. Its office is to present the case to the court in such a manner that intelligent action may be there had; and it is this action of the court, and not the report, that finally determines the rights of the parties. See also *Grant v. Phoenix Ins. Co.*, 106 U. S. 429; *Parsons v. Robinson*, 122 U. S. 112; *Burlington, etc., R. Co. v. Simmons*, 123 U. S. 52. The order of seizure and sale called "executory process," made in *Louisiana* when the mortgage "imports a confession of judgment," is in substance a decree of foreclosure and sale, and therefore a final decree, especially when made after objections have been made and heard. *Marin v. Lalley*, 17 Wall. 14.

Reference to a Master.—The complainants filed their bill in the circuit court for the eastern district of Louisiana, claiming, as heirs, a part of the property of Joseph and Lavinia Erwin, deceased. Erwin left a will. His property, real and personal, was much embarrassed, the persons claiming an interest in the succession were numerous, and from the loose manner in which the property was managed by the testator in his lifetime,

and by those who succeeded him, great difficulty was found in the distribution of the estate. The circuit court, having ascertained the heirship of the claimants, and their relative rights in the succession, referred the matter to a special master, to take an account of the successions of the said Joseph and Lavinia Erwin in so far as it might be necessary to state the accounts between the plaintiffs and the heirs-at-law, the defendants in the suit, to ascertain the property in kind that remained in the possession and control of either of the defendants; to ascertain what had been sold, and the prices of the same, and the profits thereof; to ascertain all the incumbrances that had been discharged by either of the defendants on the same, and to make allowances for payments, and permanent and useful improvements, and just expenses; to ascertain what might be due to the said plaintiffs from either defendant; and to make a special report of any matters that might be requisite to a full adjustment of the questions in the cause. *Held*, not to be a final decree. *Craighead v. Wilson*, 18 How. 199. See also *Perkins v. Tournequet*, 6 How. 206; *Pulliam v. Christian* 6 How. 209; *Crawford v. Points*, 13 How. 11; *Beebe v. Russell*, 19 How 283; *Ogilvie v. Knox Ins. Co.*, 2 Black, 539.

A decree in admiralty, of the circuit court, of restitution, with costs and damages, the report of the commissioners appointed to ascertain the damages not having been acted on, is not final. *The Palmyra*, 10 Wheat. 502; *Chace v. Vasquez*, 11 Wheat. 428.

A decree awarding to a patentee a permanent injunction, and referring the cause to a master to take an account of the gains and profits, and to report the amount of the same to the court, is not a final decree. *Humiston v. Stainthorp*, 2 Wall. 106; *Barnard v. Gibson*, 7 How. 650.

Upon a petition filed by A, alleging that she was the owner of an undivided half of certain real estate that was not susceptible of a division, and praying for a partition thereof by sale, the court decreed that she was entitled to one half of the property, and referred the case to a master, "to proceed to a partition according to law, under the direction of the court." *Held*, that the decree was not a final decree. Said Waite, C.J.: "Here the several interests of the parties in the land have been ascertained and determined, but this is merely preparatory to the final relief which is sought; that is to say, a setting off to the complainant in severalty her share of the property in

money or in kind. This can only be done by a further decree of the court. . . . In this case a partition by sale was asked for, because the property was not susceptible of division in kind. That the court has not ordered, and the reference to the master was undoubtedly to ascertain, among other things, whether such a proceeding was in fact necessary in order to divide the property. The master was in everything to proceed under the direction of the court. He had no fixed duty to perform. He was the mere assistant of the court, not in executing its process, but in completing its adjudication of the petition which was asked." *Green v. Fisk*, 103 U. S. 518. Reference to a master, however, does not necessarily prevent a decree from being final.

In *Forgay v. Conrad*, 6 How. 201, the following general rule was laid down by Taney, C.J.: "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a 'final' one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed." The facts of this case were as follows: The bill was filed by the appellee, as the assignee in bankruptcy of a certain Banks, in the circuit court for the district of Louisiana, against the appellants, Banks, the bankrupt, and three other defendants. The object of the bill was to set aside sundry deeds made by Banks for lands and slaves, which the complainant charged to be fraudulent, and for and on account of the rents and profits of the property so conveyed; and also for an account of sundry sums of money which he alleged had been received by one or more of the defendants, as specifically charged in the bill, which belonged to the bankrupt's estate at the time of his bankruptcy. The case was proceeded in until it came on for hearing, when the court passed a decree declaring sundry deeds therein mentioned to be fraudulent and void, and directing the lands and slaves therein mentioned to be delivered up to the complainant, and also directing one of the defendants named in the decree to pay him a certain sum of money, received from the bankrupt in fraud of his credi

tors, and "that the complainant do have execution for the several matters aforesaid in conformity with law and the practice prescribed by the rules of the supreme court of the United States." The decree then directed the master to take an account of the profits of the lands and slaves ordered to be delivered up, from the time of the filing of the bill until the property was delivered, or to the date of the master's report, and also an account of the money and notes received by one of the defendants (who did not appeal) in fraud of the creditors of the bankrupt. The decree concluded in the following words: "And so much of said bill as contains or relates to matters hereby referred to the master for a report is retained for further decree in the premises; and so much of said bill as is not now, nor has been heretofore, adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs."

Among the deeds set aside as fraudulent was one from the bankrupt to Ann Fogarty, for two pieces of land and sundry slaves which she afterwards conveyed to Forgay, the other appellant. Both of these deeds were declared null and void, and the land and the negroes directed to be delivered to the complainant for the benefit of the bankrupt's creditors. This part of the decree was one of the matters of which the complainant was to have execution. But the account of the rents and profits of this property was, like other similar accounts, referred to the master, and reserved for further decree. The appeal was taken by the said Forgay and Ann Fogarty; and they alone were interested in that portion of the decree last above mentioned. The bankrupt and the three other defendants did not appeal. These three defendants claimed other property which had been conveyed to them at different times and by separate conveyances. It was held that the decree of the circuit court was a final decree upon which an appeal would lie.

In *Craighead v. Wilson*, 18 How. 199, the decision in the case of *Forgay v. Conrad* was said by McLean, J., to constitute an exception to the general rule recognized by the authorities, and to have been made under the peculiar circumstances of the case. "If the defendants principally interested," said he, "could not take an appeal until the return of master, their property, under the decree, would have been disposed of beyond the reach of the appellate court, so that an appeal would be useless. This

was the principal ground on which the appeal was sustained, although it was stated that this part of the decree was final." But in *Thompson v. Dean*, 7 Wall. 342, and in *Winthrop Iron Co. v. Meeker*, 109 U. S. 180, the general rule formulated by Taney, C.J., in *Forgay v. Conrad*, was quoted with approval.

From the opinions delivered by Waite, C.J., in *St. Louis, I. M. & S. R. Co. v. South. Exp. Co.*, 108 U. S. 24, and *Winthrop Iron Co. v. Meeker*, 109 U. S. 180, the following rule may be adduced: Where the matter referred to the master does not enter into the merits of the case, but relates merely to its administration, and is only an incident of what is sued for, the reference does not prevent the decree from being final.

In *St. Louis, I. M. & S. R. Co. v. South. Exp. Co.*, 108 U. S. 24, the express company filed a bill in equity against the railroad company in a circuit court, to enjoin the railroad company interfering with or disturbing it in the enjoyment of the facilities it then had for the transaction of its express business over the railroad company's road, so long as it conformed to the latter's regulations, and paid all lawful charges for the business. The court entered a decree granting a perpetual injunction and fixing the maximum charge to be made against the express company, "reserving to either party a right at any time hereafter, to apply to this court, according to the rule in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed." It adjudged costs against the railroad company, and awarded execution for them. It further provided: "Whereas it is alleged by the complainant that since the commencement of this suit and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of the complainant, made unjust discrimination against the complainant, and has charged the complainant unjust and unreasonable rates for carrying express matter, therefore it is ordered that the complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto, as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon."

By a subsequent order of the court, a master was appointed for the purposes stated. It was held that the original order was a final decree. Said Waite, C.J.: "The controversy which the ex-

press company had referred to the master, about the compensation to be paid for the transportation during the pendency of the suit, does not enter into the merits of the case. All such matters relate to the administration of the cause, and the accounts to be settled under the present order are of the same general character as those of a receiver who holds property awaiting the final disposition of a cause. They are incidents of the main litigation, but not necessarily a part of it. The supplemental order made after the decree relates only to the settlement of the accounts which accrued pending the suit."

A direction for a taxation of costs in a decree will not generally prevent it from being final. *Craig v. Steamer "Hartford,"* 1 McAll. (U. S.) 91. But when it is the evident intention of the court rendering the decree that it shall not be taken as final, it will not be so considered by the supreme court; and an appeal from it will be dismissed. *Wheeler v. Harris*, 13 Wall. 51.

A right given in a decree to apply for modifications and directions does not prevent the decree from being final. *Stovall v. Banks*, 10 Wall. 583; *St. Louis, I. M. & S. R. Co. v. South. Exp. Co.*, 108 U. S. 24; *Winthrop Iron Co. v. Meeker*, 109 U. S. 180.

Judgments and Decrees of Affirmance and Reversal.—A judgment or decree reversing a final judgment or decree of a lower court, and remanding the cause to such court for further judicial proceedings, is not final. *Houston v. Moore*, 3 Wheat. 433; *Winn v. Jackson*, 12 Wheat. 135; *Brown v. Union Bank of Florida*, 4 How. 465; *Pepper v. Dunlap*, 5 How. 51; *Tracy v. Holcombe*, 24 How. 426; *Rankin v. State*, 11 Wall. 580; *Moore v. Robbins*, 18 Wall. 588; *St. Clair Co. v. Lovingson*, 18 Wall. 628; *Parcelo v. Johnson*, 20 Wall. 653; *McComb v. Commissioners, etc.*, 91 U. S. 1; *Butterfield v. Usher*, 91 U. S. 246; *Zeller v. Switzer*, 91 U. S. 487; *Baker v. White*, 92 U. S. 176; *Davis v. Crouch*, 94 U. S. 514; *Bostwick v. Brinkerhoff*, 106 U. S. 3; *Johnson v. Keith*, 117 U. S. 199. But a judgment reversing a final judgment of a lower court, and remanding the cause to such court merely for the entry of judgment, is final. *Mower v. Fletcher*, 114 U. S. 127. Similarly, a judgment reversing a final judgment, and remanding the cause to the inferior court, with directions to enter a modified judgment, if the defendant consent thereto, is final upon such consent being given. *Atherton v. Fowler*, 91 U. S. 143.

A judgment simply reversing a final

judgment of an inferior court, and awarding costs, since it leaves the dispute between the parties still open, is not final. *Mayberry v. Thompson*, 5 How. 121.

A decree in admiralty of a circuit court, affirming a final decree of a district court, without fixing any sum which the successful party is to recover, is not final. Said the court: "An appeal in admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings if necessary, or, if asked for, is contemplated—a trial in which the judgment of the court below is regarded as though it had never been rendered. A new decree is to be made in the circuit court. This decree is to be executed by the order of that court, and the record remains there. The case is not sent back to the district court for executing the decree, or for any purpose whatever, and that court has nothing further to do with it. The decree should therefore be complete within itself. In the case before us, the decree fixes no sum which the successful party is to recover. . . . An order affirming a decree in another court is neither, in express terms nor by necessary implication, a judgment or decree for the amount of the judgment in that court. The costs of the lower court, and the interest on its judgment to the date of the decree or judgment on appeal, are to be added to it, and, though they may be computed by the clerk, they should have the judicial consideration of the court." *The Lucile*, 19 Wall. 73.

A decree affirming or reversing an interlocutory order of a lower court, and remanding the cause to such court for further judicial proceedings, is not final. *Gibbons v. Ogden*, 6 Wheat. 448; *Verden v. Coleman*, 18 How. 86; *Readdall v. Bryan*, 24 How. 420; *Moses v. Mayor*, 15 Wall. 387; *Dainese v. Kendall*, 119 U. S. 53; *Grant v. Phoenix Ins. Co.*, 121 U. S. 118. But a decree of reversal, upon an appeal from an interlocutory order, is final when it makes a final disposition of the cause. It was so held where, upon an appeal from an interlocutory order made by an inferior court of a State, granting a temporary injunction, the highest court of the State reversed the order, and remanded the cause to the lower court, with directions to dismiss the complaint. *Commissioners, etc., v. Lucas*, 93 U. S. 108.

Where the highest court of a State renders a judgment, and sends the judgment to a court below for execution, and, with the judgment, the record, the judgment

In admiralty, a decree on the merits may be final as to some of the parties to the cause, without being so as to the others.¹

So far as its form is concerned, a judgment upon the merits of a cause is final when execution can be issued on it.²

An order of process to carry a final decree or judgment, on the merits of a cause, into execution, if it is a mere ministerial act, necessarily growing out of the decree or judgment which is being carried into effect, is not itself a final decree or judgment.³ But an order awarding a peremptory writ of *mandamus*, that directs the collector of taxes of a county to collect a tax that has been duly levied and extended on the county taxbooks for the purpose of paying a judgment recovered against the county, is a final judgment.⁴

A decision on a matter arising incidentally in a cause, but presenting independent issues, may be a final decree or judgment.⁵

becomes final from the time that it is entered in the lower court. *Green v. Van Buskerk*, 3 Wall. 448.

1. Several libels were filed in a district court, for the condemnation, as prize of war, of large quantities of cotton and other property captured on the interior navigable waters of the United States, and on land adjacent thereto. On motion, these libels were consolidated, and various claims were interposed in the consolidated suit for portions of the property libelled. Among these claims was that of W. & D. They denied the validity of the capture, and insisted on their title to a portion of the cotton. Upon the hearing of the cause as to this claim, an order was made dismissing the claim, with costs, for which execution was ordered. It was held that the decree was final, for the purpose of an appeal, as to W. & D. Said the court: "It appears from the record that the decree disposed of the whole matter in controversy upon the claim of Withenbury & Doyle. It was final as to them and their rights, and it was final also so far as the claimants and their rights are concerned as to the United States." *Withenbury v. United States*, 5 Wall. 879.

2. *Wilson v. Daniel*, 3 Dall. 401; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291; *Whitaker v. Bramson*, 2 Paine (U. S.), 209.

3. *Blossom v. Railroad Co.*, 1 Wall. 65.

An order of sale in execution of an original decree is not a final decree. *Carr v. Hoxie*, 13 Pet. 460. Nor is an order directing that an attachment be issued against a party to a suit, who refuses to execute a conveyance in compliance with a decree of the court which provides

that a conveyance of property shall be made upon the payment of a sum of money. *McMicken v. Perin*, 20 How. 133. Nor, where real estate has been sold under a decree, is an order of the court awarding process to put the purchaser into possession, a final decree. *Callan v. May*, 2 Black. (U. S.) 541.

4. *Davies v. Corbin*, 112 U. S. 36. Said Waite, C.J.: "While the writ of *mandamus*, in cases like this, partakes of the nature of an execution to enforce the collection of a judgment, it can only be got by instituting an independent suit for that purpose. There must be, first, a showing by the relator in support of his right to the writ; and, second, process to bring in the adverse party, whose action is to be coerced, to show cause, if he can, against it. If he appears and presents a defence, the showings of the parties make up the pleadings in the cause, and any issue of law or fact that may be raised, must be judicially determined by the court before the writ can go out. Such a determination is, under the circumstances, a judgment in a civil action brought to secure a right; that is to say, process to enforce a judgment." See also *Memphis v. Brown*, 94 U. S. 715.

5. An order of a circuit court, in an equity suit, made upon the petition of the complainant, who was suing as trustee for the benefit of himself and the other bondholders of a railroad company, directing that he be paid his cost and expenses out of a fund in court, the balance of the fund remaining in court in course of administration, is a final decree. Said Bradley, J.: "Though incidental to the cause, the injury was a collateral one, having a distinct and independent character, and received a final deci-

A decree on a cross-bill, however, is not a final decree.¹

There is quite a large class of orders involving merely the procedure in a cause that are dependent upon the sound discretion of the court. These are not final judgments or decrees.²

sion." Trustees v. Greenough, 105 U. S. 527.

A decree in a suit for the foreclosure of a mortgage on a railroad, fixing the compensation to be paid to the trustees under the mortgage from the fund realized from the sale, is a final decree. Said the court: "It was final in its nature, and was made in a matter distinct from the general subject of litigation—a matter by itself, which affected only the parties to the particular controversy, and those whom they represented." Williams v. Morgan, 111 U. S. 684.

A decree foreclosing a mortgage and ordering a sale of the road had been obtained in a district court, in a suit by one A and others against a railroad company; and the road, being offered for sale by the marshal, under the decree, B, the appellant in this case, made a bid for the property. The sale was suspended at this point and never actually proceeded further, the amount of the decree being subsequently paid by the company. B then went into court, and, by petition, prayed to have the sale completed and confirmed. But his application was refused. It was held that this order of refusal was a final decree. Blossom v. Railroad Co., 1 Wall. 655; 3 Wall. 196. See also Minnesota Co. v. St. Paul Co., 2 Wall. 634.

A decree confirming a sale in foreclosure proceedings is final if, for relief against the sale, resort can alone be had to an appeal from the decree of confirmation. Sage v. Railroad Co., 96 U. S. 712. A decree distributing the proceeds of a sale under a decree of foreclosure is a final decree. But such a decree, being dependent upon the decree of foreclosure, the reversal of the latter leaves the former without support, and it falls of itself by reason of that reversal, vitiated by the common error. Chicago & V. R. Co. v. Fosdick, 106 U. S. 83.

A large number of the creditors of D. sued him in the circuit court for the eastern district of Louisiana; and in one of these actions a writ of attachment was issued and levied on the goods of D. by the marshal, who took possession of them. In this action G. intervened by petition, as he was authorized to do by the laws of Louisiana and by the case of Freeman v. Howe, 24 How. 450, alleging that a seizure under a writ of the state court in his favor had been made

by the sheriff before the marshal's levy, and he claimed a priority of lien on those goods. The goods were sold under an order of the circuit court, *pendente lite*, and the proceeds distributed to other parties, and G.'s intervention dismissed, on the ground that the sheriff had made no seizure prior to that of the marshal. G., by writ of error, took the case to the supreme court. Said that court: "The order dismissing G.'s intervention disposes of his rights, and is a final judgment as to that issue, as to which he has a right to a writ of error. The order distributing the proceeds of the sale is also final, as it disposes of the fund." Gumbel v. Petkin, 113 U. S. 545. But see Bayard v. Lombard, 9 How. 530, and Curtis v. Pehtpain, 18 How. 109.

Where, in the progress of a suit for the foreclosure of a mortgage, a receiver was appointed against whom, after the foreclosure and sale of the mortgaged property, a decree was rendered directing him to pay into court the balance found due from him in the settlement of his accounts, it was held that the decree was final for the purposes of an appeal. Hinckley v. Gilman, etc., R. Co., 94 U. S. 467.

A receiver in a cause, under the direction of the court, surrendered a fund in his hands to the defendant. The cause being taken to the Supreme Court of the United States by appeal, the decree of the lower court was reversed. Thereupon the complainant obtained an order on the receiver to file his account. This being done, and it appearing therein that he had delivered the fund to the defendant, the complainant filed exceptions on the ground that the fund had been delivered without due authority. The auditor appointed, reported against the exceptions and in favor of the receiver. This report was confirmed by the court. Held, that the decree of confirmation was a final decree. Hovey v. McDonald, 109 U. S. 150.

1. In Ayres v. Carver, 17 How. 591, said Nelson, J.: "The decree, whether maintaining or dismissing the [cross] bill, disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case." See also *Ex parte* Railroad Co., 95 U. S. 221.

2. The following orders have been held

FINAL JUDGMENTS AND DECREES in the State Courts.—See DECREES ; JUDGMENT.

FIND.—See note 1.

not to be final judgments or decrees, because the matters upon which they are made are within the sound discretion of the court: An order refusing to allow an amendment to the declaration in an action of ejectment, for the purpose of enlarging the term laid. *Walden v. Craig*, 9 Wheat. 576. An order refusing to reinstate a cause after nonsuit. *United States v. Evans*, 5 Cranch, 280. A similar order after the cause has been dismissed by agreement of the parties. *Welch v. Mandeville*, 7 Cranch, 152. An order refusing to grant a new trial. *Doswell v. De la Lanza*, 20 How. 29. An order, in an action of ejectment, refusing the motion of the tenant in possession, who, though having received notice, has neglected to have himself made defendant, to set aside the judgment rendered against the casual ejector, and for leave to defend the suit. *Connor v. Peugh*, 18 How. 394. An order refusing to open a decree and grant a rehearing. *Brockett v. Brockett*, 2 How. 238; *Wylie v. Cox*, 14 How. 1; *McMickin v. Perin*, 18 How. 507; *Steines v. Franklin Co.*, 14 Wall. 15. An order quashing or refusing to quash an execution. *Boyle v. Zacharie*, 6 Pet. 648; *Evans v. Gee*, 14 Pet. 1; *Mc-Cargo v. Chapman*, 20 How. 555. An order refusing to quash a forthcoming bond conditioned upon the production of the goods taken in execution on the day of the sale, on the ground that such bond is to be regarded as a part of the process of execution. *Amis v. Smith*, 16 Pet. 303. An order refusing to revoke a writ of assistance under the following circumstances: A circuit court, in a foreclosure suit, appointed a receiver of the rents and profits of the mortgaged land, and ordered that all persons who had come into possession thereof *pendente lite* should surrender it to him on his demand; on the refusal of the person in possession, who was not a party to the suit, and who claimed under a distinct title, so to do, a writ of assistance was issued commanding the marshal to eject her; she thereupon addressed a petition to one of the judges at chambers, praying that the writ be revoked. *Hentig v. Page*, 102 U. S. 219. An order setting aside a sheriff's return to a writ of execution, and awarding an *alias*. *Wells v. McGregor*, 13 Wall. 188. An order awarding a writ of restitution by which

one of the parties to a suit is to be restored to the possession of a tract of land from which he has been improperly removed under the process of the court. *Smith v. Trabue*, 9 Pet. 4; *Gregg v. Forsyth*, 2 Wall. 56; *Barton v. Forsyth*, 5 Wall. 190. An order refusing to enter an exoneretur of bail. *Morsell v. Hall*, 13 How. 212. A judgment on a writ of error *coram vobis*. *Pickett v. Legerwood*, 7 Pet. 144. An order refusing the United States a certificate of reasonable cause of seizure, under sec. 970 of the Rev. Stats., where an information is filed against a distillery for alleged violation of the revenue laws, and the judgment is in favor of the claimant. *United States v. Abatoir Place*, 106 U. S. 160.

But an order striking out an answer does not depend upon the discretion of the court, and is a final judgment. Said the court: "There is undoubtedly a large class of cases involving the procedure merely in a cause, in which the court acts as in its discretion it thinks best, and where no appeal can be taken from its decision. . . . The rule we are speaking of has sometimes been held to apply to an order refusing to strike out an answer (4 How. Pr. (N. Y.) 432), but it does not apply to an order which strikes out an answer. That is not a mere procedure in the cause; it is the ending of the cause, leaving the action undefended and with the right to immediate judgment." *Fuller v. Claflin*, 93 U. S. 16.

1. To Find a Defendant to Serve Process on Him.—A statute of *New York* passed June 30, 1853, provides that "whenever it shall satisfactorily appear to any court, or any judge of the supreme court, or any county judge, by the return or affidavit of any sheriff, deputy-sheriff, or constable authorized to serve or execute any process or paper for the commencement or in the prosecution of any action or proceeding, that proper and diligent effort has been made to serve any such process or paper on any defendant in any such action, residing in this State, and that such defendant cannot be found, or, if found, avoids or evades such service, so that the same cannot be made personally, by such proper diligence and effort, such court or judge, may, by order, direct" a substituted service. In an appeal from an order denying defendants' motion to set aside an order made for a substituted service of the sum-

mons and complaint on the defendant, Daniel S. Youngs, it appears that the summons and complaint were served on the other defendant, the wife of Daniel, at her residence, by a deputy sheriff, and that she informed him that her husband was ill within the house, and declined to give him permission to see him or to serve him. It was held that the motion to vacate was properly denied. Said Sanford, J.: 'If, therefore, it sufficiently appeared by the affidavit upon which the order was made, that the defendant Daniel S. Youngs could not be found, no question being made as to the earnestness and diligence of the effort to find him, the order was properly denied. I think the word found as used in the statute in its technical sense, is the equivalent of the Latin word *invenio*, which has long been employed in legal practice. Indeed, the two words are synonymous, as well in their general as in their technical use. 'To find,' says Webster, coincides in origin with *venio*, but in sense with *invenio*.' And the literal signification of *invenio* is to come upon, to get at. The primary definition of find as given by Webster, is to come to, to meet; and hence to reach, to attain to, to arrive at. It appears by the affidavit upon which he order now in question was made, that the deputy charged with the service of the summons in this suit was quite unable to reach or get at the defendant so as to serve him personally; and such inability afforded sufficient warrant for resorting to the remedy which the statute affords in cases where the defendant cannot be found, even though no attempt may have been made by the defendant to avoid or evade such service." Freedman, J., concurred. Curtis, Ch. J., although concurring in the judgment of the court, put his decision upon different grounds. He thought that under the facts of the case the defendant, D. S. Y., through his wife, who was his agent, or acting for him on the premises, at the time, declined or avoided service, and that the order for substituted service was authorized thereby. *Carter v. Youngs and Wife*, 42 N. Y. Super. Ct. 169.

A statute of *Illinois* provides that "it shall not be lawful for any plaintiff to sue defendant out of the county where the latter resides or may be found," etc. In construing this statute in a case in which person was falsely charged with felony, arrested and carried from his home for the sole purpose of obtaining service of civil process upon him, the court said: "Was the defendant 'found' in the county where service was had, within the meaning of the statute? . . . If a man voluntarily leaves his residence, and goes to another

county, or if seized, when properly chargeable with crime, and taken to another county, he might be said to be found there, within the sense of the word as used in the statute; but it would be a base and utter perversion of the object of the law to permit an arrest upon false and fraudulent pretence, and the abduction of a man, for the sole purpose of obtaining service in a civil proceeding." *McNab v. Bennett*, 66 Ill. 157.

Where foreign corporations establish agencies in a state where laws provide that they may be summoned by process served upon such agents, they are "found" within the district in which such agent is doing business, within the meaning of the act of Congress of March 3, 1875, which provides that an action shall be brought in the district where the defendant is an inhabitant, or in which he may be found; and they may be served in the same manner in suits brought in the courts of the United States. *M. & M. Distilling Co. v. Ins. Cos.*, 12 Fed. Rep. 474. See FOREIGN CORPORATIONS.

To find help.—A contract to pay a stipulated price for removing pianos, by the piece, and "to find help" to aid in the removal, does not make the owner liable for the use of an apparatus invented, made, and used by the contractor to facilitate the work of removal; although the use of such apparatus may have saved the owner the necessity of a considerable portion of the help he agreed to find. An agreement to find help in such case, is an agreement to furnish manual labor, not to pay for the use of such an implement. *Ladd v. Patten*, 66 Me. 97.

Found committing an offence.—By 24 & 25 Vict. c. 96, § 103, it is provided that "any person found committing any offence" under the act (*inter alia*, obtaining money under false pretences), "may be immediately apprehended, without a warrant, by any person." By sec. 113, it is provided that notice in writing of any action, "against any person for anything done in pursuance of the act," shall be given to the defendant one month at least before the commencement of the action. A purchased an article of B, and directed him to take it to his house and ask for payment. B left the article at A's house at one P. M., and was paid for it by A's butler. A returned at three P. M., and was informed that the butler had paid for the article; and believing, although erroneously, that he himself had paid B for it at the time of the purchase, immediately sent for a policeman and ordered him to arrest B on a charge of obtaining money under false pretences. The policeman and

A's butler at once went in pursuit of B., and apprehended him at 10 P. M. In an action by B against A for wrongful arrest, of which no notice was given to A, it was held that B was "found committing the offence," if at all, at 1 P. M., and the pursuit not having been commenced till A's return at 3 P. M., A could not have believed he was acting in pursuance of the statute, and was not entitled to notice. Said Keating, J., "It was, in fact, a fresh pursuit, not on the commission of the offence, but in the discovery of it." *Downing v. Capel*, L. R. 2 C. P. 461.

In an action for false imprisonment, it appeared that the defendant was about to proceed by train from O. to R., and he left a box containing eggs on the platform at the railway station, while he went into the refreshment room; on his return the box was gone, and as the train was about to start, he was obliged to get into the train without searching for it. The first place at which the train stopped was R., where he got out and went along the train with the guard, and found his box under the seat in a third-class carriage, in which the two plaintiffs were seated. The conduct of the plaintiffs was suspicious, and they were subsequently arrested and imprisoned at the request of the defendant. For this imprisonment the present action was brought. *Held*, that the plaintiffs were "found committing the offence," under the act of 24 & 25 Vict., at R. Said Cockburn, C.J.: "If a felony had been committed, I think it clear the plaintiffs would have been found committing the offence at Reading. It was, indeed, argued for the plaintiffs that the offence was committed, if anywhere, at Oxford, as the box was left by the defendant on the platform there; that it was taken thence by some one and put into the carriage in which the plaintiffs were, where it was found at Reading. No doubt, if the box was feloniously taken at Oxford, and put into the carriage, the offence was complete at Oxford, as then there must have been an *asportavit* there, any removal, however slight, amounting to an *asportavit*. But if a stolen chattel is carried over a considerable space by the thief, the *asportavit* continues as long as the removal continues, and the taking, in point of law, continues too. So that, if the plaintiffs did steal the box at Oxford, though the defendant would have been justified in arresting them there, yet as they were still carrying the box away, the defendant would have been justified in arresting them at Reading; for in law and in fact they would have been there found committing the offence of larceny." *Griffith v. Taylor*, L. R. 2 C. P. Div. 194.

Found intoxicated.—An act of *Connec-*

ticut provides that "if any person shall be found intoxicated, he shall, on conviction thereof, pay a fine," etc. Where the complaint of a grand juror for a violation of this section alleged, that on a specified day the defendant "was drunk and intoxicated, whereby he was disabled and deprived of his reason," but did not aver that he was "found" in that condition, it was held that such complaint was insufficient. *State v. Bromley*, 25 Conn. 6.

Found to be of unsound mind.—By 14 & 15 Vict., c. 81, § 1, if any person shall be indicted for or charged with any crime or offence in any court in India, and shall be acquitted of or not be tried for such crime or offence, on the ground of his being found to be of unsound mind, he may be removed to England in the manner prescribed by the act. A European British subject in India was arrested for homicide. The magistrate before whom the charge was made having seen the prisoner, and received medical testimony on oath as to the state of his mind, deemed him insane and unfit to be tried, and so reported to the government. Upon an order of the government, thereupon made, he was taken to England, and upon his arrival a royal warrant was issued, under section 2 of the act, for his reception into a lunatic asylum, where he was accordingly kept. *Held*, that the prisoner was charged with a crime in a court, and not tried on the ground of being "found" to be of unsound mind, within the meaning of section 1, and that his detention was lawful. Said Denman, J.: "An undoubted difficulty arises, which has been strongly urged, that the very meaning of the words, 'found to be of unsound mind,' contemplate something different from a mere opinion formed by a magistrate, though based upon his own view and upon extremely good evidence of the very person who ought to be examined upon questions of this kind. That difficulty, which at first struck me and seemed insuperable, is perhaps rendered greater by the word 'found' being used in 39 & 40 Geo. III., ch. 94, § 1, where 'found' obviously does mean 'found by a jury to be of unsound mind.' But it cannot be limited here, I think, so far as to render it only applicable to cases where insanity is found by a jury, because, whatever interpretation is put upon the previous words, 'indicted for or charged with any crime or offence,' if they are different, which they certainly are, they must apply to those cases in which a magistrate has power to convict a person of an offence, that is to say, such an offence as is punishable by magistrates without calling in a jury at all." *In re Maltby*, L. R. 7 Q. B. Div. 18.

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I. DEFINITION.—One who finds and lawfully takes possession of the personal property of another, which was then lost.²

II. WHAT CONSTITUTES LEGAL "FINDING."—To constitute a legal finding, three things are necessary, to wit:

1. The property must have been legally lost. (See IV. *infra*.)
2. The finder must take legal possession of the thing found. (See III. *infra*.)
3. The finder must act innocently in the matter, and with entire honesty and good faith toward the owner. If, at the time of finding, he knows the owner of the lost property, or has the means at hand of knowing him, or reasonably believes that he can be found, and, with felonious intent, converts the property to his own use, he is guilty of larceny.³

1. This article excludes from consideration the subjects of treasure-trove, of wrecks and goods derelict at sea, of goods waived or abandoned by a thief in his flight, and of estrays, to which different rules apply; also the subject of goods abandoned with the intention of entirely relinquishing them, whereby the owner is at once divested of all property therein, and they become the property

of the first occupant. 1 Bl. Com. 296. "Quod enim nullius est, ratione naturali occupanti conceditur." "Res nullius, naturaliter fit primi occupantis."

2. Bouv. L. Dict., tit. "Finder;" Rapalje and Lawrence's Law Dict., tit. "Finder of Lost Property."

3. **Good Faith—Larceny of Finder.**—Cases in which the question for decision is whether there has been larceny of lost

property on the part of a finder, seem to be of frequent occurrence. The question of larceny, however, depends upon the question whether the finder of lost property is bound to exercise good faith toward the owner thereof, and, if so, what degree of good faith he is bound to exercise. It is important, therefore, that the law on this subject should, if possible, be clearly defined, and should be well understood. In 1 Bishop Cr. Law, § 207 (and see the cases there cited), the rule is laid down that larceny is composed of the act of trespass and the superadded intent to steal; and that larceny is not committed when this trespass and this intent do not exist at the precise moment together. Now, trespass consists in an unlawful taking—an unlawful possession. But, it may be said, the taking—the possession—of a finder, of lost property, is lawful; where, then, is the trespass, and where the larceny? (See *People v. Anderson*, 14 Johns. (N. Y.) 294; s. c., 7 Am. Dec. 462. This is the view apparently taken of this question in England in the time of Lord Coke; and from the rule laid down by him (3 Inst. 107) and others (for a collection of these old authorities see the opinion of Parke, B., in *Reg. v. Thurborn*, 1 Den. Cr. Cases, 387 [1849], and the opinion of the court in *Wilson v. People*, 39 N. Y. 459 [1868]), it seems to have been held at that time that there could be no larceny of lost property. And in *Tennessee*, in *Porter v. State*, Mart. & Yerg. 226, and several subsequent cases, this position was distinctly assumed. Says a writer in 1 Crim. Law Mag. 214, in a note to *State v. Dean*: "In Tennessee, however, it would appear that lost property cannot be the subject of larceny, on the ground that there must be a trespass in the taking; and that, if goods are lost, there is no possession upon which there can be a trespass; and they hold that, even where the finder knows the owner, it is not larceny." And he cites, in support, *Porter v. State*, M. & Y. (Tenn.) 226; *Wright v. State*, 5 Yerg. (Tenn.) 154; *Felter v. State*, 9 Yerg. (Tenn.) 397; *Lawrence v. State*, 1 Humph. (Tenn.) 228; *Pritchett v. State*, 2 Sneed (Tenn.), 285; and *Pyland v. State*, 4 Sneed (Tenn.), 357. "The last three of the cases cited," he says, "turn on the question whether the property was lost,—conceding it to be established in Tennessee that, if lost, there could be no larceny,—and hold that actual possession on the part of the owner is not necessary; that constructive possession is sufficient to make the taking larceny." In *New York*, also, in

People v. Anderson, 14 Johns. (N. Y.) 294 (1817); s. c., 7 Am. Dec. 462, and in *Wilson v. People*, 39 N. Y. 459 (1868), the rule of Lord Coke seems to have been adopted. In *People v. Anderson* the defendant was indicted for the larceny of a trunk which had been lost from a stage-coach in the highway, and which he found there, and subsequently converted to his own use. Spencer, J., delivering the opinion of the court, says: "It cannot be doubted that an indictment for larceny must charge that goods were feloniously taken, as well as feloniously carried away, and hence it is an established position that, if the taking is not an act of trespass, there can be no felony in carrying away the goods. 1 Hawk. ch. 33; Kelyng, 24; Dalton, 3. There can be no trespass in taking a chattel found in the highway, and the finder has a right to keep the possession against every one but the true owner. How, then, can it be said that a thing found *bona fide*, and of which the finder had a right to take possession, shall be deemed to be taken feloniously in consequence of a subsequent conversion, by denying and secreting it, with an intention to appropriate it to the use of the finder?" The rule of Lord Coke, however, is no longer the law in England. In *Merry v. Green*, 7 Mees. & W. 623 (1841), Parke, B., says: "The old rule that, 'if one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is no larceny,' has undergone in more recent times some limitations; one is, that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion, *animo furandi*, constitutes a larceny. Under this head fall the cases where the finder of a pocketbook, with banknotes in it, with a name on them, converts them *animo furandi*; or a hackney coachman who abstracts the contents of a parcel which has been left in his coach by a passenger, whom he could easily ascertain; or a tailor who finds and applies to his own use a pocketbook in a coat sent to him to repair, by a customer whom he must know. All these have been held to be cases of larceny, and the present is an instance of the same kind, and not distinguishable from them. It is said that the offence cannot be larceny unless the taking would be a trespass; and that is true. But if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for

him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass."

In *Reg. v. Thurborn*, 1 Den. C. C. 387 (1849), the prisoner was tried for stealing a bank-note. It appeared from the evidence that he found the note, which had been accidentally dropped in the high road. The name of the owner was not on the note, nor was there any mark upon it, or any circumstance attending the finding to indicate to whom the note belonged, when he picked it up. The prisoner meant to appropriate it to his own use at the time he found it. The day after, he was informed that the prosecutor was the owner and had dropped the note accidentally. He then changed it, and appropriated the money to his own use. Here again Parke, B., in an elaborate opinion, after reviewing the authorities on this question, says: "The result of these authorities is, that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." The rule in this case is followed and approved in *Reg. v. Preston*, 2 Den. C. C. 353 (1851). And in *Reg. v. Christopher*, Beil. C. C. 27, Hill, J., says: "Two things must be made out in order to establish a charge of larceny against the finder of a lost article: First, it must be shown that, at the time of finding, he had the felonious intent to appropriate the thing to his own use; and this is founded on the rule laid down by Lord Coke, and referred to and acted upon in *Reg. v. Thurborn*. The other ingredient necessary is that, at the time of finding, he had reasonable ground for believing that the owner might be discovered; and that reasonable belief may be the result of a previous knowledge, or may arise from the nature of the chattel found, or from there being some name or mark upon it; but it is not sufficient that the finder may think that by taking pains the owner may be found—there must be immediate means of finding him." Such is now the well-settled law in *England* on this subject.

In *New York*, also, this view of the law, as distinguished from the old rule, has been adopted, notably in *People v. Mc-*

Garren, 17 Wend. (N. Y.) 460 (1837) (for a statement of the case see *infra*), where the court, in referring to the case of *People v. Anderson*, 14 Johns. (N. Y.) 294 (1817); s. c., 7 Am. Dec. 462, say of that case: "The defendant was the *bona fide* finder of a trunk which had been lost from a stage-coach in the highway, and it did not appear" (observe these words) "that the defendant knew, or had the means of knowing, who was the owner of the property. Where that fact appears, the weight of authority seems to be that the finder of the property will be guilty of larceny, if he conceal or convert it to his own use. In that case it was held that no subsequent act, in concealing or appropriating the trunk to his own use, would make it larceny." And in *Tennessee*, too, the law has been changed by statute to conform to this view. Stat. of Tenn. 1871, vol. iii., § 4685.

In *Missouri*, in *State v. Conway*, 18 Mo. 321, and *State v. McCann*, 19 Mo. 249 (1853), the doctrine of the Tennessee courts has been expressly repudiated, and the present rule followed. In *Com. v. Titus*, 116 Mass. 42; s. c., 17 Am. Rep. 138 and note (1874), Gray, C. J., says: "The finder of lost goods may lawfully take them into his possession, and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. But if, at the time of first taking them into his possession, he has a felonious intent to appropriate them to his own use, and then knows, or has the means of knowing or ascertaining, by marks on the goods or otherwise, who the owner is, he may be found guilty of larceny." In 6 Phila. (Penn.) 18 (1865), Tatum v. Sharpless, Stroud, J., says: "The right of the finder depends on his honesty and entire fairness of conduct. The circumstances attending the finding must manifest good faith on his part. There must be no reason to suspect that the owner was known to him, or might have been ascertained by proper diligence." In *Wolfington et al. v. State*, 53 Ind. 346 (1876), Downey, J., says: "The law with reference to the larceny of lost goods is not very well settled. It seems to be settled: First, That the felonious intent must exist at the time when the finder takes possession of the goods; and that if such intent does not then exist, but the finder afterwards forms that intent and conceals the goods, or appropriates them to his own use, it is larceny. The existence or non-existence of such intent, at the time

of taking possession of the goods, must be found from all the facts and circumstances attending the transaction as in any other case. 2 Bishop Crim. Law, sec. 881 *et seq.* Second, If the finder of the goods, at the time, knows the owner of the goods, and with such knowledge converts them to his own use, he is guilty of larceny. This knowledge of ownership may be derived either from having previously seen the goods in the possession of the owner, from marks upon them, or in any other way. 2 Bishop Crim. Law, sec. 882."

Other English cases on this subject are: Reg. v. Peters, 1 Car. & Kir. 245 (1843); Reg. v. York, 1 Den. Cr. Cas. 335 (1848); Reg. v. Moore, 1 Leigh & C. Cr. Cas. 1 (1861); Reg. v. Glyde, L. R. 1 Cr. C. R. 139; s. c., 11 Cox Cr. Cas. 103 (1868); The King v. Wynne, 1 Leach's Cr. L. 460 (1784); Cartwright v. Green, 8 Ves. 405 (1803). See also 3 Chitty's Cr. L. (Ed. 1836) p. 920; 1 Whart. Cr. Law, §§ 901-911. The following cases support the present English rule, as laid down in the authorities cited above, and which may now be considered as the general rule in this country also: Livermore v. White, 74 Me. 452; s. c., 43 Am. Rep. 600; State v. Weston, 9 Conn. 527; Railroad Co. v. Haws, 56 N. Y. 178; People v. Cogdell, 1 Hill (N. Y.), 94; Hunt v. Com., 13 Gratt. (Va.) 757; Tanner v. Com., 14 Gratt. (Va.) 635; Griggs v. State, 58 Ala. 425; s. c., 29 Am. Rep. 762; State v. Ferguson, 2 McMull. (S. Car.) 502; Randall v. State, 4 Smed. & M. (Miss.) 349; Coon v. State, 13 Smed. & M. (Miss.) 246; Reed v. State, 8 Tex. Ct. App. 40; s. c., 34 Am. Rep. 732; State v. Dean, 49 Iowa, 73; s. c., 31 Am. Rep. 143; 1 Crim. L. Mag. 209; Bailey v. State, 52 Ind. 462; s. c., 21 Am. Rep. 182 and note; Baker v. State, 29 Ohio, 184; s. c., 23 Am. Rep. 731; State v. Levy, 23 Minn. 104; s. c., 23 Am. Rep. 678; State v. Clifford, 14 Nev. 72; s. c., 4 Pac. L. J. 164; 8 Rep. 435; 33 Am. Rep. 526; 1 Parker's Crim. Rep. 9, People v. Gerret Swan.

Statutory Provisions.—Many States now have statutory provisions regulating this subject, which see.

Distinction Between the Old Rule and the New—Reason for Latter.—The new rule maintains the two essentials of larceny—fraudulent intent, coincident with unlawful taking, trespass—as stoutly as the old. The difference is, that the later rule regards that as trespass which the earlier did not; and the reasoning underlying the opinion of the courts hold-

ing—the former seems to be, that the taking—the possession—of the finder is lawful as against the owner simply because the latter is unknown. If, however, the finder knows the owner, or the circumstances attending the finding are such that he ought to know him, how can his taking—his possession—as against the owner be considered lawful? See the excellent dissenting opinion of Thompson, C. J., in People v. Anderson, 14 Johns. (N. Y.) 94 (*supra*).

When Fraudulent Intent must be Formed.—In The King v. Wynne, 1 Leach's Cr. Law, 460 (1784), it was held that although the first taking was *bona fide*, yet a subsequent fraudulent conversion was sufficient to constitute larceny. And in Robinson v. State, 11 Tex. Ct. App. 403; s. c., 40 Am. Rep. 790, where a merchant sold a trunk to the defendants. Unknown to either, it contained goods previously sold to another. On getting the trunk home, the defendants discovered the contents, and retained them. *Held*, that the larcenous intent need not have been formed at the time of the delivery of the trunk, but it was sufficient if it was formed at the time of the discovery of the goods. But the weight of authority emphatically holds, as the very definition of larceny requires, that the fraudulent intent and the fraudulent taking must be coincident. See cases *supra*. And indeed in the case of Robinson v. State it may be said that the goods were not found at all until discovered in the trunk; hence even there the felonious intent and unlawful taking were coincident.

Finder must have Means of Discovering Owner at Hand.—"To render the finder of lost property liable as for larceny, he must know who the owner is at the time he acquires possession, or have the means of identifying him *instantly*, by marks then about the property which the finder understands. It is not enough that he has general means of discovering the owner by honest diligence, etc." People v. Cogdell, 1 Hill (N. Y.), 94 (1841). For instance, in State v. Weston *et al.*, 9 Conn. 527, defendants found a pocket-book in the highway containing bank-bills, and converted the property to their own use. The name of the owner was legibly written in the pocket-book, and it was proved that the defendants could read. *Held*, larceny. Peters, J., delivering the opinion of the court, said: "It is well settled that the finder of personal property on the highway, knowing or having the means of knowing the owner,

III. WHAT CONSTITUTES LEGAL "POSSESSION."—In order to make a man a finder of a lost chattel he must have possession of it; and to constitute this possession three things are necessary:

1. The fact that the thing found is in his possession must be consciously known to him.¹

and not restoring it to him, but converting it to his own use, is a thief, and ought to be punished accordingly."

Ignorance of the Law no Excuse.—On an indictment of a colored person for larceny of lost property, evidence of a general belief among colored people in that vicinity that lost property with no marks to indicate the ownership belongs to the finder is inadmissible. *State v. Welsh*, 73 Mo. 284; s. c., 39 Am. Rep. 515.

1. The question of "possession" rarely occurs as between the finder of a lost chattel and the original owner of it. The cases in which this point arises are what might be called triangular cases; as, for example, where a chattel has been actually lost by the original owner (who is either not known or does not appear and claim the article); it is then found by another, who has *actual* possession of it, and claims it; and yet, for peculiar reasons (as that the thing in question has been found upon his premises, or generally, concealed in another article belonging to him), it is also claimed by a third party, who claims to have *constructive* possession of it. The question then is, as between the finder and the third party, which of them has the *legal* possession of the thing found; and these cases are generally decided against the claim of the third party, on the ground that, having never known of the existence of the thing until found by the finder, the former cannot be said to have had a proper possession of it—no such possession as is sufficient to give him any right to the thing found as against the finder. For instance, in *Durfee v. Jones*, 11 R. I. 588 (1877); s. c., 23 Am. Rep. 528 and note, the plaintiff bought an old safe, and afterwards offered to sell it to the defendant for \$10, but defendant declined to purchase it. The safe was then left with defendant for sale, with the permission to use it for the safe keeping of his books. Defendant found, between the outer casing and the lining of the safe, a roll of bank-bills belonging to some person unknown, neither plaintiff nor defendant knowing that the money was there until defendant found it. The plaintiff who owned the safe claimed that he was entitled to have the money by right of prior possession. "But,"

says Durfee, C. J., in the course of an elaborate opinion, "the plaintiff never had any possession of the money, except unwittingly, by having possession of the safe which contained it. Such possession, if possession it can be called, does not of itself confer a right."

So in *Bowen v. Sullivan*, 62 Ind. 281 (1878); s. c., 30 Am. Rep. 172; 18 Am. L. Reg. 686 and note, an employee (Ellen Quinn, a minor), while engaged, in the course of her employment, in assorting a bale of old papers purchased by the proprietor for manufacture, found among the rags a clean, unmarked, and undirected envelope containing bank-bills, and, to ascertain whether the bills were genuine, delivered them to the proprietor, upon his promise to return them. The bills were found to be genuine. Here also the owner was unknown, and neither the proprietor of the paper-mill nor the finder of the bills knew of their existence until thus found. The proprietor refused to return the bills, whereupon the finder's guardian brought an action against him to recover their value. *Held*, that the guardian was entitled to recover as against the proprietor. In his instructions to the jury in the court below the trial judge said: "If you believe from the evidence that the bank-notes were found by the plaintiff's ward among the rags or papers belonging to the defendants, in their mill, and that said bank-notes got there by accident, and were not placed there purposely by the person of whom the rags and papers were purchased by the defendants, and the defendants did not know they were among the rags when they made the purchase, then I instruct you that said bank-notes were lost property, and you should find for plaintiffs." The jury so found. Perkins, J., in affirming the judgment in the court below, said: "It is claimed that the appellants, in purchasing the envelope containing the bills, by weight, purchased the bank-bills in question. Their existence was unknown when the envelope was purchased, and their weight was so infinitesimally small compared with their value, that we do not concur in this proposition. It is unreasonable."

Merry v. Green, 7 M. & W. 623 (1841); is a case similar to *Durfee v. Jones supra*. In this case a person found a purse con-

2. He must have (at least at the time of finding) physical power and control over the thing found.¹

3. He must intend to be and remain the owner of the thing found.²

taining money in a secret drawer of a bureau or secretary which he had purchased at a public auction, and converted the money to his own use. At the time of the sale no person knew that the bureau contained anything whatever. In his opinion in this case Parke, B. says: "It was contended that there was a delivery of the secretary and the money in it to the plaintiff as his own property, which gave him a lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us that though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it nor the vendee to receive it; both were ignorant of its existence; and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this." [On the trial of this case it was offered in evidence that the auctioneer had stated, at the time of the sale, that the bureau only, and not its contents (if any), would be sold, but this evidence was rejected. On account of this rejection, the court above sent the case back for retrial, saying that if the purchaser of the bureau knew that he was buying it alone he was guilty of larceny in the appropriation of the money found to his own use; but if he had reason to believe that he bought the bureau together with its contents (if any), he had a colorable right to the money, and its conversion was no larceny.] See also *Lawrence v. Buck*, 62 Me. 275 (1874); *Lawrence v. State*, 1 Humph. (Tenn.) 228 (1839).

1. In 13 Irish L. T. 613, it is said: "In order to acquire 'possession' of lost chattels the finder must have physical power over the object, coupled with a particular intent. What constitutes such physical relation may be illustrated by the curious case of *Young v. Hichens*, 6 Q. B. 606, holding that, where fish were nearly surrounded by a seine with an opening of seven fathoms between the two ends, at which points boats were stationed to frighten them from escaping, they were not reduced into possession as

against a stranger who rowed in through the opening, and caught them." Of course this is not a case of finding, yet it serves very well to show the kind and extent of physical power and control which the finder must have over the object found; i.e., the power must be actual, and it must, for the time being, be complete. This rule is a necessary corollary of the right by which the finder gets his title; for the finder derives his title from the right of "occupancy," from his being the first occupant of property which has apparently no owner. But to occupy the thing he must, of course, have physical possession and control of it. This physical control must not, however, necessarily continue. See the case of *Clark v. Maloney*, 3 Harr. (Del.) 68, cited just below, note 2. Cf. *Lawrence v. Buck*, 62 Me. 275.

2. In order to constitute a legal possession of a thing, however, it is necessary that the possessor should stand not only in a certain *physical* relation to the thing, but also in a certain *mental* relation to it. He must be in a "state of mind" toward it. Just what his "state of mind" must be is, however, a matter of some controversy. At the Roman law (and the same is true of those systems of law derived from it) it was necessary that the possessor should have an *animus domini*—an intent to be the owner of the thing, to have and so exercise ownership over it. And this seems to have been the common-law requisite also.

But a writer in 12 Am. L. Rev., in an exhaustive article on "Possession" (p. 688 *et seq.*), argues that this *animus domini* is not necessary at the common law; that all that is necessary is for the possessor to "have an intent to exclude others from the thing."

In 13 Ir. L. T. 613, discussing this subject, it is said: "Savigny says that the *animus domini*, or intent to deal with the thing as owner, is, in general, necessary to turn a mere physical detention into juridical possession; and his opinion is that which seems to have been adopted in England. But, observes a learned writer in the American Law Review, 'If what the law does is to exclude others from interfering with the object, the intent which the law should require would seem to be an intent to exclude others (i.e., from the

object). The writer believes that such an intent is all the common law deems needful, and that no more should be required in principle."

The same view is held in an excellent article by Mr. Sigmund Zeisler, reported in 16 Chic. L. N. 343 *et seq.*, and in 19 Ir. L. T. 95, 105, 135, 149, where, after stating that the respective relations toward the thing found of the owner and the finder are, that the owner still has his ownership, but the finder has the physical power over the chattel, he inquires, "But has the finder possession?" and in answer he says: "In the Roman law, and in those Continental writers on the philosophy of law who have derived their views from this system, it would be a mere *detentio*, custody, but not 'possession,' an essential element of which, in the Roman law, is the *animus domini*, the intent to deal with the thing as owner. (Savigny, Treatise on Possession. Tr. fr. the Germ. by E. Perry, Lond. 1848, 6th Ed. p. 177. His opinion is, for the common law, almost generally adopted by Engl. writers.) But has the finder 'possession,' in the legal acceptance of the term, at common law? To decide this question we must know what are the tests of possession in our system of jurisprudence. Oliver W. Holmes, Jr., now one of the justices of the Supreme Judicial Court of Massachusetts, in his admirable lectures on common law (The Common Law; Boston, 1881; Lecture 6) tried to find an answer to this question. In a thorough and highly interesting examination of the early sources of our law the learned author has shown, at least to our satisfaction, that the *animus domini* is not essential to constitute possession, but that all the common law requires, besides the physical relation of the person to the thing and an actual power over it, as toward his fellow-men, is only an intent to exclude others."

But the learned writer in 12 Am. L. Rev. goes even farther than this, and holds that the direct intent to exclude others from the object is not necessary, but that this intent may be included in a larger intent to exclude others from the place where the object is. For (p. 703) he says: "There is another class of cases besides those of bailees and tenants, which will probably, though not necessarily, be decided one way or the other, as we adopt the test of an intent to exclude or the *animus domini*." Bridges v. Hawkesworth (15 Jur. 1079; 21 L. J. Q. B. 75; 7 Eng. L. & Eq. 424) will serve as a starting-point. There a pocket-book

was dropped on the floor of a shop by a customer, and picked up by another customer before the shopkeeper knew of it. Common lawyers and civilians would agree that the finder got possession first, and so could keep it as against the shopkeeper. For the shopkeeper, not knowing of the thing, could not have the intent to appropriate it [*animus domini*], and having invited the public to his shop, he could not have the intent to exclude them from it. But suppose the pocket-book had been dropped in a private room, how should the case be decided? There can be no *animus domini* unless the thing is known of; but an intent to exclude others from it may be contained in the larger intent to exclude others from the place where it is, without any knowledge of the object's existence."

It is extremely desirable that the question which of these two views, the *animus domini* or the "intent to exclude," is the correct one should be definitely decided. For if the intent to exclude others from the object, and particularly if the intent to exclude others from the place where the object is, is all that is necessary, in this respect, to constitute legal possession, then the first-mentioned requisite of such possession, the conscious knowledge that the thing is in one's control, falls, and we are brought to the conclusion that the cases above decided upon the strength of this principle were in error. And this the writer in 12 Am. L. Rev. maintains. For, referring to the decision in *Durfee v. Jones* (the safe case, *supra*), he says (p. 706): "The writer ventures to think this decision wrong. . . . The argument of the court goes on the plaintiff's (the safe-owner's) not being a finder. The question is whether he need be. It is hard to believe that if the defendant (who found the money in the safe) had stolen the bills from the safe while it was in the owner's hands the property could not have been laid in the safe-owner (*R. v. Rowe*, Bell. C. C. 93), or that the latter could not have maintained trover for them if converted under these circumstances. Sir James Stephen (Crim. Law, Art. 281, Ill. 4) seems to have drawn a similar conclusion from *Cartwright v. Green*, and *Merry v. Green*, 8 Ves. 405, 7 M. & W. 623; but it is believed that no warrant for it can be found in these cases, and still less for the reason suggested [a reason drawn from Savigny, but not fitted to the English law]. It will be understood, however, that *Durfee v. Jones* is perfectly consistent with the writer's

IV. WHAT CONSTITUTES LEGAL "LOSING."—In order to constitute legal losing, the thing must have been actually *lost* by the owner, and not merely *mislaid*; that is, he must not voluntarily and purposely have laid it away in a certain place, for a time, with the intention of retaking it, and then have forgotten where he had placed it; but it must have, involuntarily and accidentally as respects the owner, got out of his possession.¹

view of the general nature of the necessary intent, and that it only touches the subordinate question whether the intent to exclude must be directed to the specific thing, or may be even unconsciously included in a larger intent, as the writer is inclined to believe."

But whatever, in accordance with these writers, ought to be the law on this subject, it is believed the cases of *Durfee v. Jones*, *Bowen v. Sullivan*, and *Merry v. Green* (recited under note 1, p. 981, *supra*) sufficiently indicate that the principle of *animus domini* is the law; and so long as these cases are not in some way reversed or judicially discredited, they must be considered to be authoritative.

Animus Domini must, but Physical Control need not, continue.—"With respect to the continuance of the rights acquired by gaining possession, and as to whether the physical relation and the intent must still subsist, it is to be observed that in the view of Savigny, which generally prevails, there must always be the same *animus* as at the time of acquisition, and a constant power to reproduce at will the original physical relations to the object. In an American case, *Clark v. Maloney*, 3 Har. (Del.) 68, where a man found logs afloat and moored them, but they again broke loose and floated away, and were found by another, it was held that the first finder retained the rights which sprung from his having taken possession, and that he could maintain trover against the second finder, who refused to give them up." 13 Ir. L. T. 613.

1. In *McAvoy v. Medina*, 11 Allen (Mass.), 548 (1866); s. c., 87 Am. Dec. 733, a customer found a pocket-book which was lying on a table in a barber-shop, and gave it to the barber to advertise for the owner and give it to him should he appear. The owner never appeared, and the barber refused to give it to the finder on his demand. The finder then brought an action against the barber to recover it. In his opinion, Dewey, J., says of the pocket-book: "But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This

property was voluntarily placed upon a table in the defendant's shop by a customer of his, who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe-keeping of the same until the owner should call for it." He then cites the cases of *Bridges v. Hawkesworth* and *Lawrence v. State*. Referring to the latter case, he says: "The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that 'to place a pocket-book upon the table and to forget to take it away is not to lose it in the sense in which the authorities referred to speak of lost property.' We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner."

The case of *Lawrence v. State*, 1 Humph. (Tenn.) 228 (1839), cited *supra*, was very similar to the above. Here a man placed his pocket-book upon the table of a barber's shop, there to remain till he could get a bank-bill changed; and on leaving the shop he forgot to take his pocket-book with him, but upon missing it he immediately recollected that he had left it at the barber's shop. "The pocket-book, under these circumstances," says Reese, J., "was not lost, nor could the defendant be called a finder. The pocket-book was left, not lost. The loss of goods, in legal and common intentment, depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner as to their locality at any given moment. If I place my watch or pocket-book under my pillow in a bed-chamber, or upon a table or bureau, I may leave them behind me indeed, but if that be all, I cannot be said with propriety to have lost them. To lose is not to place or put anything carefully and

V. RIGHTS AND OBLIGATIONS OF THE FINDER.—1. **Source.**—The rights and obligations of the finder of lost chattels spring from his relation, in respect to the thing found, as against, respectively—

- I. **ALL THE WORLD** (except the true owner and those deriving title from him). As against all but the owner, the legal finder
 - a. Becomes the true owner himself, with all the rights and responsibilities of ownership.¹ Hence he—
 - b. May maintain trover for the thing found against every one but the rightful owner and his assignees;² even—

voluntarily in the place you intend and then forget it; it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there."

So in *People v. McGarren*, 17 Wend. (N. Y.) 460 (1837), where one Northrop came to the store of defendant to purchase cloth. After spending some time in looking at cloths he went off without making a purchase, leaving his whip on the counter in the store. Defendant concealed it. Within a few minutes Northrop returned and inquired for it, when defendant said he had not seen it, and afterwards refused to give it up. On an indictment for larceny, it was held that this property was not lost, and was the subject of larceny.

Again, in *Kincaid v. Eaton*, 98 Mass. 139 (1867); s. c., 93 Am. Dec. 142, where a customer of a bank found a pocket-book which had been left by the owner, also a customer, on a public desk provided for the use of the patrons of the bank; and in *Livermore v. White*, 74 Me. 452 (1883); s. c., 43 Am. Rep. 600, where the owner of a tannery sold it and accidentally omitted to remove a few hides from the vats, and many years afterwards a laborer found them,—it was held that the property in neither case was lost.

But in *Bridges v. Hawkesworth*, 115 Jur. 1079; 21 L. J. Q. B. 75; 7 Eng. L. & Eq. 424, where a customer in a store found money on the floor, it was held to be his as against the store-keeper. In this case, however, it was admitted on both sides that the money was lost, and the case was decided on the ground that the place of finding made no difference in the rights of the finder.

And in *Hamaker v. Blanchard*, 9 W. N. C. 331 (1879); s. c., 90 Pa. St. 377; 35 Am. Rep. 664, where a servant in a hotel found money in the public parlor, it was held that the evidence showed that the money was not voluntarily placed where it was found, but was accidentally

lost, and consequently the money belonged to the servant, as finder, against the hotel-keeper. See also *Bowen v. Sullivan*, 62 Ind. 281 (1878); s. c., 30 Am. Rep. 172; 18 Am. L. Reg. 686, and note; *State v. Conway*, 18 Mo. 321; *State v. McCann*, 19 Mo. 249 (1853), which is a case very much like *People v. McGarren*, 17 Wend. (N. Y.) 460 (1837); 21 Ala. 240; 14 Johns. (N. Y.) 293; 116 Mass. 42.

1. The leading case on this subject is *Armory v. Delamirie*, 1 Strange, 504; 1 Sm. L. C. (8th Am. Ed.) 679, where a chimney-sweeper's boy found a jewel, and took it to a goldsmith to find out what it was. The goldsmith kept the jewel and refused to return it to the finder. On an action of a trover against the goldsmith, it was held that the finder was entitled to recover the jewel, he being the owner as against every one but the rightful owner. This case has been commented upon and approved in almost every case of finding which has since come before the attention of the courts.

In *Bowen v. Sullivan*, 62 Ind. 281 (1878); s. c., 30 Am. Rep. 172; 18 Am. L. Reg. 686, Perkins, J., says of it: "Ever since the case of *Armory v. Delamirie*, 1 Strange, 504, . . . the law has been steady and uniform, that the finder of lost property has a right to retain it against all persons except the true owner. And ordinarily the place of finding is immaterial." There is no more well-settled rule in our law than this. For a few of the cases holding this doctrine, see *Bridges v. Hawkesworth*, 15 Jur. 1079; 7 Eng. L. & Eq. 424; *Lawrence v. Buck*, 62 Me. 275 (1874); *Clark v. Maloney*, 3 Harr. (Del.) 68; *Tatum v. Sharpless*, 6 Phila. (Pa.) 18 (1865); *Railroad Co. v. Haws*, 56 N. Y. 175 (1874); *Durfee v. Jones*, 11 R. I. 588 (1877); s. c., 23 Am. Rep. 528.

2. *McLaughlin v. Waite*, 9 Cow. (N. Y.) 670 (1827); *Same v. Same*, 5 Wend. (N. Y.) 408 (1830); *Ellery v. Cunningham*, 1 Metc. (Mass.) 112 (1840); and cases *supra*.

1. Against the owner of the premises where the thing is found;¹
2. Against a subsequent finder.²
2. THE TRUE OWNER HIMSELF.—Towards him the finder occupies the relation of a bailee.³ And—
 - a. Where there is no reward offered, of a voluntary bailee;
 - b. Where there is a reward offered, of a bailee for hire.⁴
2. Obligations.—Both the rights and the obligations of the finder in respect to the thing found spring from this relation—as of a bailee—of the finder toward the owner in regard to the thing found. The principal obligations of the finder, therefore, are—
 1. Finder must return thing found when the rightful owner appears.⁵
 2. Finder must exercise toward thing found—
 - a. Slight care if a voluntary bailee;
 - b. Ordinary care if a bailee for hire.⁶

1. *Bridges v. Hawkesworth*, *supra*. In such a case, however, the thing must have been actually lost, and the finder must be on the premises by a rightful act; he must not be a trespasser.

2. *Clark v. Maloney*, 3 Harr. (Del.) 68 (*supra*). Compare *Lawrence v. Buck*, 62 Me. 275 (1874).

3. "This [finding] is a species of deposit, which, as it does not arise *ex contractu*, may be called a *quasi* deposit; and it is governed by the same general rules as common deposits." *Bouvier's Law Dic.*, tit. "Finder;" *Schouler on Bailm.* 4, 33.

4. "And the case of a finder of things may well be referred to this same head (Bailment not strictly upon contract); for the mere fact of coming into voluntary possession of another's property will oblige one, if acting gratuitously, to use it with the care of a bailee for the bailor's sole benefit; or, if acting with the promise of reward, to use it like a hired bailee." *Schouler on Bailm.* (1880), 33, 55, 98.

5. *Isaack v. Clark*, 2 Bulstr. 312; *Schouler's Bailm. & Carriers* (2d Ed.), § 6.

6. *Isaack v. Clark*, 2 Bulstr. 312; *Nicholson v. Chapman*, 2 H. Bl. 254; 1 Rolle, 125; *Everard v. Hopkins*; *Tancil v. Seaton*, 28 Gratt. (Va.) 601 (1877); s. c., 1 Virg. L. J. 354; 26 Am. Rep. 380.

"For the mere fact of coming into voluntary possession of another's property," etc., *supra*, note 4; *Schouler on Bailm.* p. 33. See *Story Bailm.* §§ 85–87.

Degree of Care required from bailee for bailor's sole benefit (voluntary bailee), and from bailee for mutual benefit (bailee for hire). *Schouler Bailm.* (1880), p. 15, gives the following standard:

The measure of care and diligence exacted of the bailee is—
And the measure of negligence for which he becomes answerable is—

I. In bailments for the bailor's sole benefit.	} = Slight	= Gross (or more than ordinary).
II. In bailments for mutual benefit.		
	} = Ordinary	= Ordinary.

It would be impracticable to cite many cases showing the difference between *slight* and *ordinary* care. A good idea of this distinction may be obtained from the language of Mr. Justice Bradley in *Railroad Co. v. Lockwood*, 17 Wall. 382: "The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter. We have already adverted to the tendency of judicial opinion, adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the

3. Rights.—1. NECESSARY AND REASONABLE EXPENSES.—The finder is entitled to recover such expenses incurred¹—

a. In the successful recovery of lost property;

b. In the preservation of lost property.

2. LIEN.—²Finder is not entitled to a lien where no reward is offered.

Finder is entitled to lien where a reward is offered.³

are and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tenacity of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is so firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that 'every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it.' Poullier, in his commentary on the Code, regards this as a happy thought, and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice."

The Finder is not Bound to take the goods he finds if he does not want to; but if he does take them, then he must exercise the proper care over them. *Souv. L. Dict.*, tit. "Finder;" *Isaack v. Clark*, 2 Bulstr. 312.

Finder Liable for the Loss of the Goods found, if Due to his Gross Negligence.—If a man finds goods of another, if they are after hurt or lost by wilful negligence, he shall be charged to the owner. But if they be laid in a house that by chance is burned, or if he delivereth them to another to keep that runneth away with them, I think he be discharged." *Doct. & Stud. Dial.* 2, ch. 38.

So in *Tancil v. Seaton*, 28 Gratt. (Va.) 107; s. c., 26 Am. Rep. 380, the plaintiff, having found a bank-note, deposited it or gratuitous safe-keeping with the defendant, a banker, from whose safe it was stolen, together with money of his own, by burglary. *Held*, (1) that in the absence of any claim by the rightful owner communicated to the defendant, he plaintiff had such an interest in it as would entitle him to recover it from the defendant; but (2) that the defendant was

not liable unless he had been grossly negligent in his care of the note.

Finder is Answerable if by Gross Negligence he delivers Found Goods to any one but the Rightful Owner.—Lord Coke in *Isaack v. Clark*, 2 Bulstr. 312.

When Found Goods are Perishable, Finder may, in the Exercise of a Sound Discretion, and for the Best Interests of All Parties, Sell them.—He must act honestly, however, and retain proceeds of sale for owner. *Millcreek Township v. Brighton Stock Yards Co.*, 27 Ohio, 435.

1. *Doct. & Stud.* c. 51; 2 H. Bl. 254; *Nicholson v. Chapman*, 2 Kent (6th Ed.), 356; *Reeder v. Anderson*, 4 Dana (Ky.), 193 (1836); *Etter v. Edwards*, 4 Watts (Pa.), 63 (1838); *Preston v. Neall*, 12 Gray (Mass.), 222 (1838); *Armory v. Flynn*, 16 Johns. (N. Y.) 402; *Sheldon v. Sherman*, 42 N. Y. 484 (1870); *Marvin v. Treat*, 37 Conn. 96 (1870); *Millcreek Township v. Brighton Stock Yards Co.*, 27 Ohio, 435. See *Story Bailm.* (9th Ed.) § 621 a; 2 Kent, 356.

The reason given for this right of the finder, in *Reeder v. Anderson*, 4 Dana (Ky.), 193, is that "when a man loses a piece of property there is an implied request from him to everybody else to aid him in recovering it; and any one who finds and restores it may recover of the owner, upon the implied *assumpsit*, of at least an indemnity for his time and expenses." See also *Chase v. Corcoran*, 106 Mass. 286 (1871).

It is doubtful, however, if finder can recover for expense and labor voluntarily bestowed upon thing found. *Nicholson v. Chapman*, 2 Kent, 356; *Etter v. Edwards*, 4 Watts (Pa.) 63 (1838).

For these necessary and reasonable expenses finder has no lien on thing found; he has only an action, of implied *assumpsit*, for damages. *Reeder v. Anderson*, 4 Dana (Ky.), 193. Finder has a lien only when a reward is offered, and for that alone. *Wood v. Peirson*, 45 Mich. 313 (1881).

2. *Binstead v. Buck*, 2 Wm. Bl. 1117; *Etter v. Edwards*, 4 Watts (Pa.), 63.

3. *Wentworth v. Day*, 3 Metc. (Mass.) 352 (1841); *Wilson v. Guyton*, 8 Gill, 213-215 (1849); *Cummings v. Gann*, 52 Pa.

3. **REWARD.**—This must be for a specific amount. An offer of a “liberal” reward, for instance, gives the finder neither a lien for the reward, nor even a right to a reward itself, on the ground that neither the finder nor the owner can have the right, as against the other, to fix the amount of the reward; nor is there any one else who can do it.¹

A reward is apportionable when the goods for the recovery of which it is offered are apportionable; e.g., where money has been lost, and a part of it is found and returned.²

4. **AN ABSOLUTE TITLE** to the found goods vests in the finder if the owner does not appear and claim them.³

St. 484 (1866); *Wood v. Peirson*, 45 Mich. 313; s. c., 7 N. W. Rep. 888 (1881).

1. *Wilson v. Guyton*, 8 Gill (Md.), 213 (1849). Compare *Watts v. Ward*, 1 Oregon, 86, s. c., 62 Am. Dec. 299.

2. *Symmes v. Frazier*, 6 Mass. 345 (1810); *Deslondes v. Wilson*, 5 La. 397; s. c., 25 Am. Dec. 187.

Finder cannot Claim a Reward if he was unaware, at the time he performed his services, that such a reward was offered, notwithstanding he may have complied with all the conditions of the offer. *Lee v. Trustees of Flemingsburg*, 7 Dana (Ky.), 28; *Fitch v. Snedaker*, 38 N. Y. 248 (1868).

Finder must Comply with all the Conditions on which the Reward is Offered.—*Wood v. Peirson*, 45 Mich. 313 (1881).

Offer of Reward is Binding until Retracted.—*Shuey v. U. S.*, 92 U. S. 73. But if, after being withdrawn, a person, ignorant of its being withdrawn, should comply with all the conditions of the offer, he could not claim it. *Shuey v. U. S.*, 92 U. S. 73. If, however, before it is retracted, one so far complies with the offer as to perform that for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. *Symmes v. Frazier*, 6 Mass. 344.

Identification of Lost Property—Waiver of Reward—Tender.—A reward for lost property is not waived, nor any legal advantage connected with the finding, by insisting on the identification of the lost property. Nor is an action for the recovery of the lost goods defeated by a want of a tender of the reward. *Wood v. Peirson*, 45 Mich. 313; s. c., 7 N. W. Rep. 888.

Where the finder accepts a less sum than the reward offered in full satisfaction, it binds him. *Marvin v. Treat*, 37 Conn. 96; s. c., 9 Am. Rep. 307.

Fraudulent Procuring of Reward.—

Where the finder of a document or title-deed refuses to deliver it to the owner until a promise is made by the latter to pay a certain sum therefor, such promise is without consideration and void, and gives the finder no lien upon the document. Neither can the finder in such a case estimate the amount of the reward to be paid. *Victor de la O. v. Pueblo of Acoma*, 1 New Mex. 226 (1857).

Taking a horse trespassing on the taker's land, with intent to conceal it, either until the owner shall offer a reward, and then return it and claim the reward, or until the owner may be induced to sell it for less than its value, is larceny. *Com. v. Mason*, 105 Mass. 163 (1870); s. c., 7 Am. Rep. 507, 510.

3. 1 Bl. Com. 296; 2 Bl. Com. 9-402; 2 Kent, 290-356; *Wood v. Peirson*, 45 Mich. 317. “He [the finder] has what the law treats as a special property in the chattel, a title or interest sufficient to maintain the action of trover against any stranger or third person who takes or detains it from him. . . . If the owner does not appear, the finder acquires, both in the Roman and in the common law, an absolute title to the thing found. This is now almost universally a matter of statutory regulation. Generally the statutes provide for some kind of advertisement, and if the owner does not appear within a certain time, and the goods found do not exceed a certain sum in value, they belong to the finder; but if they exceed that sum, the proceeds are in some States to be divided between the finder and some public fund; in others they belong exclusively to some public fund, generally the county treasury, allowing the finder his necessary expenses and costs.” 16 Chic. L. N. 344; 19 Ir. L. T. 96.

Identification of Lost Property.—The finder must give the loser a fair and rea-

4. **How Rights of Finder Affected by Special Circumstances.**—1. BY THE CHARACTER OF THE THING FOUND.—The question of the character of the thing found arises only in the case of that peculiar species of property known as “choses in action.” And as to these the law is stated to be: “In general, the finding of a chose in action [e.g., a bill of exchange, promissory note, coupon bond, insurance policy, etc.] gives the finder no right either to the thing represented or the instrument of evidence found. But choses in action which, by the common consent and the current action of men, are treated as chattels [e.g., bank-notes, etc.] will be considered as supporting a special property in the finder.”¹ With respect to the latter, he has all the rights and is under all the obligations attending the finding of any other lost chattel.

2. BY THE PLACE WHERE FOUND.—As affecting the finding itself, the place where the lost article is found is perfectly immaterial. It is only as it affects the collateral questions—whether the finder has acted in good faith, whether he has been a trespasser, and whether the article is legally lost—that the place of finding is important.²

sonable opportunity to identify the thing lost. But the finder is also entitled to require the claimant of the lost property to show to the finder's satisfaction that the property in question is the same the claimant had lost and advertised, and to give such evidence as would satisfy a fair and reasonable person of the fact. Whether the finder has given such opportunity is a question of fact for the jury to decide. *Wood v. Peirson*, 45 Mich. 313; s. c., 7 N. W. Rep. 888.

1. It is thus a learned writer in 18 Am. L. Reg. pp. 696–7, sums up the law on this subject after a consideration of the cases. See also *Biles on Bills*, 360, 378 *et seq.*; *Schouler on Pers. Prop.* vol. ii. sec. 16; *Miller v. Race*, 1 Burr. 452 (1758); *Lawrence v. Waite*, 9 Cow. (N. Y.) 670; 5 Wend. (N. Y.) 404 *et seq.* (1827 and 1830); *Matthews v. Harsell*, 1 E. D. Smith (N. Y.), 393 (1852); *Tancil v. Season*, 28 Gratt. (Va.) 601; s. c., 1 Virg. L. J. 354 (1877); *Eng. v. Lord Tredegar*, L. R. 1 Eq. 344.

2. In *Bowen v. Sullivan*, 62 Ind. 281 (1878); s. c., 18 Am. L. Reg. 686, and note, it is said: “The primary question is, Were the notes lost property? If they were, it can make no difference whether they were found upon the highway, in defendant's paper-mill, or in their dwelling-house. The difference between the highway, the place of business, or the dwelling-house (so far as this case is concerned) is a difference only as to the degree of privacy: the place of business is

more private than the highway, and the dwelling-house is more private than the place of business. But if the bank-notes were lost property, and the plaintiff's ward found them, it does not matter where she found them: they belong to her as against every person but the loser or real owner.” Compare *Matthews v. Harsell*, 1 E. D. Smith (N. Y.), 393 (*infra*). In *Tatum v. Sharpless*, 6 Phila. (Pa.) 20 (1865), *Stroude, J.*, after reviewing the decisions, says: “The important point in these decisions was, that the *place* in which a lost article is found does not constitute any exception to the general rule of law that the finder is entitled to it as against all persons but the owner.” See also *Bridges v. Hawkesworth*, 15 Jur. 1079; 7 Eng. L. & Eq. 424; *Barker v. Bates*, 13 Pick. (Mass.) 255 (1832); *Matthews v. Harsell*, 1 E. D. Smith (N. Y.), 393 (1852); *Durfee v. Jones*, 11 R. I. 588 (1877); s. c., 23 Am. Rep. 528; *Bowen v. Sullivan*, *supra* (1878); *Hamaker v. Blanchard*, 9 W. N. C. 331 (1879); s. c., 90 Pa. St. 377; 18 Am. L. Reg. 686, and note.

The *place* of finding derives its chief importance from its bearing on the question whether the article was really lost; for instance, where money was found on the table of a barber-shop, on the counter of store, on the desk of a banking-house, the money was not considered lost, on the ground that the place where it was found indicated that the owner had put it there purposely and voluntarily; hence

3. BY THE RELATION OF THE FINDER TO A THIRD PARTY.—The relation of the finder to a third party (e.g., as a servant or employee) in nowise affects the question of finding or the rights of the finder. Where, however, the finder was a slave, or was a person specially employed to find the thing found, this belongs to the master or the employer.¹

VI. TITLE OF TRANSFEE OF FINDER TO THE THING FOUND.—The transferee of a finder is in the same position as the transferee of a thief: in neither case does the transferee take a better title than the transferor has. Hence the owner can claim the goods wherever he can find them.² Exception.³

it was not lost, and therefore could not be found. See Part IV., *supra*.

1. In *Bowen v. Sullivan*, *Guardian*, 62 Ind. 290, Perkins, J., says: "The defendants insist that Ellen Quinn, the finder, was in their employ as a rag-sorter, and that therefore what she found while so in their employ belonged to them. The evidence would have sustained such a finding, and in support of the verdict perhaps we should presume in favor of it. If she was so in the defendant's employ, the finding of the money was not wrongful. In the elaborate case of *Brandon v. Planters and Merchants' Bank of Huntsville*, 1 Stewart [Ala.], 320, it was held that lost property found by a slave belonged to his master; but we have found no case to which this doctrine has been applied as between employer and employee. See *Tatum v. Sharpless and Durfee v. Jones*, *supra*." See also *Bridges v. Hawkesworth*, 15 Jur. 1079; s. c., 7 Eng. L. & Eq. 424; *Tatum v. Sharpless*, 6 Phila. (Pa.) 20 (1865); *Hamaker v. Blanchard*, 9 W. N. C. 331; s. c., 90 Pa. St. 377; 18 Am. L. Reg. 686; *Ellery v. Cunningham*, 1 Metc. (Mass.) 112 (1840); 18 Am. L. Reg. 686 and note; and the article in 16 Chic. L. N. 343; 19 Ir. L. T. 95-149.

In *Matthews v. Harsell*, 1 E. D. Smith (N.Y.) 393, Woodruff, J., doubts whether a house-servant who finds lost jewels, money, or chattels in the house of his or her employer should be allowed to retain them against the will of the employer. Where the employer sanctions it, however, as in that case, he has no doubt that the house-servant has all the rights of a *bona fide* finder. His opinion, however, is but *obiter dictum*, and is opposed to a long line of cases which hold that the place of finding is immaterial. Should the "intent to exclude others from the object, or from the place where the object is," be the true test of possession, *quare*, what effect would this have upon

the rule as to the place of finding? See *ante*, III. 3, note 2 (p. 982).

2. See Schouler on Pers. Prop. vol. ii. secs. 18, 19. "Adverse possession usually strengthens one's title in the lapse of time; and in *Tennessee* even the adverse possession of a *bona fide* purchaser for a period of three years is held to divest the rights of the original owner of a stolen chattel. *Garrett v. Vaughan*, 1 Baxt. 113." § 19, note 2.

3. "But as concerns money, bank-notes, and current negotiable instruments, lost or stolen, the rule is well established, in the courts both of *England* and *America*, that the *bona fide* holder, who has paid a valuable consideration or furnished an equivalent, shall retain the title against any former owner, even against one from whom such chattel had been stolen." See 2 Schoul. Pers. Prop. §§ 20, 21.

Underlying Principles.—The underlying principle governing this subject is that of **possession**, modified by the principles of **bailment** (as regards finder's duty toward thing found); by the principles of **implied contract** (as regards finder's right to recover for necessary and reasonable expenses), and of **express contract** (as regards finder's right to reward); by the principles peculiar to **negotiable instruments**; and by the principles of **master and servant** (employer and employee).

Authorities.—13 Ir. L. T. 603, 613, 623; 7 Alb. L. Jr. 65; 3 Jurist (N. S.), Part II. 141; 18 Amer. L. Reg. 686 *et seq.*; 12 Am. L. Rev. 688 *et seq.* (Possession); 2 Schouler on Pers. Prop. ch. i.; Story on Bailm. §§ 85-87, 121 a, 621 a; Schouler on Bailm. 4, 33, 55, 97, 123; 22 Leg. Obs. 498; 24 Leg. Obs. 410; 50 L. T. 233; Stimson's Am. Stat. Law, §§ 4054, 4325; and an admirable prize essay by Mr. Sigmund Zeisler in 16 Chic. L. N. 343; also 19 Ir. L. T. 95, 105, 135, 149.

FINDING.—(See INDICTMENT; INFORMATION; JURY; etc.)—In practice, the result of a judicial examination or inquiry, especially into some matters of fact; the statement to the court of such result.¹

FINE.—Fine is a pecuniary punishment for an offence or a contempt committed, imposed by the judgment of a court. (See SENTENCE; PUNISHMENT.)²

Origin.—Amongst the ancients, all punishments were pecuniary, from whence the Latins properly say *solone pœnas*; but in process of time this sort of punishment became contemptible, and then for some crimes death ensued.³

Amount of Fine.—Their *quantum* neither can nor ought to be ascertained by an invariable law.⁴

1. Burr. L. Dict.

"This term is most commonly applied to the making up and delivery, by a jury, of their verdict; but Lord Coke applies it to the judgment of the court itself: 'There is one *finding* by the jury and another by the judges, and when the defendant confesses it, etc., the judges find sufficient matter before them to give judgment' (11 Co. 30, Powlter's Case)." Burr. L. Dict.

Form of Finding.—A finding of facts by the court, in a case in which the court is the judge of the facts as well as the law, in these words, viz., "the court are of opinion," etc., is a good finding. *Todd v. Potter*, 1 Day (Conn.), 238. The *Texas* Code of Criminal Procedure requires that verdicts in criminal cases shall be in writing, and, when the plea is not guilty; that they "shall find the defendant either guilty or not guilty." *Held*, a verdict which omits the word "find" is fatally insufficient, unless corrected with consent of the jury; and it is not competent for the court, by a recital in its judgment, to correct the omission of the word "find" in the verdict as rendered by the jury. *Shaw v. State*, 2 Tex. App. 491.

2. *State v. Stein*, 14 Tex. 398.

It is called *finis*, because it is an end for that offence. Co. Litt. 126.

At common law a fine was one of the ordinary and appropriate punishments, in the discretion of the judges, for misdemeanors. 1 Bish. Crim. L. § 940. It extends to all cases in which the law has not provided some specific penalty. 4 Steph. Com. 444; 2 East. P. C. 838. Statutes in England and the United States have made fines the punishment for numerous offences. All courts of record have also a general power of imposing fines for disobedience to their orders.

To punish by fine is not in any legal

sense to inflict a penalty. *Lancaster v. Richardson*, 4 Lans. (N. Y.) 140.

3. All amercements and fines belong to the king; and the reason is, because the courts of justice are supported by his charges. 3 Salk. 33; Bradw. 129.

Difference in Assessment of Fine and Amercement.—An amercement is ordered by the court, but assessed by the jury; a fine is not only ordered, but assessed, by the court, though a pecuniary penalty assessed by the court upon an officer is properly an amercement, but, when upon a stranger, it is a fine. 3 Salk. 33; 2 Rep. 40.

All courts of record may fine and imprison an offender, if the nature of the offence be such as deserve such punishment; but no court, unless a court of record, can fine or imprison. 4 Bac. Abr. 225.

4. 11 Harg. St. Tr. 136; 4 Ir. 106; 4 Steph. Com. 445, 443.

The amount may be fixed by law or left to the discretion of the court. *Lancaster v. Richardson*, 4 Lans. (N. Y.) 140.

But where a statute provides that the jury shall fix and determine the amount, the court cannot fix it. *Nelson v. State*, 46 Ala. 186.

The Bill of Rights (1 W. & M. § 2, ch. 2) declares that no excessive fines shall be imposed; and by the eighth amendment to the Constitution of the United States it is provided that excessive fines shall not be imposed. This amendment is addressed to courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to, and a limitation upon, their discretion. But the supreme court of the United States, having no appellate jurisdiction to revise the sentences of inferior courts in criminal cases, cannot, even if the excess of the fine was apparent on the record, reverse sentence.

Ex parte Watkins, 7 Pet. (U. S. S. C.) 568.

Not a Penalty.—To punish for a misdemeanor by fine or imprisonment is not, it seems, in a legal sense, to inflict a penalty. *Village of Lancaster v. Richardson*, 4 Lans. (N. Y.) 140.

Distinction Between Fine and Forfeiture.

—A fine is a pecuniary penalty, and is commonly (perhaps always) to be collected by suit of some kind. A forfeiture is a penalty by which one loses his rights and interest in his property. *Gosselink v. Campbell*, 4 Iowa, 300; *Common Council v. Fairchild*, 1 Ind. 318; *Fuir v. U. S.*, 1 Wyom. 247.

But, as used in a statute of *Massachusetts*, it was held to mean forfeitures and penalties recoverable in civil actions, or used as pecuniary punishment inflicted by sentence. *Hauseant v. Russell*, 11 Gray (Mass.), 375. See also, under *Illinois* statute, *People v. Nedrow*, 13 N. E. Rep. 535.

In what Currency Payable.—The court, in imposing a fine for a criminal offence, may direct that it shall be paid in gold, but, if nothing be said as to the currency, it will be understood to be payable in the ordinary currency at the time. The only limit to the judicial discretion is the provision of the constitution that "excessive fines shall not be imposed." *State v. Robertson*, 15 Rich. (S. Car.) 20.

Does Not Bear Interest.—A fine imposed by the judgment of a court, on conviction for an offence, does not bear interest under the *Texas* statute. *State v. Stein*, 14 Tex. 398.

In Statutes.—Sums recovered on forfeited bail-bonds are not "fines, penalties, or forfeitures," within section 4 of the act of Congress of June 22, 1874. *In re Brittingham*, 5 Fed. Rep. 101. So under *Oregon* statute, *In re Ison*, 6 Oreg. 469.

Fines imposed for obstructing officers of the customs, under act of 1799, ch. 123, are to be recovered and distributed by the collector of customs. *Ex parte Marquand*, 2 Gall. (U. S.) 552.

In *Pennsylvania*, the offence of being a common scold may be punished by fine. *James v. Crum*, 8 S. & R. (Pa.) 220.

Where a statute provides that all fines under it shall be recovered by "an action at law" to be brought in the name of the State, a proceeding of indictment was held an action at law within the meaning of the statute. *Oregon v. Caarr*, 6 Oreg. 133.

Sentence and Collection of Fine.—(See SENTENCE.) The proper order for the collection of a fine is that the defendant stand committed until it be paid.

Rex v. Hord, Say. 176; *Reg. v. Layton*, 1 Salk. 353; *Harris v. Camm*, 23 Pick. (Mass.) 280; *Hill v. State*, 2 Yerg. (Tenn.) 247; *Hudeburgh v. State*, 38 Tex. 537; *Dunn v. Reg.* 12 Q. B. 1031; *Rex v. Bethel*, 5 Mod. 19; *Rex v. Broughton*, 1 Trem. P. C. 119.

A fine may be collected either by commitment of the person upon whom the fine is imposed, or of execution against his property. *Huddlert v. Ruffin*, 6 Ohio St. 604.

It is not essential, to imprison in such case, that an effort should first be made to satisfy the fine out of the goods of the defendant; he may be imprisoned at once upon his refusal to pay the fine.—*Ex parte Bollig*, 31 Ill. 89; *Faris v. Cum*, 3 B. Mon. (Ky.) 79;—or, having served his term of imprisonment, he may be again arrested on a writ of execution, no property being found, and again imprisoned.—*In re Beard*, 26 Ohio St. 195. But see *State v. Cooley*, 80 N. Car. 398; *Hamilton v. State*, 9 Baxt. (Tenn.) 355. And a judgment that a defendant pay a fine, and award of process for the recovery thereof, according to the cause and practice of the court, is good, although it be not added that the defendant stand committed until it is paid. *Kane v. People*, 8 Wend. (N. Y.) 204.

But in *Texas*, it has been held that, where a fine is imposed on a trial for misdemeanor, the court has no authority to commit the person convicted to jail until the fine and costs are paid, and at the same time issue an execution therefor. *O'Connor v. State*, 40 Tex. 27.

Judgment of Fine, a Final Judgment.—A judgment for a fine and costs is final, and a subsequent sentence of imprisonment is error. *Pifer v. Camur*, 14 Gratt. (Va.) 710.

One who has been convicted, under *Massachusetts* statute, of an offence punishable with fine and imprisonment, and sentenced to pay a fine only, may be sentenced by the superior court, upon his failure to prosecute an appeal, to both fine and imprisonment. *Bachelor v. Conner*, 109 Mass. 361.

A fine may be collected immediately by *feri facias*. *Rex v. Woolf*, 2 B. & Ald. 609; 1 Chit. 583; *Rex v. Carlisle*, 1 D. & R. 474; 1 Chit. Crim. L. 611; *Rex v. Hurd*, 1 Salk. 379.

Generally, in this country, by statute or under the common law, the fine is treated as a sort of judgment debt. *Bish. Crim. Proc.* § 1304.

By act of Congress of June 1, 1872, ch. 225, § 12, it is provided that, in all criminal and penal cases in which judgment

has been rendered imposing a fine, it may be enforced, so far as the fine is concerned, by execution against the property of the defendants, in like manner as judgments in civil cases. And also that, when the judgment directs the defendant should be imprisoned until the fine is paid, the issuing of execution shall not operate to discharge the defendant from imprisonment until the amount of the sentence is collected. Rev. St. U. S. § 1041. See *Cagle v. State*, 6 Humph. (Tenn.) 391; *State v. Robinson*, 17 N. H. 263.

A statute may authorize terms and conditions to be annexed to the remission of a fine. *County of Strafford v. Jackson*, 14 N. H. 16.

Not a Debt, Within Bankrupt Act.—A judgment for a fine imposed as a penalty for crime is not a debt, within the meaning of the Bankrupt Act, and, not being included in the special provisions allowing certain claims to be proved as debts, it cannot be proved against the estate of a bankrupt. *In re Sutherland*, 3 Nat. Bank Reg. 314.

New Statutes Abolishing Imprisonment for Debt.—A fine imposed for the violation of laws for the punishment of crimes and misdemeanors is not such a debt as is within the scope of provisions of constitution and statutes abolishing imprisonment for debt. *Dixon v. State*, 2 Tex. 481; *State v. Mace*, 5 Md. 337.

Infant Liable for.—An infant's property is liable to satisfy a fine adjudged against him. *Beasley v. State*, 2 Verg. (Tenn.) 481. See *Smith v. Floyd*, 1 Pick. (Mass.) 275; *Honett v. Alexander*, 1 Dev. (N. Car.), 431.

Discharge and Remission.—An escape from custody does not discharge the fine. *State v. Simpson*, 1 Jones (N. Car.), 80.

The court has no authority to remit any part of the fine in a criminal case. *Luchy v. State*, 14 Tex. 400.

Most of the States allow a discharge after certain periods of imprisonment, where the convict is unable to pay. *Gannon v. Adams*, 8 Gray (Mass.), 295; *Ex parte Bollig*, 31 Ill. 89; *County of Strafford v. Jackson*, 14 N. H. 16; *State v. Robinson*, 17 N. H. 263; *Ex parte Scott*, 19 Ohio St. 581. See also *Ex parte Tengage*, 31 Ind. 370; *McMackin v. State*, 48 Ga. 335; *State v. Jordon*, 39 Iowa, 287; *State v. Annerda*, 40 Iowa, 157; *Cumm v. Levy*, 5 Binn. (Pa.) 489.

Under some statutes, the sentence may be in the alternative to pay a fine or be imprisoned. *State v. Markham*, 15 La. Ann. 498; *Reg. v. Luen*, Gilb. Cas. 231; *Douglass v. Reg.*, 13 Q. B. 74; *Brock v. State*, 22 Ga. 98; *Harris v. Cowell*, 23

Pick. (Mass.) 280. The better practice in such cases is for the judge pronouncing sentence to fix some reasonable time within which the prisoner may pay the fine. *Brownhend v. Chisholm*, 47 Ga. 393. Cf. *Bish. Crim. Proc.* §§ 1307-1309.

Without a commitment until payment of a fine imposed, the sheriff cannot hold the defendant for the fine. *Ex parte Munloby*, 13 Mo. 625.

Joint Sentence on Conviction.—When defendants are committed on joint indictment, a separate fine can and should be assessed against each. *State v. Berry*, 21 Mo. 504. Both are liable for costs, and each for his own fine. *Johnson v. State*, 2 Dutch. (N. J.) 313.

Joint Fine.—Defendants jointly indicted, whom the jury found guilty and assessed the fine at \$50, must pay jointly, and not \$50 each. *Cain v. State*, 20 Tex. 355.

When Nominal Fine Imposed.—When, on a conviction for a misdemeanor, no circumstances are shown to regulate the discretion of the court in fixing the punishment, a nominal fine only will be imposed. *People v. Cochran*, 2 Johns. Cas. (N. Y.) 73.

Does Not Include Costs.—A statute requiring fines and penalties, imposed on appeal, to be double the amount imposed in the court below, does not include costs. *Lord v. State*, 37 Me. 177.

Fine May be Imposed in Absence of Defendant.—Where the offence is punishable by fine, the court may render judgment in the absence of the defendant. *Reg. v. Templeman*, 1 Salk. 55; *Sur v. People*, 12 Wend. (N. Y.) 344; *People v. Taylor*, 3 Den. (N. Y.) 98; *People v. Clark*, 1 Park. C. C. (N. Y.) 360; *Rex v. Hause*, 3 Ben. (U. S.) 1786; 1 Bish. Crim. Proc. § 275. See, generally, *State v. St. Johnsbury*, 59 Vt. 332; *Yonkers Society v. Yonkers*, 44 Hun (N. Y.), 348; *Superiors v. Sullivan*, 41 Wis. 115; *Village of Platteville v. Bell*, 43 Wis. 488.

Fines of Land.—A fictitious judicial proceeding, formerly used to effect a conveyance of real estate. See *ESTATES*; *Bac. Abr.*, "Fines and Recoveries," 2; *Black. Com.* 349; *Co. Litt.* 120.

Fines on Alienation.—An attendant or consequence of tenure by knight service was that fines were due for every alienation, whenever the tenant had occasion to make over his lands to another. 2 *Black. Com.* 71.

That the word "fine" was used by the author of the *Touchstone*, and by Lord Coke, to denote a sum of money agreed to be paid on alienation, and not a penalty imposed by the court, can admit of

FINISH.—See note 1.

FIRE.—(See also ARSON; FIRES; NEGLIGENCE, etc.).—Fire is not an elementary principle, but is the effect produced by the application of heat or caloric to combustible substances. Walker says that in the popular acceptance of the word "fire is the effect of combustion." It is therefore equivalent to ignition or burning.² An insurance against damage or loss by "fire," will therefore not include the destruction of the building insured by its being rent and torn to pieces by lightning without being burnt or consumed;³

no doubt. In the former sense, it is used not only in the older, but in the modern, books. Lilly's Convey. 624. Jacob, in his Law Dictionary, says the premiums given on the renewal of leases are termed "fines," and there are fines for alienation of copyholds paid to the lord. One of the definitions of the same word given by Mr. Burrill, is "a sum of money, or price, paid for obtaining a benefit, favor, or privilege; as, the ancient fines for obtaining a writ, and for alienation." *De Peyster v. Michael*, 6 N. Y. 495.

1. In an action upon an order drawn upon and accepted by the owner of a house in process of building, "to be paid when the house is finished," the question whether at the date of the writ the house was "finished," is one of fact upon which the terms of the contract are admissible in evidence; and the owner's moving into the house is not conclusive proof that the house was "finished," and will not estop him to deny that it was. And where neither the contractor nor the defendant finished the house, but it was sold by the latter in an unfinished state, and afterwards completed by the purchaser, the plaintiff doing some work upon it, the plaintiff was held entitled to recover. *Robbins v. Blodgett*, 121 Mass. 5, 84; 124 Mass. 279.

Where an agreement was made that houses on certain mortgaged land were to be "finished to the acceptance of the mortgagee," it was held that under the circumstances the houses were "finished" when all that remained to be done was the inside painting, papering, bell-hanging, and the like. *Hyannis Savings Bank v. Moors*, 120 Mass. 459.

In a statutory definition of "bleaching-works," and "dyeing-works," as including a building where processes of "bleaching, dyeing, or finishing of any yarn or cloth," etc., were carried on, the "finishing" spoken of refers to the process of finishing which is incidental to dyeing, and not to the dealing with fabrics which are neither bleached nor dyed, and a building used for

this latter purpose does not come within the operation of the act. *Howarth v. Coles*, 12 C. B. N. S. 139.

2. *Babcock v. Montg'y Co. Mut. Ins. Co.*, 6 Barb. (N. Y.) 643.

3. *Babcock v. Montg'y Co.*, 4 N. Y. 326, affirming judgment in above case. The insurance in this case was against "fire, by lightning." The court said *inter alia*: "The proposition of the plaintiff is, that in the ordinary acceptance of language, lightning is fire, and hence that destruction by lightning in any manner, is necessarily a destruction by fire; or, if not, that, in effect, the language of this policy imported an insurance against lightning. In support of the first branch of this proposition, reference was made on the argument, as well to passages in ancient scripture, as to the writings of modern philosophers. . . . Treating electricity as an agent which is capable of producing destructive effects, it is mainly, if not altogether in reference to its well known modes of mechanical and chemical action, that danger is to be apprehended to property; and it is therefore, only as against these, that insurance would naturally be required. . . . In the case in hand, the parties, who are presumed to have had an ordinary acquaintance with the known effects of lightning upon a building, and knowing that it might either rend, shatter, and prostrate it, or ignite and cause it to be consumed, entered into the contract of insurance, which is the foundation of this controversy. They employed ordinary work, and not scientific terms, to express their meaning; and the policy must be understood in the plain, ordinary and popular sense of the words used in it (2 Arch. N. P. 272.) Taking the language of the policy in this sense, the defendants did not undertake to indemnify the plaintiffs against lightning nor the effects of lightning. Such an undertaking might have charged them with the loss alleged to have been incurred. But they became liable for one only of the known effects of lightning, to wit, for fire produced by that

but it will cover the effects of an explosion caused by fire;¹ a loss arising in part from explosion, and in part from combustion of explosive materials on the insured premises² (but not at a distance from them, where the combustion is not communicated);³ the destruction of goods by reason of the blowing up of the building in which they are stored, to prevent the spread of a conflagration;⁴ the burning of a ship to prevent her from falling into the hands of the enemy;⁵ a loss by fire caused by collision;⁶ in fact, "the fair

means; having treated the lightning as a cause, and fire resulting from it as an effect, and the only effect to be insured against. According to Webster, 'lightning' is defined to be a sudden discharge of electricity from a cloud to the earth, etc., producing a vivid flash of light, etc. He does not speak of 'fire' in connection with it; while he defines the latter to be 'heat and light emanating visibly, perceptibly, and simultaneously, from any body; or, in popular acceptance, the effect of combustion.' Here we have the sense in which it must be intended that the parties employed these terms in their contract. . . . These authorities which were referred to by the learned counsel for the defendants, show the legal acceptance of the term 'fire,' in connection with 'lightning,' and it is but a reiteration of its popular meaning. It is the effect of combustion caused by lightning. The latter is not treated as 'fire,' but as an agent that may produce fire, which is the immediate and only recognized cause of loss. Electricity, caloric, or heat may so act, without producing fire as to cause great injuries to property; but these are not embraced by an insurance against fire alone." To the same effect, see *Kenniston v. Mer. Co. Mut. Ins. Co.*, 14 N. H. 341. See also FIRE INSURANCE; LIGHTNING.

1. *Waters v. Merch. Louisville Ins. Co.*, 11 Pet. (U. S.) 213; *Washburn v. Farmers' Ins. Co.*, 2 Fed. Rep. 304. See also EXPLOSIONS.

2. *Scripture v. Lowell Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 356. The court says: "The question, we admit, is a nice one. Upon careful reflection, however, we have come to the conclusion that the received opinions on the subject, and the adjudications referred to, are in accordance with reason and principle. It seems not to be denied that actual combustion produced by the ignition of gunpowder, is within the present policy. If then a combustible substance, in the process of combustion, produces explosion also, it is not easy to perceive why, of the two diverse but concurrent results of the combustion, the one should be ascribable to fire only less than the other. The plain fact here is,

the application of fire to a substance susceptible of ignition, the consequent ignition of that substance, and immediate danger to the premises thereby. It is not sufficient answer to say that some of the phenomena produced are in the form of explosion. All the effects, whatever they may be in form, are the natural results of the combustion of a combustible substance; and as the combustion is the action of fire, this must be held to be the proximate and legal cause of all the damage done to the premises of the plaintiff."

3. *Everett v. London Assurance*, 19 C. B. N. S. 126, where the damage resulted from the disturbance of the atmosphere by the explosion of a gunpowder magazine a mile distant from the premises insured. Byles, J., said: "The expression in the policy which we have to construe is 'loss or damage occasioned by fire.' These words are to be construed as ordinary people would construe them. They mean loss or damage either by ignition of the article consumed, or by ignition of part of the premises where the article is: in the one case there is a loss, in the other a damage, occasioned by fire. Lord Bacon, says: 'It were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.' If that were not so, a ship in the neighborhood of Mount Etna or Vesuvius during an eruption, and receiving damage from substances projected therefrom, might be said to be damaged by fire. So, a shot falling amongst crockery-ware might in one sense be said to occasion a loss by fire. But neither of these cases would fall within these words, which must be understood in their plain and ordinary sense."

4. *City Fire Ins. Co. v. Corlies*, 21 Wend. (N. Y.) 367, and see *Greenwald v. Ins. Co.*, 3 Phila. (Pa.) 323.

5. *Gordon v. Rimmington*, 1 Camp. 123.

6. *Ins. Co. v. Transp'n Co.*, 12 Wall. (U. S.) 194. Where the insurance was against fire, "except fire happening by

and reasonable interpretation of a policy of insurance against loss by fire, will include within the obligation of the insurer every loss which necessarily follows from the occurrence of the fire, to the amount of the actual injury to the subject of the risk, whenever that injury arises directly and immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided." ¹

means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power," fire caused by a collision was held not within the exception.

1. *Brady v. N. W. Ins. Co.*, 11 Mich. 445. It is there said: "That which is the actual cause of the loss, whether operating directly or indirectly, or by putting intervening agencies—the operation of which could not be reasonably avoided—in motion, by which the loss is produced, is the cause to which such loss should be attributed. If, in the effort to extinguish fire, property is damaged or destroyed by water, the water may be said to be the proximate cause of the injury or destruction; yet in no just sense can it be said to be the actual cause. *That* was the fire."

Where a bill of lading was given for cotton "dangers of fire and navigation only, excepted," it was held that "fire" meant any fire, and was not restricted to fire originating from the furnace of the boat. *Swindler v. Hilliard & Brooks*, 2 Rich. (S. Car.) 286. The court said: "What does the word 'fire,' taken in this connection, mean? Does it mean fire from lightning, or fire originating from the steamboat furnace, or fire in its most comprehensive sense? In general, I would say that where a word is inserted in a contract by way of limiting a liability, something more was meant than that which by law was already exempted; and if we restrict the term to fire from lightning or mere physical agency, the insertion of it in this bill of lading was wholly unnecessary—because, by law, the carrier is not liable for fire originating in this source. . . . It does not follow that we are to restrict the word fire to a limited sense, when it usually has a more enlarged signification. Words in construction are to receive their usual signification, unless it appears that they are used in different sense. In common parlance, fire comprehends every kind of fire, without reference to the physical agencies by which it is produced; whether it be communicated by a torch, or lightning, or the furnace of a steam-engine, or arise from self-combustion or any other cause."

Where from the negligence of a servant of the assured in not opening a register, smoke and heat from a stove used in the insured manufactory were forced into a room greatly damaging goods without actually burning any, the fire not being greater than it ought to have been, had there been free vent for the smoke and heat; the loss was held not to result from "fire," within the meaning of the policy. *Austin v. Drew*, 4 Camp. 360; s. c., Holt, 126. The court said: "There was no more fire than always exists when the manufacture is going on. Nothing was consumed by fire. The plaintiff's loss arose from the negligent management of their machinery." A jurymen urging that "if my servant by negligence sets my house a-fire, and is burnt down, I expect, my Lord, to be paid by the insurance office?" The court replied: "And so you would, sir; but then there would be a fire, whereas here there has been none. If there is a fire, it is no answer that it was occasioned by the negligence or misconduct of servants; but in this case there was not fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. But can this be said where the fire never was at all excessive, and was always confined within its proper limits? This is not a fire, within the meaning of the policy, nor a loss for which the company undertake. They might as well be sued for the damage done to the drawing-room furniture by a smoky chimney." A verdict was found reluctantly for the defendants, and a new trial was refused in 6 Taunt. 436.

Where plate-glass was insured against damage resulting from any cause, "except fire or breakage during removal," and a fire broke out in a house adjoining the plaintiff's, and extended to the back of his premises, thirty yards from his shop windows, and he began to remove his stock, calling in some neighbors to assist him, whereupon a crowd, attracted by the fire, pulled down the window shutters, broke the plate-glass windows, and stole

FIRE-ARM.—(See also ASSAULT ; CONCEALED WEAPONS ; EXPLOSION.)—A fire-arm is a weapon acting by the force of gunpowder, and to come within the prohibition of a statute against carrying concealed weapons it need not be capable of being used as a weapon of present offence and defence.¹

FIRE DEPARTMENT.—(See also FIRE INSURANCE ; MUNICIPAL CORPORATION.)

I. Liability of Municipal Corporation for Negligence of Its Fire Department, 997.

II. Removal of Members, 1000.

I. Liability of Municipal Corporation for Negligence of its Fire Department.—The members of the fire department of a municipality are public officers, and not the mere servants of the municipality; and, in the absence of an express statute, the municipal corporation is not liable for injuries occasioned by the negligence of the members of its fire department in performing their duties.

the goods; this was held not to be a loss originating from fire or from breakage during removal, *Marsden v. City & Co. Ass. Co.*, Harr. & Ruth, 53.

In a policy of insurance on premises "where no fire is kept," these words must be understood as referring only to the habitual use of fire, not its occasional introduction for a temporary purpose connected with the occupation of the premises. *Dobson v. Sotheby*, 1 Mov. & M. 90. See FIRE INSURANCE.

1. *Atwood v. State*, 53 Ala. 508, where a pistol with the tubes imperfect and battered up, and the locks so much out of order that it could not be discharged by the trigger, was held a "fire-arm."

2. *Hafford v. New Bedford*, 16 Gray (Mass.), 297; *Fisher v. Boston*, 104 Mass. 87; *Tainter v. Worcester*, 125 Mass. 311; *Heller v. Sedalia*, 53 Mo. 159; s. c., 14 Am. Rep. 444; *Hayes v. Oshkosh*, 33 Wis. 314; s. c., 14 Am. Rep. 760; *Jewett v. New Haven*, 38 Conn. 368; s. c., 9 Am. Rep. 382; *Yule v. New Orleans*, 25 La. Ann. 394; *Burrill v. Augusta*, 78 Me. 118; s. c., 57 Am. Rep. 788; *Grube v. St. Paul*, 34 Minn. 402; *Wheeler v. Cincinnati*, 19 Ohio St. 19; s. c., 2 Am. Rep. 368; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Robinson v. Evansville*, 87 Ind. 334; *Welsh v. Rutland*, 56 Vt. 228; *Greenwood v. Louisville*, 13 Bush (Ky.), 226; *Freeman v. Philadelphia*, 7 W. N. C. Pa. 45; *Rosenberry v. Philadelphia*, 7 W. N. C. Pa. 558; *Knight v. Philadelphia*, 15 W. N. C. Pa. 307; *Fire Ins. Patrol v. Boyd*, 22 W. N. C. Pa. 248; s. c., 113 Pa. St. 269.

In *Hafford v. New Bedford*, 16 Gray (Mass.), 297, certain members of the fire

department, established by the city, ran over and injured the plaintiff, while drawing a hose-carriage on their way to a fire. Held, that the city was not liable. *Bigelow, C.J.* said: "The members of the fire department of New Bedford, when acting in the discharge of their duties, are not servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as officers of the city, charged with the performance of a certain public duty or service, and no action will lie against the city for their negligence or improper conduct while acting in the discharge of their official duty."

In *Fisher v. Boston*, 104 Mass. 87; s. c., 6 Am. Rep. 196, the city was held not to be liable for a personal injury to the plaintiff caused by the bursting of the hose attached to a fire-engine. *Gray, J.*, said: "In the absence of express statute, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire-engines owned by them, than in the case of a town-house or a public way. It makes no difference whether the legislature itself prescribes the duties of the officers charged with the repair and management of fire-engines, or delegates to the city or town the definition of those duties by ordinance or by-law. However appointed or elected, such persons are public officers, who perform duties imposed by the law for the benefit of all the citizens, the performance of which the city or town has no control over and derives no benefit from in its corporate capacity. The acts of such public officers are their own official acts and not the acts

of the municipal corporation or its agents."

In *Jewett v. New Haven*, 38 Conn. 368, the plaintiff, while driving in a public highway in the city, was negligently run into and injured by the driver of a hose-cart, a member of the fire department, who was hastening to the engine-house to procure additional hose for use at a fire. *Held*, that the members of the fire department, when engaged in extinguishing fires, are performing a public, governmental act for the general good, and cannot be regarded as servants of the city, for whose negligence it can be held liable. Park, J., observed: "The utter insufficiency of the old mode of extinguishing fires led the ingenuity of man to devise a better one, and his wisdom brought forth the present system as a substitute; so that when an alarm of fire is now made, instead of a promiscuous body of men with buckets and pails, comes the city itself, with its fire department and powerful engines, to stay the conflagration. Although the two systems differ widely in the degree of their efficiency, still in principle they are the same. If I assist my neighbor in the extinguishment of his fire, I am laboring for him—for his benefit. Can it make any difference whether I am alone or with others? and if with others, whether we act together or separately? whether we are organized or unorganized? whether we have improvements adapted to the purpose of extinguishing fires, or have none that we can use to advantage? In either case I am still laboring for my neighbor whose building is on fire. . . The fire department is more the servant of the citizens than it is of the city. The city is constituted merely the governing power to give it efficiency. But it is said the fire department of New Haven are paid for their services, and that this is an important consideration in determining whether the relation of master and servant exists in a given case. It may be important as evidence, but it is no criterion to determine the fact. One man may be the servant of another, and a third party may pay his wages on a contract between him and the third party. One man may give his services to another, and still the relation of master and servant may exist between them. Wages may be paid, and still the relation of master and servant may not exist; which is the case in question. And, furthermore, public servants are paid for their services as well as private ones. A body of efficient men cannot be obtained in any other way. A majority of the court are satisfied that the relation of master

and servant does not exist between the city and its fire department."

In *Knight v. Philadelphia*, 15 W. N. C. (Pa.) 307, it was held that the city is not liable for injuries caused by the negligent driving of a fire-engine by an employee of the fire department. The court say: "The members of the fire department are not such servants of the municipal corporation as to make it liable for their acts of negligence. Their duties are of a public character and for a high order of public benefit. The fact that the Act of Assembly did not make it obligatory on the city to organize a fire department, does not change the legal liability of the municipality for the conduct of the members of the organization. The same reason which exempts the city from liability for the acts of its policemen applies with equal force to the acts of its firemen."

It was held otherwise by the lower court, in *Buchanan v. Philadelphia*, 2 W. N. C. Pa. 600.

In *Fire Ins. Patrol v. Boyd*, 22 W. N. C. (Pa.) 248, the husband of the plaintiff, while walking on the sidewalk, was killed by being struck by a roll of tarpaulins, which were thrown from an upper window by H., an employee of the Insurance Patrol. K., who was a co-employee, was standing on the sidewalk at the time, and shouted to Boyd, but too late to prevent the accident. H. and K., in the performance of their duties, had gone to the premises to remove some tarpaulins which had been used in the house by servants of the Insurance Patrol to protect property therein during a fire which had occurred a few days previously. The defendant was a corporation organized without capital stock, "to protect and save property in or contiguous to burning buildings, and to remove or take charge of such property or any part thereof when necessary," supported by voluntary contributions from various fire-insurance companies, and not possessing the means of making profits or declaring dividends. *Held*, that such a corporation is a public charitable corporation, and, acting in aid of and relieving the duties of the municipal government in the preservation of life and property at fires, is not liable for the negligent acts of its employees. See also *Fire Ins. Patrol v. Boyd*, 22 W. N. C. (Pa.) 248; s. c., 113 Pa. St. 269, where the first trial of this case is reported.

A city is not liable for personal injuries caused by the negligence of members of its fire department. *Grube v. St. Paul*, 34 Minn. 402; *Howard v. San Francisco*, 51 Cal. 52; *Wilcox v. Chicago*, 107 Ill.,

334; s. c., 47 Am. Rep. 434. A city is not liable for the acts of officers of its fire department, unless made so by express statute, or unless the act complained of was expressly ordered by the city government. *Burrill v. Augusta*, 78 Me. 118; *Grube v. St. Paul*, 34 Minn. 402.

In *Smith v. Rochester*, 76 N. Y. 506, defendant's common council appointed a Committee to make arrangements for the "Centennial" celebration. The committee directed the fire department to be in front of the city hall at midnight of December 31, 1875. One of the defendant's hose-carts, which was being driven rapidly and negligently along a street on its way to the place designated, ran over and injured the plaintiff. *Held*, that the calling out of the hose-cart for such purpose was not authorized, and defendant was not liable; that the ownership of the horses and hose-cart by the city did not make it responsible for the negligent acts of its servants having control of them, when using them in a service not authorized by law.

In *O'Meara v. New York*, 1 Daly (N. Y.) 425, the plaintiff while standing on the sidewalk, was knocked down and run over by a fire engine in the charge of firemen, which was running upon the sidewalk in violation of a city ordinance. *Held*, that the city was not liable. The mere fact that the firemen had at the time an engine in their possession by the authority of the Mayor and Common Council, did not create the relation of master and servant.

In *Wilcox v. Chicago*, 107 Ill. 334, 339. Mr. Justice Walker, discussing the effect of the doctrine holding the city liable for every neglect of its fire department, said: "It would subject the city to the opinions of witnesses and jurors whether sufficient dispatch was used in reaching the fire after the alarm was given; whether the employees had used the requisite skill for its extinguishment; whether a sufficient force had been provided to secure safety; whether the city had provided proper engines and other appliances to answer the demands of the hazards of fire in the city; and many other things might be named that would form the subject of legal controversy. To remit recoveries to be had for all such and other acts would virtually render the city an insurer of every person's property within the limits of its jurisdiction. It would assuredly become too burdensome to be borne by the people of any large city, where loss by fire is annually counted by the hundreds of thousands, if not by the millions. . . . To allow recoveries

for the negligence of the fire department would almost certainly subject property holders to as great, if not greater, burthens than are suffered from the damages from fire. Sound public policy would forbid it, if it was not prohibited by authority."

An incorporated village is not liable for injuries resulting from the negligence of an engineer of its fire department in thawing out a hydrant. *Welsh v. Rutland*, 56 Vt. 228.

Injuries to Fireman.—The city is not liable to a member of its fire department for injuries caused by defects in its apparatus for extinguishing fires. *Wild v. Paterson*, 47 N. J. L. 406.

Volunteer Firemen.—A municipal corporation is not liable for damages caused by the acts of a voluntary association of firemen while engaged in extinguishing a fire within the corporate limits. *Torbush v. Norwich*, 38 Conn. 225.

Injuries to Property.—A city is not liable for the destruction of property by sparks from a fire engine through the negligence of the fire department. *Hayes v. Oshkosh*, 33 Wis. 314; s. c., 14 Am. Rep. 760.

A grant by the legislature to a city of power to establish a fire department confers a legislative or discretionary power and does not render the city liable for losses by fire occasioned through the negligence of the officers of the fire department. The doctrine of *respondet superior* does not apply. *Heller v. Sedalia*, 53 Mo. 159; s. c., 14 Am. Rep. 444.

Destruction of Buildings to Prevent the Spreading of Fire.—Where a fire department in arresting the spread of fire in a city, destroys houses or other property, the city is not liable for the loss, unless made so by statute. *Field v. Des Moines*, 39 Iowa 575; s. c., 18 Am. Rep. 46; *White v. City Council of Charleston*, 2 Hill, L. (S. C.) 571; *McDonald v. Red Wing*, 13 Minn. 38; *Dunbar v. San Francisco*, 1 Cal. 355; *Keller v. Corpus Christi*, 50 Tex. 614.

McKean, C. J., in *Res publica v. Sparhawk*, 1 Dallas (Pa.) 357, 383, 388, says: "Houses may be razed to prevent the spreading of fire, because for the public good. We find, indeed, a memorable instance of folly recorded in the 3d vol. of Clarendon's History, where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give direction for, or consent to, the pulling down forty wooden houses, or to the removing the furniture etc., belonging to the lawyers of the

II. Removal of Members.—The power to remove members of the fire department of a municipality is regulated by statute. For a collection of the cases see note 1.

temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct, half that great city was burnt." And in *Mouse's Case*, 12 Coke 63, Lord Coke says: "For the commonwealth, a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do without being liable to an action."

Statutory Liability.—Where the statute allows a recovery, the case must be clearly brought within its terms to charge the municipal corporation. *Bowditch v. Boston*, 101 U. S. 16; *Coffin v. Nantucket*, 5 Cush. (Mass.) 269; *Keller v. Corpus Christi*, 50 Tex. 614.

In *Texas* it has been held, that a city is not liable at common law or under the constitution for the destruction of a house by its fire department for the purpose of preventing the spread of a fire. If the city charter provides a mode of compensation in such cases, the mode must be pursued as pointed out. *Keller v. Corpus Christi*, 50 Tex. 614. See also *Coffin v. Nantucket*, 5 Cush. (Mass.) 269.

Under the statute of Massachusetts and the ordinance of Boston, adopted pursuant thereto, the city is not responsible to the owner of buildings destroyed to prevent the spreading of a fire, unless a joint order for their destruction be given by three or more engineers of the fire department, who are present, of whom the chief engineer, if present, must be one. But such owner must show the joint order and that his case is within the terms of the ordinance. *Bowditch v. Boston*, 101 U. S. 16.

For an interesting historical sketch of the original and growth of the fire department of the city of Philadelphia, see the opinion of Read J. in *Harmony Fire Co. v. Trustees of Fire Association*, 35 Pa. St. 496, 498.

1. The commissioners of the department of fire and buildings of the city of Brooklyn have no authority to remove or dismiss any member from the department except upon notice, trial and conviction for one of the offences enumerated in the Brooklyn charter act. *People v. Brooklyn* (N. Y.), 13 N. E. Rep. 28. See also *People v. Commissioners of Brooklyn*, 103 N. Y. 370; *People v. Commissioners*, 106 N. Y. 676, reversing 37 Hun

(N. Y.), 644; *People v. Brooklyn*, 106 N. Y. 64; *State v. Bryson*, 44 Ohio St. 457; s. c., 5 West. Rep. 790.

Where a board of fire commissioners, without any trial or hearing, summarily dismissed a fireman, *held*, on *certiorari*, that these facts appearing from the affidavit, writ, and return, the action of the board must be annulled. *People v. Brooklyn*, 106 N. Y. 64.

In *People ex rel. Smith v. Com'rs, etc.*, of Brooklyn, 103 N. Y. 370, the relator was appointed as a "detailed fireman" by the commissioners of the department of fire and buildings of the city of Brooklyn. He was removed by resolution of the board, without notice, trial, or charges having been made against him, as required by the charter of said city to authorize a removal. The removal was on the ground that no such office as "detailed fireman" existed. *Held*, to be error; that the appointment of the relator was as fireman, and he could only be removed in the manner prescribed by the charter. See also *Pennie v. Brooklyn*, 97 N. Y. 654.

The clerk of the board of fire commissioners of Jersey City is an employee in the fire department and is protected from removal, by the statute. *State ex rel. Van Alst v. Fire Com'rs*, 49 N. J. 156.

The fire commissioner of Brooklyn has power to dismiss a fireman upon his trial and conviction upon a charge of incompetency because of the excessive use of spirituous liquors, as this is "misconduct or neglect of duty" as used in the statute. The fact that the fireman was not present at the trial, being at the time in a lunatic asylum, but represented by counsel at the hearing, and no committee of his person was appointed, does not render his removal illegal. *People v. Partridge*, 13 Abb. N. Cas. (N. Y.) 410.

Removal for Incapacity.—In *People ex rel. McCabe v. Fire Com'rs*, 43 Hun (N. Y.), 554, the relator, the second assistant chief of the fire department of New York City, was removed for alleged incapacity, upon the ground that, by unnecessarily sending out a signal at a fire by which more engines and trucks were called than were needed, he had violated a general order of the department which declared that an officer should "be responsible for any want of judgment . . . which may cause unnecessary loss of life, limb, or property." It was not claimed that any

actual loss of life, limb, or property had occurred by reason of the signal so given, nor that the relator did not successfully extinguish the fire. *Held*, that the general order only included cases in which an actual loss had been caused, and that the single error of judgment committed was not sufficient evidence of the relator's incapacity to warrant his removal.

The supreme court has no jurisdiction, upon *certiorari*, to review a conviction and sentence of dismissal of a member of the fire department of New York City, by the board of fire commissioners, for the offence of intoxication while on duty, and to reduce the sentence, imposed by the board, to suspension. *People ex rel. Kent v. Fire Com'rs*, 100 N. Y. 82.

Illegal Removal from Office.—The city is not liable to a fireman for loss of salary caused by his illegal dismissal from office by the fire commissioners. *Baltimore v. O'Neill*, 63 Md. 336; *Hines v. District of Columbia*, 4 Mc Arthur (D. C.), 141.

In *Hines v. District of Columbia*, 4 McArthur (D. C.), 141, a private in the fire department, appointed to serve during good behavior and at a compensation fixed by law, was removed by the board of fire commissioners, without his consent, and without charges being made against him, and without a hearing. *Held*, that the plaintiff had no right of action against the District of Columbia.

In *Baltimore v. O'Neill*, 63 Md. 336, the fire commissioners of the city of Baltimore, who were by statute the sole judges of the efficient and faithful discharge of duty by their appointees, discharged the fireman of a company in the fire department for disrespect to his superiors. *Held*, that his only remedy was by action against the commissioners, in which, if the removal was fraudulent or illegal, his loss of salary was an element of damage, but that he could not recover salary claimed to be due since the dismissal from the city.

Action for Salary After Illegal Removal.—A member of the fire department of the city of Washington cannot maintain a personal action for his monthly salary unless he has actually performed the duties of his office; and the fact that he has been removed, without notice of charges and without a trial, will not entitle him

to this remedy. *Meredith v. District of Columbia*, 3 McArthur (D. C.), 52.

Transfer Without Consent is a Removal.—The transfer of an employee in the Jersey City fire department, without his consent, from his position of engineer to that of stoker, which latter position is attended with different duties and decreased pay, is invalid under the act regulating the terms of officers and men in fire departments. *State ex rel. Michaelis v. Fire Com'rs*, 49 N. J. 154.

Erection of Fire-escapes.—The power to require, by the service of proper notices, the erection of fire-escapes in and upon hotels in New York City is conferred upon the fire department of the city, and must be exercised by it, and not by one of its subordinate bureaus or officers. *Fire Department of N. Y. v. Sturtevant*, 33 Hun (N. Y.), 407.

Ordinance as to Immoderate Driving.—A city ordinance prohibiting immoderate driving is as binding upon the fire department as upon drivers of ordinary vehicles. *Morse v. Sweeney*, 15 Ill. App. 486. This was an action against the fire marshal of Chicago to recover for the value of a horse killed by being struck by the vehicle of defendant, who was driving at an immoderate rate of speed to a fire. The court observed: "The law cannot recognize any privileged classes, such as the members of the fire or police department of the city, as possessing rights so superior to those of other citizens of the State as to exempt the former from the requirements of the rules of the common law, or, in other words, from the exercise of proper prudence and care in the use of the streets, so as not to cause injury to other persons lawfully upon them."

Taxation of Property Used by Fire Department.—A house and lot and horses owned by a city and used in operating its fire department are public property used for public purposes, and not liable to taxation. *County of Erie v. Erie*, 113 Pa. St. 368; s. c., 4 Cent. Rep. 305.

Disbandment of Fire-engine Company.—A fire-engine company, under the New Jersey statute, being a ministerial agent employed *durante bene placita*, may be disbanded at the pleasure of the managers of the department. *State v. Plainfield Fire Dept.*, 41 N. J. L. 343.

FIRE INSURANCE.

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I. What is.—Insurance against fire is a contract to indemnify the insured for loss or damage to his property occasioned by that element during a specific period.¹ Marine insurance ordinarily includes this peril; but what is here to be treated, as well as what is commonly understood from the term *fire insurance*, is that against loss occurring to property on land by fire.

II. The Policy.—1. *Valued and Open.*—Fire-insurance policies are of two general classes—open and valued. An open policy is one where the sum to be paid in case of loss is not fixed in the policy, except as it is limited by the sum insured, but is left open to be determined by the actual loss.² It is this kind that is in general use by fire-insurance companies. Of course the policy always mentions a sum up to, but not exceeding, which the insurers shall be liable in case of loss, according to the amount thereof; but it is very rarely that a fire policy binds the underwriters to the payment of a determinate sum without regard to the actual loss sustained. And in no case where the policy is a floating or shifting one—that is, where the policy and risk shifts from articles of a class to other articles of the same class with which they are replaced, as where goods are sold from an insured store stock and replaced

1. Flanders on Fire Insurance, 17.

2. Farmers' Ins. Co. "Butler, 38 Ohio St. 128.

with others—can it be said that the policy is valued. A valued policy is one where the subject of insurance is valued therein and the sum to be paid by the company in case of a total loss is thus absolutely determined in advance, in the absence of fraud, misrepresentation, and concealment.¹ To make it such, it must be on specific property. The words “valued at” are ordinarily used in valued policies in the valuation of the property insured; thus: “One thousand dollars on his two-story frame, shingle-roof dwelling, valued at \$2000;” but these are not essential. Any words which clearly express the design to make the policy a valued one are sufficient for that purpose.²

2. *The Insured.*—Where only one party is insured, and he is distinctly named, no difficulty ordinarily arises in determining who is entitled, if any one, to enforce the policy. But sometimes the policy is made in favor of more than one owner, or of one of several joint owners, or an agent for an undisclosed principal, or in favor of “whom it may concern,” or the loss is made payable

1. *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475; *Fuller v. Boston Mut. Fire Ins. Co.*, 4 Metc. (Mass.) 206; *Holmes v. Charlestown Mut. Fire Ins. Co.*, 18 Metc. (Mass.) 211; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553; *Ins. Co. of N. A. v. McDowell*, 50 Ill. 120; *Lycoming Ins. Co. v. Mitchell*, 49 Pa. St. 372; *Laurent v. Chatham Fire Ins. Co.*, 1 Hall (N. Y.), 41; *Cayon v. Dwellinghouse Ins. Co. (Wis.)*, 32 N. W. Rep. 540.

The mere fact that property is insured for a certain sum does not make the policy a valued one. There must be a clear intention, expressed in the policy, to make it a valued one. *Wallace v. Ins. Co.*, 4 La. 289; *Cox v. Aetna Ins. Co.*, 29 Ind. 586.

A policy enumerating certain articles with figures indicating dollars placed opposite to each, does not constitute a valued policy. *Luce v. Springfield F. & M. Ins. Co.*, 1 Flip. (U. S. C. Ct.) 281.

In case of a partial loss, it is to be paid in its proportion to the valuation of all the property of the same class, if this valuation is such that the value of a part can be proportionately determined. *Harris v. Eagle Fire Ins. Co.*, 5 Johns. (N. Y.) 367; *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429; *Natchez Ins. Co. v. Bruckner*, 5 Miss. 63; *Tobin v. Hanford*, 17 C. B. (N. S.) 528; *Lapyrpe v. Farr*, 2 Vern. 716.

The insurers under a valued policy are bound to pay the valuation therein fixed in case of loss, notwithstanding the actual loss may be a less sum. *Patapsco Ins. Co. v. Coulter*, 3 Pet. (U. S.) 222; *Gris-*

wold v. Union, etc., Ins. Co., 3 Blatchf. (C. Ct. U. S.) 231; *Howland v. Ins. Co.*, 2 Cranch (C. Ct. U. S.), 471; *Carson v. Marine Ins. Co.*, 2 Wash. (C. Ct. U. S.) 468; *Marine Ins. Co. v. Hodgson*, 6 Cranch (U. S.), 206; *Alsop v. Commercial Ins. Co.*, 1 Sum. (U. S.) 451; *Lovering v. Mercantile Ins. Co.*, 12 Pick. (Mass.) 348; *Borden v. Hingham Ins. Co.*, 18 Pick. (Mass.) 523; *Clark v. Ocean Ins. Co.*, 16 Pick. (Mass.) 289; *Fuller v. Boston, etc., Ins. Co.*, 4 Metc. (Mass.) 206; *Forbes v. Mfg. Ins. Co.*, 1 Gray (Mass.) 371; *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475, 532; *Phillips v. Merrimack Ins. Co.*, 10 Cush. (Mass.) 350; *Whitney v. American Ins. Co.*, 3 Cow. (N. Y.) 210; *Cole v. Louisiana Ins. Co.*, 14 Martin (La.) 165; *Aiken v. Ins. Co.*, 16 Martin (La.) 640; *Pritchett v. Ins. Co. of N. A.*, 3 Yates (Penn.), 458.

And a stipulation in the application, that the valuation shall not be conclusive, does not change the rule if the application is not made a part of the policy. *Luce v. Dorchester & C. Ins. Co.*, 105 Mass. 297; *Eastern R. R. Co. v. Relief Ins. Co.*, 98 Mass. 420.

However, if fraud be practised by the insured, as in over-valuation, the company cannot be held to the valuation fixed.

2. *Harris v. Eagle Ins. Co.*, 5 Johns' (N. Y.) 368; *Luce v. Dorchester, etc., Fire Ins. Co.*, 105 Mass. 297; *Brown v. Quincy, etc., Fire Ins. Co.*, 105 Mass. 396; *Phillips v. Merrimack Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 350; *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.), 63; *Fuller v. Boston Mut. Fire Ins. Co.*, 4 Metc. (Mass.) 206.

to a third party, when the question is more difficult. Where it is in favor of all of joint owners, all are entitled to enforce it; but where it is in favor of only a part of joint owners, only those named can take advantage of its provisions, even though they be partners.¹ Where the policy is made in favor of an agent for an undisclosed principal, only that principal can enforce it.² To so entitle the principal, it is not essential that he should have expressly authorized the agent to take out the policy. He may ratify an unauthorized act of this sort,³ or even adopt the act of a third party who has not been his agent for any purpose.⁴ And where the policy is made in favor of "whom it may concern," any person who can show himself to have had an insurable interest in the property at the time of loss,⁵ and to have been within the contemplation of the parties at the time of making the contract,⁶ is entitled to its benefits, unless the policy provides against an alienation,⁷ in which latter case it must be shown that the claimant had an interest when the contract was made.⁸

A mortgagee has no claim upon insurance effected by the mortgagor, except upon a contract. And if the mortgagor agrees to keep the property insured for the benefit of the mortgagee, and one of the companies in which such insurance is made becomes insolvent, the mortgagee cannot claim the benefit of other insurance effected by the mortgagor for his own protection.⁹

Where a vendee agrees to keep the property insured for the benefit of the vendor, which fact is notified to the company, a payment made to the vendee before the interest of the vendor is discharged is wrongful, and the vendor may still recover.¹⁰

3. *Description of the Property.*—The description of the property should of course be accurate. A totally wrong description renders it ineffective.¹¹ Yet it is sufficient where the property is

1. *Dumas v. Jones*, 4 Mass. 647; *Toppan v. Atkinson*, 2 Mass. 365; *Burgher v. Columbian Ins. Co.*, 17 Barb. (N. Y.) 274; *Pacific Ins. Co. v. Catlett*, 4 Wend. (N. Y.) 75; *Turner v. Burrows* 8 Wend. (N. Y.) 144; *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202.

2. *Russell v. N. E., etc., Ins. Co.*, 4 Mass. 82; *Graves v. Boston, etc., Ins. Co.*, 2 Cranch (U. S.), 419; *Newson v. Douglass*, 7 Har. & J. (Md.) 417; *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606; *Pritchett v. Ins. Co.*, 27 La. Ann. 525.

There must be more than the ordinary terms to so entitle a stranger to the contract. *Burgher v. Columbian Ins. Co.*, 17 Barb. (N. Y.) 274.

3. *Farmers' Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23; *Finney v. Fairhaven Ins. Co.*, 5 Metc. (Mass.) 192.

4. *Mound City Life Ins. Co. v. Huth*, 49 Ala. 529.

5. *Newson v. Douglass*, 7 Har. & J. (Md.) 417.

6. *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606;

7. *Turner v. Burrows*, 8 Wend. (N. Y.) 144; *Newson v. Douglass*, 7 Har. & J. (Md.) 417.

If a carrier insure goods in his charge "for whom it may concern," any one entitled to the beneficial interest in such goods may adopt the policy, even after the loss; and this although the carrier would not be responsible for such loss. *Fire Ins. Asso. v. Merchants', etc., Co.*, 66 Ind. 337; s. c., 7 Atl. Rep. 905.

8. *Minturn v. Manufacturers' Ins. Co.*, 10 Gray (Mass.), 501.

9. *Mordyke, etc., Ins. Co. v. Gery*, (Ind.), 13 N. E. Rep. 683.

10. *Grange Mill Co. v. Western, etc., Co.*, 118 U. S. 396; s. c., 9 N. E. Rep. 274.

11. *Bryce v. Lorrillard Ins. Co.*, 55 N. Y. 240; *Ionides v. Pacific Fire Ins. Co.*, L. R. 62 B. 674; *Goddard v. Monitor Ins. Co.*, 108 Mass. 56; *Prudhomme v.*

designated with reasonable certainty.¹

A mere error does not make the policy inoperative.² However, where the description is that of the insured, and he warrants its connections, less than a totally wrong description will invalidate the policy.³

4. *Location of Property*.—The location of the property insured is of the essence of the contract. Therefore, recovery cannot be had where the property at the time of loss was not where the policy described it as being.⁴ But, in determining whether the

Salamander Fire Ins. Co., 27 La. Ann. 695.

1. Ins. Co. v. Lewis, 48 Tex. 622; Texas Ins. Co. v. Stone, 49 Tex. 4.

Goods insured were described to be in dwelling-houses insured; the insured had only the room, as a lodger, in which the goods were. *Held*, correctly described. *Friedlander v. London Assurance Co.*, 1 M. & Rob. 171.

2. *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257; *American Central Ins. Co. v. McLanathan*, 11 Kan. 533; *Ins. Co. v. Lewis*, 48 Tex. 622; *Texas Ins. Co. v. Stone*, 49 Tex. 4.

In *Yonkers Fire Ins. Co. v. Hoffman* Fire Ins. Co., 6 Robt. (N. Y.) 316, the policy described the premises as between Mead and Arch streets, when in the original policy Ash was written, but it was held that, as the description was complete without this part, and as extrinsic evidence is admissible to correct the error, the insurers were liable.

3. *Newcastle Fire Ins. Co. v. MacMoran*, 3 Dow, 255; *Scott v. Quebec Fire Ins. Co.*, 1 Stuart (L. C.) 147; *Dobson v. Sotheby*, 1 Moody & M. 90; *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52; *Lapin v. Charter Oak F. & M. Ins. Co.*, 58 Barb. (N. Y.) 325; *Sarfield v. Metropolitan Ins. Co.*, 61 Barb. (N. Y.) 479; *Day v. Conway Ins. Co.*, 52 Me. 60; *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33.

And it does not matter that the agent knew of the incorrectness, if it is provided that the insurer shall not be bound by any acts or statements made by or to any agent, unless contained in it, and that the applicant shall be liable for all statements in the application, if made through an agent. *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52.

Thus, in *Fowler v. Ætna Ins. Co.*, 6 Cow. (N. Y.) 673, a condition was that a misdescription of the property, so that the same might be taken at a less rate, should avoid the policy. The insured property was described as contained in a "two-story frame house, filled in with brick." The house was not filled in with

brick. *Held*, that the description "filled in with brick" was a warrant, which, being untrue, avoided the policy.

But in *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25, where there was a condition like that in the last case, it was held that a misdescription would not avoid the policy unless a lower rate of premium was charged in consequence of it; and, whether such misdescription reduced the premium which would otherwise have been demanded, was a question of fact for the jury.

Where an insurance company prepares a policy after an examination of the property by its own surveyor, and with full knowledge of the risk, the insured is not responsible for a misdescription. *Benedict v. Ocean Ins. Co.*, 1 Daly (U. S.); 8; *Gerhauser v. North British & Merc. Ins. Co.*, 7 Nev. 174. See also *Woods v. Atlantic Mut. Ins. Co.*, 50 Mo. 112.

An insurance on "merchandise" such as is usually kept in country stores is not void because hardware, china, and glassware, looking-glasses, etc., were not specifically mentioned, if the articles were such as are usually kept in country stores—which is for the jury to decide. *Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. St. 350.

An omission to mention the cellar under a building is not a misdescription. *Benedict v. The Ocean Ins. Co.*, 31 N. Y. 389.

The description "a three-story granite building" applies to a building with a granite front only, and three stories in front and rear, although only one in the middle. *Medina v. Builders' Mut. Fire Ins. Co.*, 120 Mass. 225; similar case, *Carr v. Hibernia Ins. Co.*, 2 Mo. App. 466.

4. *Severance v. Continental Ins. Co.* 5 Biss. (U. S.) 169; *Providence, etc., R. Co. v. Yonkers, F. Ins. Co.*, 10 R. I. 74; *Lyons v. Providence, etc., Ins. Co.*, 14 R. I. 109; *Liebenstein v. Ætna Ins. Co.*, 45 Ill. 303; *Lycoming Ins. Co. v. Updegraff*, 40 Pa. St. 311; *Brynton v.*

insured property was in the place designated, the nature of the property, the uses to which it is put, the custom of the business with which it is connected, and the other circumstances of the case may be taken into consideration.¹ Permission may be granted for the removal of the property from the location mentioned in the policy, and, when the value of the policy is removed, it will attach in the new location;² but the granting of such permission does not impose upon the insured the duty of removing. Until removal, the insurers are responsible at the first location.³

5. *What Policy Covers.*—The policy covers, as a matter of course, the property expressly mentioned in it; but often it covers much more, by implication.⁴

Clinton, etc., Ins. Co., 16 Barb. (N. Y.) 254; Wall v. E. Riv. Ins. Co., 7 N. Y. 370; Eddy St. Foundry v. Hampden, etc. Ins. Co., 1 Cliff. (U. S.) 300; Houghton v. Mfg. F. Ins. Co., 8 Metc. (Mass.) 114; Sampson v. Security Ins. Co., 133 Mass. 49; Simonton v. Liverpool, London & Globe Ins. Co., 51 Ga. 76; Croghan v. Underwriter's Agency, 53 Ga. 109; Maryland Fire Ins. Co. v. Gusdorf, 43 Md. 506; Harris v. Royal Canadian Ins. Co., 53 Iowa, 236; English v. Franklin Fire Ins. Co., 55 Mich. 273; s. c., 54 Am. Rep. 377.

Thus, should the property be described as being at a certain number of a street, when it is at another, recovery could not be had unless a mutual mistake in the description be shown. Severance v. Continental Ins. Co., 5 Biss. (U. S.) 156.

But when the property is described as being in a certain building it may be anywhere in that building, even though not where it was when insured.—West v. Old Colony Ins. Co., 9 Allen (Mass.), 316; Fair v. Manhattan Ins. Co., 112 Mass. 320; Blake v. Exchange Ins. Co., 12 Gray (Mass.), 265;—unless it be described as being in a particular part, when that description controls.—Boynton v. Clinton, etc., Ins. Co., 16 Barb. (N. Y.) 254; Moadinger v. Mechanics' Fire Ins. Co., 2 Hall (N. Y.), 496; Stover v. Elliott Ins. Co., 45 Me. 175.

So, if it be described as being in a certain story, without stating in what part, it may be removed from one room to another in that story. West v. Old Colony Ins. Co., 9 Allen (Mass.), 316.

The insured may, however, remove the property to avoid loss. Case v. Hartford Fire Ins. Co., 13 Ill. 676; Peoria M. & F. Ins. Co. v. Wilson, 5 Minn. 53; Talamon v. Home, etc., Ins. Co., 16 La. Ann. 426.

Should the location be misdescribed by

the fault of the agent, the company is estopped relative thereto. Phoenix Ins. Co. v. Allen (Ind.), 10 N. E. Rep. 85.

1. Webb v. Nat. Ins. Co., 2 Sandf. (N. Y.) 397; Fitchburg R. Co. v. Charlestown Mut. Fire Ins. Co., 7 Gray (Mass.), 64.

The Iowa court has gone so far under this rule as to hold that insurance on a carriage, described as "contained in" a certain building, covers the same wherever it may be for temporary purposes. McCluer v. The Girard F. & M. Ins. Co., 43 Iowa, 349. See also, affirming same principle, Mills v. Farmers' Ins. Co., 37 Iowa, 400; Tongueville v. Western Assr. Co., 51 Iowa, 553; Everette v. Continental Ins. Co., 21 Minn. 76; Holbrook v. St. Paul Ins. Co., 25 Minn. 229; Trade Ins. Co. v. Barracliff, 45 N. J. L. 543; Noyes v. Northwestern Nat. Ins. Co., 64 Wis. 415; s. c. 54 Am. Rep. 631. But see, to the contrary, Annapolis, etc., R. Co. v. Baltimore Fire Ins. Co., 32 Md. 37; Hartford Fire Ins. Co. v. Farish, 73 Ill. 166; Boynton v. Clinton, etc., Ins. Co., 16 Barb. (N. Y.) 258; Providence, etc., R. Co. v. Yonkers Fire Ins. Co., 10 R. I. 74.

2. McClure v. Lancashire Ins. Co., 6 Ir. Jurist (N. S.) 63.

3. Kunz v. Am. Ex. Ins. Co., 41 N. Y. 412.

4. A policy on the "stock in trade" of a mechanic covers his tools and other articles and implements used by him in his trade or business. Moadinger v. Mechanics' Fire Ins. Co., 2 Hall (N. Y.), 490; Spratley v. Hartford Ins. Co., 1 Dill. (U. S. C. Ct.) 392; Seavey v. Central, etc., Ins. Co., 111 Mass. 540; Crosby v. Franklin Ins. Co., 5 Gray (Mass.), 504; Phoenix Fire Ins. Co. v. Favorite, 49 Ill. 259.

So a policy on a "stock of watches, watch-trimmings, etc.," has been held to

cover a general stock in trade, including silverware, jewelry, clocks, watch tools, and fancy goods,—*Crosby v. Franklin Ins. Co.*, 5 Gray (Mass.), 504;—So, also, a policy on "stock in trade, being mostly chamber furniture in sets, and other articles usually kept by furniture-dealers," covers paints and varnishes used in finishing furniture, where usually kept by furniture dealers, *Haley v. Dorchester Mut. Fire Ins. Co.*, 12 Gray (Mass.), 545.

A policy on a "steam saw-mill" not only covers the building, but also the fixtures and machinery. *Bigler v. N. Y. Cent. Ins. Co.*, 20 Barb. (N. Y.) 635; *Shannon v. Gore, etc.*, *Ins. Co.*, 2 Upper Can., 188.

Likewise, a policy on a "starch-manufactory" includes fixtures and machinery. *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553.

And a policy on "machinery" covers movable dies worked by a press,—*Searing v. Central Ins. Co.*, 111 Mass. 549; and, in the case of a paper-mill, all the tools and implements used therewith in the manufacture of paper,—*Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26.

A policy on household furniture and family stores covers silver forks and spoons, notwithstanding a clause which excludes "plate." *Hanover Fire Ins. Co. v. Mannason*, 29 Mich. 316.

And a policy on tools covers patterns, though it contains a clause exempting company from liability for patterns unless particularly specified. *Lovewell v. Westchester Ins. Co.*, 124 Mass. 418.

Insurance on "grain in stack and granary" covers a stack of flax raised for the seed. *Hewitt v. Watertown Fire Ins. Co.*, 55 Iowa, 323; s. c., 39 Am. Rep. 174.

A policy on "merchandise generally and without exception, their own, or held in trust, or on consignment" applies to household furniture, wearing apparel, and books received and held in deposit by the insured subject to the order of the owner, as well as to the property of the insured and goods consigned on commission. *Siter v. Morris*, 13 Pa. St. 218.

A policy covers all articles of the class named though not used. Thus, a policy on "furniture" covers furniture stored in a garret. *Clark v. Firemen's Ins. Co.*, 18 La. 431.

A policy on the insured's goods, "or held by him in trust," comprehends a piano left with assured, for sale or rent. *Snow v. Carr*, 61 Ala. 363;—or to be shipped elsewhere,—*Lucas v. Liv. Lond. &*

Globe Ins. Co., 23 W. Va. 258; s. c., 48 Am. Rep. 383.

Liquor or other property illegally kept for sale or use may be covered,—*Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124; *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38; *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418; s. c., 38 Am. Rep. 687;—as may a building used for immoral purposes,—*Va. F. & M. Ins. Co. v. Feagin*, 62 Ga. 515. However, see *Lawrence v. Nat. Ins. Co.*, 127 Mass. 557; *Johnson v. Union Ins. Co.*, 127 Mass. 555.

Where it is provided that, if the buildings insured are appropriated to an illegal purpose, the agent must insist upon the removal of the danger or cancellation of the policy. Held, that the mere appropriation of an insured building to an illegal purpose did not avoid the policy. *Behler v. German. Mut. Ins. Co.*, 68 Ind. 347.

But a policy on an unfinished structure does not cover material supplied and designed to be incorporated into it, but which is not actually attached. *Ellmaker v. Franklin Ins. Co.*, 5 Pa. St. 183; *Hood v. Manhattan Ins. Co.*, 11 N. Y. 532; *Mason v. Franklin Fire Ins. Co.*, 12 Gill. & John. (Md.) 468;—or the material of a building after it has fallen,—*Nave v. Home, etc.*, *Ins. Co.*, 37 Mo. 430;—nor does a policy on grain, flour, and fixtures consisting of working-tools, cover paper bags. *Hutchinson v. Niagara Dist. Ins. Co.*, 39 U. C. Q. B. 483;—or one on grain and other merchandise, scales and other articles not kept for sale,—*Kent v. Liverpool & London Ins. Co.*, 26 Ind. 294;—nor does one on a "stock of hair, wrought, raw, and in process," include fancy goods made of other material. *Medina v. Builders' Mut. Ins. Co.*, 120 Mass. 225.

A watch is not embraced in a policy on "furniture and wearing apparel,"—*Clary v. Protection Ins. Co.*, *Wright* (Ohio), 228;—nor furniture and movables, in a policy on fixtures;—*Holmes v. Charlestown Mut. Ins. Co.*, 10 Metc. (Mass.) 211;—nor musical instruments, surgical instruments, guns, pistols, and books, in a policy covering a stock of jewelry and clothing;—*Rafel v. Nashville M. & F. Ins. Co.*, 7 La. Ann. 244;—nor articles kept for use, in a policy on merchandise (though otherwise where the policy is on "property"). *Burgoss v. Alliance Ins. Co.*, 10 Allen (Mass.), 221.

"Frame building occupied as a tannery" does not cover engine and machinery. *Sunderlin v. Aetna Ins. Co.*, 18 Hun (N. Y.), 522.

A policy taken out by a partner in his

Thus, it has been held that insurance on stock "manufactured or in process of manufacture" covers, by implication, raw or manufactured stock,¹ and an insurance on a building covers the cellar walls,² and a heater bricked in.³

6. *Shifting Risk*.—A policy on what is called a shifting risk—that is, where the articles composing the subject of insurance are, from the usages of the business, constantly changing, as a stock of merchandise, or that of a manufacturer—covers that which is on hand at the time of the loss, though none of it may have been on hand at the time of the underwriting of the policy, and though nothing be said regarding it therein.⁴

7. *Duration of Policy*.—Unless it is otherwise stipulated, a policy runs from the day of its date or the making of the contract, even though the premium is not then paid.⁵

It ceases when either the sum insured is paid by reason of a loss, or the time mentioned in the policy expires.⁶

Where a partial loss is paid, the policy continues for the balance of the sum insured, and, if the company elects to rebuild under a provision therefor, then for the difference between the sum expended in rebuilding and the amount insured.⁷

When the exact time of expiration is not stated in the policy, but it is made to run from one day certain to another, it covers the whole of the last day named.⁸

own name, on partnership property, for his individual benefit and paid for from his individual funds, covers his undivided interest only. *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202.

1. *Spratley v. Hartford Ins. Co.*, 1 Dill. (U. S. C. Ct.) 392.

2. *Ervin v. N. Y. Cent. Ins. Co.*, 3 Thomp. & C. (N. Y.) 213; *Workman v. Ins. Co.*, 2 La. 507; *Menk v. Home Mut. Ins. Co.* (Cal.), 14 Pac. Rep. 837.

3. *Adams v. Greenwich Ins. Co.*, 9 Hun (N. Y.), 45.

4. *Whitwell v. Putnam Fire Ins. Co.*, 6 Lans. (N. Y.) 166; *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424; *N. Y. Gas-Light Co. v. Mechanics' Fire Ins. Co.*, 2 Hall (N. Y.), 108; *Sawyer v. Dodge Mut. Ins. Co.*, 37 Wis. 504; *City Fire Ins. Co. v. Mark*, 45 Ill. 482; *Am. Cent. Ins. Co. v. Rothchild*, 82 Ill. 166; *Peoria F. & M. Ins. Co. v. Anapow*, 45 Ill. 86; *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44; *Worthington v. Bearse*, 12 Allen (Mass.), 382; *Getchell v. Aetna Ins. Co.*, 14 Allen (Mass.), 325; *London, etc., R. Co. v. Gye*, 1 El. & El. 652; *Crombie v. Portsmouth Fire Ins. Co.*, 26 N. H. 389; *Planters, etc., Ins. Co. v. Engle*, 52 Md. 468; *Bates v. Equitable Ins. Co.*, 3 Cliff (C. Ct.) 215; *Butler v. Standard Fire Ins. Co.*, 26 Grant Ch. (Canada) 341.

Pratt, J., said, in *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424, the policy being upon goods in a retail store: "It was manifestly the intention of the parties to the policy, in this case, that it should cover, to the amount of the insurance, any goods of the character and description specified in the policy, which from time to time during its continuation might be in the store. Any other construction of a policy of insurance upon a stock in trade continually changing would render it worthless as an indemnity. It is a primary principle in the construction of the contract of insurance, to give it the effect as an indemnity, which the parties to it designed."

A policy on "live stock on the premises" covers a horse subsequently acquired. *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400.

5. *Lightbody v. N. A. Ins. Co.*, 23 Wend. (N. Y.) 18; *Palm v. Medina Co. Mut. Fire Ins. Co.*, 20 Ohio, 529.

6. *Crombie v. Portsmouth Fire Ins. Co.*, 26 N. H. 389.

7. *Frull v. Roxbury Mut. Fire Ins. Co.*, 3 Cush. (Mass.) 263; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535.

8. *Isaacs v. The Royal Ins. Co.*, 22 L. J. Q. B. 681.

But this is now really of no importance, as the beginning and ending of a policy, as at present written, are fixed moments.

8. *Two-thirds or Three-fourths Clause.*—Sometimes, especially with mutual companies, it is provided in the charter or by-laws, or the policy itself, that insurance shall only be placed to the extent of a certain part of the value of the property, and sometimes that liability shall attach only to the extent of a fixed part of the loss, usually two thirds or three fourths. Such provisions are held to be valid and binding when it is shown that they were brought to the knowledge of the assured.¹

But the insuring of a sum in excess of the limit does not invalidate the policy if it be without fraud or misrepresentation.² Unless the assured covenants not to do this, when it does.³

Where it is provided, in the charter, that insurance shall only be placed to the extent of a specified part of the value of the property, and it is therein made the duty of certain officers to determine such amount, their valuation binds the company in case of loss, in the absence of fraud.⁴

9. *Countersigning.*—Policies usually provide that they shall have validity only where countersigned by the agent; but it has been held that the insurers can take no advantage of this where they have delivered the policy as perfect.⁵

10. *Cancellation.*—Fire-insurance policies contain a provision whereby either party may terminate the risk.⁶

And it is only by virtue of this that the insurers may exercise such right.⁷

1. *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Metc. (Mass.) 211; *Post v. Hampshire Mut. Fire Ins. Co.*, 12 Metc. (Mass.) 555; *Egan v. Mut. Ins. Co.*, 5 Den. (N. Y.) 326. *Williamson v. Gove*, etc., Ins. Co., 26 U. C. Q. B. 145; *King v. Printe Edw. Co. Mut. Ins. Co.*, 19 U. C. C. P. 134. See also *Huckins v. People's Mut. Fire Ins. Co.*, 11 Fost. (N. H.) 238; *Ashland Mut. Fire Ins. Co. v. Housinger*, 10 Ohio St. 10; *Singleton v. Boone*, etc., Ins. Co., 45 Mo. 250.

Where a policy provides that not exceeding two thirds of the value of the property shall be insured, and such policy, together with another on the same property, exceeds such limit, the insurers are only liable for their ratable proportion of the amount of such two thirds. *Goodall v. New England Fire Ins. Co.*, 5 Fost. (N. H.) 169; *Haley v. Dorchester Mut. Fire Ins. Co.*, 12 Gray (Mass.), 545.

An insurance on the interest of a mortgagee is not limited to two thirds of his interest. *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238.

2. *Williams v. New England Mut. Ins. Co.*, 31 Me. 219; *Cumberland Valley*

Mut. Protection Co. v. Schell, 29 Pa. St. 31.

3. *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402; *Elliott v. Lycoming Mut. Ins. Co.*, 66 Pa. St. 22.

4. *Fuller v. Boston Mut. Fire Ins. Co.*, 4 Metc. (Mass.) 206; *Phillips v. Merimack Mut. Ins. Co.*, 10 Cush. (Mass.) 350; *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 297.

See, however, where the value is fluctuating, *Atwood v. Union Mut. Fire Ins. Co.*, 8 Fost. (N. H.) 234; and compare *Huckins v. People's Mut. Fire Ins. Co.*, 11 Fost. (N. H.) 238.

A stipulation in the policy that "this company shall in no event be liable beyond three fourths of the actual cash value at the time of loss," controls the valuation in the application. *Brown v. Quincy Mut. Fire Ins. Co.*, 105 Mass. 396.

5. *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241.

But see, as sustaining the provision, *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400.

6. This is valid and will be enforced. *Irwin v. Nat. Ins. Co.*, 2 Disney (Ohio), 68.

7. *Alliance Mut. Ins. Co. v. Swift*, 10

But, to terminate the policy, the insurers must give notice of such intention to the assured.¹

And if loss be payable to a third party, as a mortgagee, it must be given to him also.²

Also, if there be a condition as to the time within which it must be given, such condition must be complied with.³

This notice of the insurers must be unequivocal. Merely giving notice of a desire to cancel is not sufficient;⁴ nor is a notice to deliver the policy for cancellation.⁵

Moreover, the agreed or proportionate part of the premium must be actually returned or tendered to the assured; and the policy runs until it is.⁶

Cush. (Mass.) 433; Wilkins v. Tobacco Ins. Co., 30 Ohio St. 317; Rothschild v. Am. Cent. Ins. Co., 74 Mo. 41; s. c., 41 Am. Rep. 303.

1. Union Assur. Co. v. State (Ind.), 15 N. E. Rep. 518; King v. Enterprise Ins. Co., 45 Ind. 44; Griffey v. N. Y. Cent. Ins. Co., 100 N. Y. 417; Chadbourne v. German, etc., Ins. Co., 31 Fed. Rep. 533.

Notice to the broker who obtained the policy, and payment of the return premium to him, is held to be effectual in Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502; Grace v. Am. Cent. Ins. Co., 16 Blatch. (U. S. C. Ct.) 433; Newark Fire Ins. Co. v. Sammons, 11 Ill. App. 230. It is held not to be effectual in Body v. Hartford Fire Ins. Co., 63 Wis. 157; Hermann v. Niagara Fire Ins. Co., 100 N. Y. 411; Rothschild v. Am. Cent. Ins. Co. 74 Mo. 41; Petersburg, etc., Ins. Co. v. Manhattan Ins. Co., 66 Ga. 446.

And see Goit v. Nat. Protective Ins. Co., 25 Barb. (N. Y.) 189; Springfield F. & M. Ins. Co. v. McKinnon, 59 Tex. 507; Franklin Fire Ins. Co. v. Massey, 33 Pa. St. 221; Ætna Ins. Co. v. Maguire, 51 Ill. 342.

Notice to the broker is sufficient, even though there be a stipulation in the policy that, if the insurance be procured by a broker, such broker shall be considered the agent of the assured, and not of the company. Mut. Assur. Soc. v. Scottish, etc., Ins. Co. (Va.), 4 S. E. Rep. 178.

The assignment of the company for the benefit of its creditors does not have the effect of a cancellation. Ralf v. Com. Ins. Co., 10 Mo. App. 393.

2. Lattan v. Royal Ins. Co., 45 N. J. L. 453.

3. Grant v. Reliance Fire Ins. Co., 44 U. C. Q. B. 229.

4. Goit v. Nat. Protection Ins. Co., 25 Barb. (N. Y.) 189; Griffey v. N. Y. Cent.

Ins. Co., 100 N. Y. 317; Petersburg, etc. Ins. Co. v. Manhattan Ins. Co., 66 Ga. 446.

5. Lyman v. State Mut. Ins. Co., 14 Allen (Mass.), 429; Griffey v. N. Y. Cent. Ins. Co., 100 N. Y. 417.

An entry of cancellation upon the company's books, without the knowledge or consent of the assured, cannot be received as evidence of cancellation. King v. Enterprise Ins. Co., 45 Ind. 44.

6. Franklin Fire Ins. Co. v. Massey, 33 Pa. St. 221; Peoria F. & M. Ins. Co. v. Botto, 47 Ill. 516; Albany City Ins. Co. v. Keating, 46 Ill. 395; Hathorn v. Germania Ins. Co., 55 Barb. (N. Y.) 28; Van Valkenburg v. Lenox Fire Ins. Co., 51 N. Y. 565; Griffey v. N. Y. Cent. Ins. Co., 100 N. Y. 417; Hollingsworth v. Germania Ins. Co., 45 Ga. 294; Home Ins. Co. v. Curtis, 32 Mich. 402; White v. Connecticut Ins. Co., 120 Mass. 330; Grant v. Reliance Fire Ins. Co., 44 U. C. Q. B. 229; Lattan v. Royal Ins. Co., 45 N. J. L. 423. Compare Stone v. Franklin Ins. Co., 105 N. Y. 543; s. c., 12 N. E. Rep. 45.

Otherwise where policy provides that it may be cancelled at any time by either party "on giving notice to that effect;" and this although the policy also provides that the company shall refund the unearned premium. Newark Fire Ins. Co. v. Sammons, 11 Ill. App. 230.

And when the insured is owing the company on account of the premium, it is sufficient to give him notice that, unless the amount due is paid on a day named, the policy will be cancelled on a date fixed. The policy will be treated as cancelled on that date. Bergson v. Builders' Ins. Co., 38 Cal. 541. But compare Lattan v. Royal Ins. Co., 45 N. J. L. 453; and in this case it is held that the notice may be given to a third party, to whom the loss is made payable. Mueller v. Southside Fire Ins. Co., 87 Pa. St.

The company cannot cancel the policy when danger of fire is imminent;¹ but, aside from this, it is entirely optional, under the usual clause, when and for what reason it shall terminate the contract.²

Upon the part of the assured, a surrender of the policy by him to the agent, and the acceptance of it by the latter, with the mutual intention of cancelling it, is a cancellation.³ But in all cases it would be necessary for him to pay the insurance company an amount of money equal to the "short rates" stipulated for, and the reasonable expenses incurred by the company in taking the risk, before demanding the cancellation of his policy.⁴

The assured may demand the cancellation of his policy and the return of the unearned premium, even though proceedings have been instituted to wind up the company.⁵ But, upon his part, as well as upon the part of the company, the demand for cancellation must be unequivocal and unconditional; a mere expression of desire will not do.⁶

11. *Renewal*.—A policy of insurance may be renewed, by the underwriters, for an additional term beyond that mentioned in it, by the mere issuance of a renewal receipt or certificate, and this is the custom and practice in the insurance business.⁷

399. See also *Hillock v. Traders Ins. Co.*, 54 Mich. 531, where it is held that the actual tender of unearned premium is unnecessary if the minds of the parties have met on the point that the policy is to be cancelled; and that, if the assured directs the insurance agent to procure other insurance for him, it is presumable that he means him to use for the purpose the money that he would have to return, and the direction would be a waiver of such tender.

In a suit upon a fire policy containing a condition authorizing the underwriter to cancel the policy upon repayment of a ratable part of the premium, it was answered that this had been done before the fire; that the parties agreed upon \$13 as the return premium, which had been paid and accepted. The evidence showed that a ratable part of the premium was \$13.83, and there was a verdict for the plaintiff, though the evidence showed the agreement to receive and the payment of \$13, as pleaded. *Held*, that the answer was good, and a new trial should have been granted. *Ætna Ins. Co. v. Weisinger*, 91 Ind. 297.

1. *Home Ins. Co. v. Heck*, 65 Ill. 111.

But in a case where, after an adjustment of a loss and the issuance of a certificate with a promise to pay the amount, the company learned that the application misrepresented the title, it was held that the company was entitled to a cancella-

tion of the policy and certificate. *American Ins. Co. v. Barnett*, 73 Mo. 364; s. c., 39 Am. Rep. 517.

2. *International Life Ins. Co. v. Franklin Fire Ins. Co.*, 66 N. Y. 119.

3. *Frain v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Walters v. St. Joseph Fire Ins. Co.*, 39 Wis. 489; *Farmers' Mut. Ins. Co. v. Wenger*, 90 Pa. St. 220.

A third party to whom loss is made payable cannot alone cancel the policy. *Marrin v. Stadacona Ins. Co.*, 43 U. C. Q. B. 556.

4. *Burlington Ins. Co. v. McLeod*, 34 Kan. 189.

5. *Reife v. Commercial Ins. Co.*, 10 Mo. App. 393.

6. *Petersburg, etc., Ins. Co. v. Manhattan Fire Ins. Co.*, 66 Ga. 446.

7. A promise by the agent to renew, in the absence of payment of the premium, cannot be treated as a contract on the part of the company to renew. *Croghan v. Underwriters' Agency*, 53 Ga. 109.

But the issuance of a renewal receipt by the company, pursuant to an application therefor, with a notification to the insured that he is held responsible for the premiums, constitutes a binding contract. *Planters' Ins. Co. v. Ray*, 52 Miss. 325.

A policy may be issued to one of several parties originally insured. *Lockwood v. Middlesex Mut. Ins. Co.*, 47 Conn. 553.

The renewal has the effect of a new contract, but upon the same terms and conditions as the old.¹

The renewal, with full knowledge of the facts, has the effect of waiving the penalty of any misrepresentation made in the original application,² or of any subsequent breach of the conditions of the policy; as where, in violation of its provisions, the assured obtains other insurance without notice to, and consent obtained from, the company;³ or where the assured mortgages the property in contravention of the terms of the policy,⁴ or there is a want of title on the part of the insured.⁵

12. *Insolvency*.—The mere insolvency of an insurance company at the time a policy is issued does not make it void.⁶

III. *Special Conditions of the Policy*.—1. *Other Insurance*.—Fire policies always contain numerous special provisions defining the risk and prescribing the terms and conditions upon which the insurers shall be liable. Among these an invariable provision now is that, if the assured shall have or procure any other insurance or the same property without notice to, and consent obtained from the insurers, the policy shall be void. This provision is valid and binding,⁷ without regard to the motion or intention of the party in

1. *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; *Brady v. N. W. Ins. Co.*, 11 Mich. 425; *Aurora Fire Ins. Co. v. Kranich*, 36 Mich. 286; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235. But see *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153.

A renewal is not other insurance; it is a contract of continuance of existing insurance. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6.

Where a renewal receipt has been issued to the assignee of a policy, and he has paid the premium, *assumpsit* lies by him. *Peoria M. & F. Ins. Co. v. Hervey*, 34 Ill. 46.

So, where loss is made payable to a third party, such party has the right to pay the renewal premium in case of the failure of the assured to do so. *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665.

2. *Witherell v. Maine Ins. Co.*, 49 Me. 200. See also *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

3. *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402; *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526; *Robinson v. Pacific Fire Ins. Co.*, 18 Hun (N. Y.), 395.

4. L., the owner of a building, insured it, then sold one half of it, and formed a partnership with the vendee under the name of L. & Co. Upon the expiration of the policy, it was renewed by L. & Co. upon the condition that the original policy continued in force, and that there

had been no change in the risk since first insured. *Held*, that the insurers intended to continue the insurance on the terms and conditions expressed in the policy, but to L. & Co. *Lancey v. Phoenix Fire Ins. Co.*, 56 Me. 562.

4. *State Ins. Co. v. Todd*, 83 Pa. St. 272.

5. *Phelps v. Gebhard Fire Ins. Co.*, 9 Bosw. (N. Y.) 405; *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221.

6. *Ewing v. Coffman*, 12 Lea (Tenn.), 79.

7. *Battaille v. Merchants' Ins. Co. of N. O.*, 3 Rob. (La.) 384; *Duclos & Co. v. Citizens' Mut. Ins. Co.*, 23 La. An. 332; *Ramsay, etc., Mfg. Co. v. Mut. F. Ins. Co.*, 11 U. C. Q. B. 516; *Fabyan v. Union Mut. F. Ins. Co.*, 33 N. H. 203; *Gale v. Belknap Ins. Co.*, 41 N. H. 170; *Ins. Co. v. Stockbower*, 26 Pa. St. 199; *Kimball v. Howard F. Ins. Co.*, 8 Gray (Mass.), 33; *Hygum v. Aetna Ins. Co.*, 11 Iowa, 21; *Colby v. Cedar Rapids Ins. Co.*, 66 Iowa, 577; *Bigler v. N. Y. Central Ins. Co.*, 22 N. Y. 402; *Gilbert v. Phoenix Ins. Co.*, 36 Barb. (N. Y.) 372; *Deitz v. Mound City Mut. F. & L. Ins. Co.*, 38 Mo. 85; *Manhattan Ins. Co. v. Stein*, 5 Bush (Ky.), 652; *Healey v. Imperial F. Ins. Co.*, 5 Nev. 268; *N. Y. Cent. Ins. Co. v. Watson*, 23 Mich. 486; *Phoenix Ins. Co. v. Mich. South. R. Co.*, 28 Ohio St. 69; *Harris v. Ohio Ins. Co.*, *Wright* (Ohio), 544; *Neve v. Columbia Ins. Co.*, 2 McMull. (S. Car.) 220; *Bonneville v. West. Assur. Co.*, 32 N. W. Rep. (Wis.) 34; *American*

obtaining additional insurance;¹ and applies to an assignee of the policy, as well as to the party originally insured,² though not to another policy in the same company.³ But it is generally considered that if the other insurance be invalid, such a stipulation alone will have no effect upon the policy,⁴ even though the underwriters of the

Ins. Co. v. Replogel (Ind.), 15 N. E. Rep. 810; *Moulthrop v. Farmers' Mut. Fire Ins. Co.*, 52 Vt. 123; *Somerfield v. State Ins. Co.*, 8 Lea (Tenn.), 547; s. c., 41 Am. Rep. 662.

It is binding, even though it be in the charter without any mention of it in the policy,—*Blanchard v. Atlantic Ins. Co.*, 33 N. H. 9; even though the other policy contain the same condition,—*Somerfield v. State Ins. Co.*, 8 Lea (Tenn.), 547; and though the assured may have thought that there was no other insurance,—*Zinck v. Phoenix Ins. Co.*, 60 Iowa, 266. And see *Fabyan v. Union Mut. F. Ins. Co.*, 33 N. H. 203.

Other insurance without notice and consent does not make the policy absolutely void, but voidable, and capable of being confirmed and made valid by acts of the company, showing a waiver of the defect. *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Baer v. Phoenix Ins. Co.*, 4 Bush (Ky.), 242; *Hubbard v. Hartford F. Ins. Co.*, 33 Iowa, 325; *Pennsylvania F. Ins. Co. v. Kittle*, 39 Mich. 51; *Turner v. Meriden F. Ins. Co. (R. I.)*, 16 Fed. Rep. 454. *Contra*, *N. Y. Central Ins. Co. v. Watson*, 23 Mich. 486.

An insurance policy issued by the New England Company provided that, if the insured should have existing, during the continuance of that policy, any other insurance not consented to by that company in writing, and mentioned in or indorsed upon the policy, then the insurance by that company should be void. *Held*, that, although the assured had existing, during a portion of the term embraced in such policy, other insurance not consented to by the company, still, if such other insurance had ceased to exist at the time of the loss, which the assured was seeking to recover, his right of recovery would not be affected. *New England F. & M. Ins. Co. v. Schettler*, 38 Ill. 166. The same decision was made in *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573. But compare *N. Y. Central Ins. Co. v. Watson*, 23 Mich. 486.

Agent of company and the assured, acting under a mutual misapprehension as to existence of prior insurance, both in good faith assuming that property was not insured, agent wrote a policy which remained in his office until after the fire,

when it was marked "cancelled." In a suit upon prior policy, *held*, that the second policy was not other insurance. *Wilson v. Queen Ins. Co.*, 10 Ins. L. J. 302. *U. S. C. C. (Pa.)*.

So, where a policy is surrendered to a local agent, with mutual intent that it be surrendered and cancelled, and at the same time he is directed to obtain a policy from another company in place of it, which he does, in a suit upon the latter the former cannot be considered as other insurance. *Train v. Holland Purchase Ins. Co.*, 68 N. Y. 208.

1. *Pennsylvania F. Ins. Co. v. Kittle*, 39 Mich. 57.

2. *Dickson v. Provincial Ins. Co.*, 24 U. C. C. P. 157.

3. *Bridgewater Iron. Co. v. Enterprise Ins. Co.*, 134 Mass. 433.

4. *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Stacey v. Franklin Ins. Co.*, 2. *Watts v. Serg. (Pa.)* 506; *Schenck v. Mercer, etc.*, *Ins. Co.*, 4 Zab. (N. J.) 447; *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291; *Clark v. New England, etc., Ins. Co.*, 6 Cush. (Mass.) 342; *Forbush v. West. Mass. Ins. Co.*, 4 Gray (Mass.), 337; *Hardy v. Union Mut. F. Ins. Co.*, 4 Allen (Mass.), 217; *Wheeler v. Watertown F. Ins. Co.*, 131 Mass. 1; *Behrens v. Germania F. Ins. Co.*, 64 Iowa, 19; *Hubbard v. Hartford F. Ins. Co.*, 33 Iowa, 325; *Fireman's Ins. Co. v. Holt*, 35 Ohio St. 189; *Knight v. Eureka F. Ins. Co.*, 26 Ohio St. 664; *Dahlberg v. St. Louis Mut. Ins. Co.*, 6 Mo. App. 121; *Sutherland v. Ins. Co.*, 31 Gratt. (Va.) 176; *Emery v. Mut., etc., Ins. Co.*, 51 Mich. 469; s. c., 47 Am. Rep. 590.

Where a first policy prohibited any "increase of risk," and the insured increased the risk by erecting a building connecting his house and barn, *held*, that, the first policy being at an end and of no effect, did not avoid the second policy. *Jackson v. Farmers' Mut. F. Ins. Co.*, 5 Gray (Mass.), 52. But compare, with this, *Sanders v. Watertown Fire Ins. Co.*, 86 N. Y. 414. Also compare, with above-cited cases, *Somerfield v. State Ins. Co.*, 8 Lea (Tenn.), 547; *Funke v. Minnesota, etc., Ins. Assoc.*, 29 Minn. 347; *David v. Hartford Ins. Co.*, 13 Iowa, 69; *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 456; *Campbell v.*

void policy compromise and pay the loss.¹ And, in view of such decisions, it is now generally provided, further, that the policy shall be void whether or not the other insurance be valid. But this has been both given² and denied³ what was probably its intended effect.

For the provision to have its stipulated operation, it is not essential that the property insured by the two policies be wholly identical; if it is as to some part, it is sufficient to avoid the policy under the provision.⁴

Ætna Ins. Co., 1 *Coch*, N. S. 21; *Carpenter v. Providence Washington Ins. Co.*, 16 *Pet. (U. S.)* 495; *Jacobs v. Equitable Ins. Co.*, 19 *U. C. Q. B.* 250.

A policy of company which has not complied with statute governing its admission to the State and authority to transact business is "other insurance," and cannot be claimed to be void. *Behler v. German Mut. Ins. Co.*, 68 *Ind.* 347. See FOREIGN CORPORATIONS.

A policy of insurance, conditioned to be void in case of other insurance above a certain sum without written consent, is avoided by subsequent valid insurance above that sum, not consented to, although such subsequent insurance also avoided certain other insurance contemporaneous with the policy in question, and thus brought the amount of insurance within the amount allowed by that policy. *Royal Ins. Co. v. McCrea*, 8 *Lea (Tenn.)*, 531.

1. *Philbrook v. New Eng. Mut. Ins. Co.*, 37 *Me.* 137; *Fireman's Ins. Co. v. Holt*, 35 *Ohio St.* 189.

At time of fire there were two policies covering the same property, obtained at different times, both containing condition against other insurance without assent of the company, and neither containing such consent. It was held, in a suit upon the first policy, that, the second being invalid by reason of existence of first not consented to by legal intentment, there was no second insurance, and therefore no avoidance of the first policy. Nor is the fact that assured receives payment from the second company important or material in this connection. Assured is not thereby estopped from asserting that there was no valid insurance. *Thomas v. Builders' Mut. Ins. Co.*, 119 *Mass.* 121. Same holding in *Jersey City Ins. Co. v. Nichol*, 35 *N. J. Eq.* 291; s. c., 40 *Am. Rep.* 625.

In *Emery v. Mut., etc., Co.*, 51 *Mich.* 469, it was held that a suit upon the second policy could be maintained for the same reason. But in *Mitchell v. Lycoming Mut. Ins. Co.*, 51 *Pa. St.* 402, it is said that, where policies which are al-

leged to create an over-insurance are voidable only for some breach of condition for which the insurers might avoid them, but which they have waived, the over-insurance exists. See also *Ganthier v. Waterloo Ins. Co.*, 44 *U. C. Q. B.* 490.

2. *Kennedy v. Ins. Co.*, 6 *Ins. L. J.* 359; s. c., 10 *Barb. (N. Y.)* 285.

3. *Allison v. Phoenix Ins. Co.*, 3 *Dill. (U. S.)* 480; *Sutherland v. Old Dominion Ins. Co.*, 31 *Gratt. (Va.)* 176.

Assured held a policy containing a condition that, if the assured should have any other insurance (whether valid or not) without consent, it should be void. Without surrendering or cancelling this policy, he procured another from a second company, which also contained a similar condition against other insurance. Held, that the first policy remained in force, as the second never had any validity, and the plaintiff could not therefore recover. Whether the words "valid or not" in the first policy are not void for repugnancy, *query*. See *v. Ins. Co.*, 55 *N. H.* 65.

In *Phenix Ins. Co. v. Lamar*, 106 *Ind.* 513, it was held that, if the other policy be in and of itself invalid and void, so that it constitutes no contract of insurance, it is not within the prohibition; but if, to invalidate, it requires the production of extraneous facts, it is within the prohibition.

4. *Mussey v. Atlas Mut. Ins. Co.*, 14 *N. Y.* 79. But compare *Sloat v. Royal Ins. Co.*, 49 *Pa. St.* 14; *Billington v. Canadian Mut. F. Ins. Co.*, 39 *U. C. Q. B.* 433.

But it has been held not to be a case of double insurance when property insured by two policies is commingled; as, where the stock of goods of one store is added to that of another. *Vose v. Hamilton Mut. Ins. Co.*, 39 *Barb. (N. Y.)* 302; *Boatman's, etc., Co. v. Hocking*, 8 *Atl. Rep. (Pa.)* 417. But this is not according to the weight of authority. *Washington Ins. Co. v. Hayes*, 17 *Ohio St.* 432; *Walton v. Louisiana State M. & F. Ins. Co.*, 2 *Rob. (La.)* 563.

It is, however, essential that the interests assured be substantially identical,¹ and, furthermore, that they be of the same person; for the interests of different persons in the same property may be successively insured and all the policies be valid, notwithstanding they may contain the provision under consideration.² But where one already holding a policy on an interest in the property takes an assignment of another, the transaction comes within the stipulation;³ and this although the assignee has no notice of the assignment.⁴

The terms of the provision are usually such as to clearly comprehend a prior, as well as a subsequent, policy; but a clause which provides that the policy shall become void, "if any other insurance be made, which, together with this, shall exceed," etc., relates only to subsequent insurance.⁵ Consent to other insurance,

1. *McLachlan v. Aetna Ins. Co.*, 4 Allen, N. B. 173; *Roos v. Merchants' Mut. Ins. Co.*, 27 La. Ann. 409; *Roots v. Cincinnati Ins. Co.*, 1 Disn. (Ohio) 138.

One of two joint owners applied for insurance, which was issued in his own name; returning the policy as not what he designed, by not including the other joint owner's interest, the agent added the words, "In case of loss, if any, one-half payable to G. P., as his interest may appear." The applicant had other insurance on his own interest, not consented to in writing by the company. The policy required any other insurance on "said property" to be consented to in writing. *Held*, the court can look at surrounding circumstances in the construction, and these show that a joint interest should be construed to be insured, and that the other insurance was not therefore on the same insurable interest, which was intended by the words "said property," and did not constitute double insurance. *Pitney v. Glens Falls Ins. Co.*, 61 Barb. (N. Y.) 335.

Policy issued to one of tenants in common, without stating joint ownership, is other insurance, within meaning of clause relating thereto in another policy, covering joint interest. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6.

Insurance on goods in store is not additional insurance, under a policy insuring building and prohibiting any other insurance on property "connected with it." *Jones v. Maine Mut. Fire Ins. Co.*, 18 Me. 155.

2. *Park v. Phoenix Ins. Co.*, 19 U. C. Q. B. 110; *Gilchrist v. Gore Mut. Ins. Co.*, 34 U. C. Q. B. 15; *Acer v. Merchants' Ins. Co.*, 57 Barb. (N. Y.) 68; *Franklin Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47; *Commercial F. Ins. Co. v. Capitol City F. Ins. Co.*, 81 Ala. 326.

Insurance by a vendee is not, for in-

stance, affected by a provision to this effect in an unassigned policy of the vendor. *Aetna Ins. Co. v. Tyler*, 12 Wend. (N. Y.) 507; affirmed, 16 Wend. (N. Y.) 385. Nor is insurance by a mortgagee of his interest within the clause of a prior policy in favor of the mortgagor, unless such insurance is made at the expense of the mortgagor, and may be applied to his benefit. *Holbrook v. Am. Ins. Co.*, 1 Curtis (C. Ct.), 193; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Sauvey v. Isolated Ins. Co.*, 44 U. C. Q. B. 523; *Jackson v. Mass. Mut. F. Ins. Co.*, 23 Pick. (Mass.) 418.

The by-laws provided that "If a previous policy exists, and is not disclosed, the policy in this company will be void." *Held*, that a previous insurance effected by a third party (who had an interest in the property), in the name of the assured, but without his knowledge or consent, was not in violation of the above provision. *Nichols v. Fayette Mut. F. Ins. Co.*, 1 Allen (Mass.), 63. And see, to the same effect, *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

3. *Levitt v. Western, etc., Ins. Co.*, 7 Rob. (La.) 351; *Walton v. Louisiana State M. & F. Ins. Co.*, 2 Rob. (La.) 563; *Columbus Ins. Co. v. Walsh*, 229.

4. *Barrett v. Union Mut. F. Ins. Co.*, 7 Cush. (Mass.) 175. But consult *Nichols v. Fayette Mut. F. Ins. Co.*, 1 Allen (Mass.), 63; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

5. *Mussey v. Atlas Mut. Ins. Co.*, 4 Kern. (N. Y.) 79. And a condition that "persons insuring property at this office must give notice of any other insurance made on their behalf," etc., applies to subsequent, as well as prior, insurance. *Harris v. Ohio Ins. Co.*, 5 Ohio, 467; *Stacey v. Franklin F. Ins. Co.*, 2 Watts & Serg.

specifying the company, implies a consent to its renewal in the same company,¹ but not in another company.²

Regarding the mode of giving the notice, it may be said that, if any mode be prescribed that must be observed. Thus, if a written notice be stipulated for, no other will suffice.³ But if no mode be mentioned, a verbal notice will answer.⁴ And even where a written notice is required by the terms of the policy, the right to insist upon it may be waived.⁵ The notice should of course convey, to the insurers, knowledge of every material fact which the provision contemplates, but literal exactness in every particular cannot be said to be required in its giving; a substantial compliance with its provisions has been said to be enough.⁶

But the notice must be direct. Merely speaking of other insurance in the presence of an officer or agent of the company will not suffice.⁷

The notice should ordinarily be brought home to the knowledge of the proper officials or representatives of the insuring company. Mere knowledge of the additional insurance by a soliciting agent or broker, having no authority to write policies for the company

(Pa.) 506. So a condition that every person "insuring" must give notice "of any other insurance effected," etc., applies to subsequent, as well as prior, insurance. *Warwick v. Monmouth, etc., Ins. Co.*, 44 N. J. L. 83; s. c., 43 Am. Rep. 343.

"Additional insurance" means prior, as well as subsequent, insurance. *Behrens v. Germania Ins. Co.*, 58 Iowa, 26.

1. *Brown v. Cattaraugus, etc., Ins. Co.*, 18 N. Y. 385. *Compare Healey v. Imperial F. Ins. Co.*, 5 Nev. 268.

2. *Burt v. People's Mut. Ins. Co.*, 2 Gray (Mass.), 397; *Hutchinson v. Western Ins. Co.*, 21 Mo. 97; *Parsons v. Victoria Mut. Ins. Co.*, 29 U. C. C. P. 22; *New Orleans Ins. Assoc. v. Holberg*, 64 Miss. 51; s. c., 1 So. Rep. (Miss.) 5.

3. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495; *Hutchinson v. Western Ins. Co.*, 21 Mo. 97.

Where policy provides that notice of other insurance shall be given in writing, and shall be consented to in writing by the secretary, and that no other notice shall be binding or have any force against the company, knowledge of an agent cannot be considered as an equivalent of what is required. *Commonwealth F. Ins. Co. v. Huntzinger*, 10 Ins. L. J. (Pa.) 618; s. c., 98 Pa. St. 41.

4. *McEwen v. Montgomery County Mut. Ins. Co.*, 5 Hill (N. Y.), 101; *Sexton v. Montgomery Co. Mut. Ins. Co.*, 9 Barb. (N. Y.) 191; *Goodall v. New England Mut. F. Ins. Co.*, 5 Fost. (N. H.) 169;

Schenck v. Mercer Co. Mut. Ins. Co., 4 Zab. (N. J.) 447.

5. *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256. And it was held in this case that where insurers, with actual knowledge of other insurance, agree to transfer the policy for the benefit of creditors, they becoming responsible for the premium, is such waiver. See also *Kenton Ins. Co. v. Shea*, 6 Bush (Ky.), 174; *Hayward v. Natl. Ins. Co.*, 52 Mo. 181.

6. *Liscom v. Boston Mut. F. Ins. Co.*, 9 Metc. (Mass.) 205; *Baptist Soc. v. Hillsborough Mut. F. Ins. Co.*, 19 N. H. 580; *Goodall v. New England Mut. F. Ins. Co.*, 5 Fost. (N. H.) 169.

The insured is not bound to give any details of the other insurance unless specially required. *McMahon v. Portsmouth F. Ins. Co.*, 2 Fost. (N. H.) 15.

The stating of a wrong company in which the other insurance was procured will not avoid the policy if the amount stated is correct. *Benjamin v. Saratoga Co. Mut. F. Ins. Co.*, 17 N. Y. 415. Nor, indeed, according to the *Canada* case of *Osser v. Provincial Ins. Co.*, 12 U. C. C. P. 133, even though the amount be overstated.

Notice of a mere intention to procure other insurance has, however, been held not to be a compliance with the condition. *Kimball v. Howard F. Ins. Co.*, 8 Gray (Mass.), 33; *Healey v. Imperial F. Ins. Co.*, 5 Nev. 268. *Compare Carrugi v. Atlantic F. Ins. Co.*, 40 Ga. 135.

7. *Schenck v. Mercer Co. Mut. F. Ins. Co.*, 4 Zab. (N. J.) 447.

or transact its business generally in the locality, is not usually sufficient,¹ even though he may have obtained both.² To give notice communicated to such an agent this effect, it must, according to the weight of authority, be further shown that it has been communicated to the company, or that it is in some way estopped to deny it.³

But knowledge of other insurance, on the part of a general agent, as, a local agent authorized to write policies for the company and transact its business generally in his locality, is treated as the knowledge of his company;⁴ and it has been held that his waiver of notice of other insurance, as by the receipt of renewal premiums, after he has knowledge of other insurance on the premises, is binding on the company, although the policy provides that no condition can be waived except in writing by the secretary,⁵ and "that any person other than the assured, who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance."⁶

Sometimes it is a part of the provision that the notice shall be given with all "reasonable diligence." What is reasonable diligence within the meaning of such a provision has been held to be a question of law where the facts are not in dispute.⁷

A notice given after the destruction of the property by fire, and seven months subsequently to the date of the second policy, is not a compliance with such a condition;⁸ nor is an unexplained delay of nineteen days.⁹

1. *Liverpool, Lond. & Globe Ins. Co. v. Sorsby*, 60 Miss. 302; *McLachlan v. Aetna Ins. Co.*, 4 Allen (N. B.), 173; *Hendrickson v. Queen Ins. Co.*, 31 U. C. Q. B. 547; *Fire Asso. v. Hogwood (Va.)*, 4 S. E. Rep. 617.

But compare *Bennett v. Council Bluffs, etc., Co.*, 70 Iowa, 600; s. c., 31 N. W. Rep. 948.

2. *Equitable Ins. Co.*, 17 U. C. Q. B. 35; affirmed on U. F., 18 U. C. Q. B. 14.

3. *Howitz v. Equitable Mut. Ins. Co.*, 40 Mo. 557.

Stating a wrong sum to the company by the agent will not avoid the policy. *Hornthal v. Ins. Co.*, 88 N. Car. 71.

4. *Kenton Ins. Co. v. Shea & O'Connell*, 6 Bush (Ky.), 174; *Von Bories v. United L. F. & M. Ins. Co.*, 8 Bush (Ky.), 133; *Cobb v. Ins. Co. of N. A.*, 11 Kan. 93; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. (U. S.) 368; *Frain v. Holland Purchase Ins. Co.*, 68 N. Y. 208; *McEwan v. Montgomery Co. Mut. Ins. Co.*, 5 Hill (N. Y.), 101; *Pechner v. Phoenix Ins. Co.*, 6 Lans. (N. Y.) 411; *Hornthal v. West. Ins. Co.*, 88 N. Car. 71; *Schenck v. Mercer Co. Mut. Ins. Co.*,

4 Zab. (N. J.) 447; *Carrugi v. Atlantic F. Ins. Co.*, 40 Ga. 135; *City F. Ins. Co. of Hartford v. Carrugi*, 41 Ga. 660; *Bennett v. Council Bluffs, etc., Co.*, 70 Iowa, 600; s. c., 31 N. W. Rep. 948; *Mattocks v. Des Moines Ins. Co. (Iowa)*, 37 N. W. Rep. 174; *Am. Ins. Co. v. Gallatin*, 48 Wis. 36; *Am. Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.), 513; *Crescent Ins. Co. v. Griffin*, 59 Tex. 509; *Hamilton v. Home Ins. Co. (Mo.)*, 7 S. W. Rep. 261.

Where several policies are effected by one as agent for several companies, the companies must be held to be notified and consenting to the effecting of the other insurance. *Ins. Co. of N. A. v. McDowell*, 50 Ill. 120.

5. *Carroll v. Charter Oak Ins. Co.*, 10 Abb. (N. Y.) Pr. (N. S.) 166.

6. *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. (C. Ct.) 368; *Morrison v. Ins. Co. (Tex.)*, 6 S. W. Rep. 605.

But see *Fire Asso. v. Hogwood (Va.)*, 4 S. E. Rep. 617.

7. *Kimball v. Howard F. Ins. Co.*, 8 Gray (Mass.), 33.

8. *Kimball v. Howard F. Ins. Co.*, 8 Gray (Mass.), 33.

9. *Mellen v. Hamilton F. Ins. Co.*,

But the provision now more often inserted is, that the company shall have *immediate* notice of the other insurance; but this, like most others, may be either expressly or impliedly waived.¹

The consent of the insurers to the subsequent insurance may also be verbal where there is no provision to the contrary; but where there is such a provision, either in the policy or by-laws, good authorities hold that it cannot be departed from.²

The weight of authority is, however, to the effect that this part of the condition may be waived;³ and it is certain that, where it

5 Duer (N. Y.), 101; affirmed, 17 N. Y. 609.

1. In *Farmers' Ins. Co. v. Taylor*, 73 Pa. 342, it was held a waiver of a condition requiring immediate notice, where the company, without objection, accepts notice of other insurance eight months after their policy is issued, and the other policy is obtained.

2. *Hale v. Mechanics Mut. F. Ins. Co.*, 6 Gray (Mass.), 169.

In *Barrett v. Union Mut. F. Ins. Co.*, 7 Cush. (Mass.) 175, the by-laws annexed to the policy provided that prior insurance should avoid it, unless expressed in the policy. It was held that, there being prior insurance not expressed in the policy, the same was void, and that parol evidence was not admissible to show that the prior insurance was known and assented to by the company, and that the policy was received by the assured, supposing it contained a recital thereof.

To the same effect see *Forbes v. Agawam Mut. Ins. Co.*, 9 Cush. (Mass.) 470; *Worcester Bank v. Hartford F. Ins. Co.*, 11 Cush. (Mass.) 265; *Pendar v. American Mut. Ins. Co.*, 12 Cush. (Mass.) 469; *N. Y. Cent. Ins. Co. v. Watson*, 33 Mich. 486; *Allemania Ins. Co. v. Hurd*, 37 Mich. 11; *Noad v. Provincial Ins. Co.*, 18 U. C. Q. B. 584.

3. *Howitz v. Equitable Mut. Ins. Co.*, 40 Mo. 557; *Nat. F. Ins. Co. v. Crane*, 16 Md. 260; *Ins. Co. of N. A. v. McDowell*, 50 Ill. 120; *Cobb v. Ins. Co. of N. A.*, 11 Kan. 93; *Ins. Co. v. Lyons*, 38 Tex. 253; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. (U. S.) 368; *Richmond v. Niagara F. Ins. Co.*, 79 N. Y. 230.

In *Howitz v. Equitable Mut. Ins. Co.*, 40 Mo. 557, the policy sued on contained a clause providing that, if the insured should procure any other insurance, and should not give notice to the company, and have the same indorsed on the policy or otherwise acknowledged in writing, the policy should cease and be of no further effect. The application

was for insurance to the amount of \$10,000. The agent of the defendant stated to the plaintiff that by its rules the company could take but \$5000 on any one risk, and offered to procure the insurance for the remaining \$5000. This he did the next day, and notified the defendant, who did not object. The premium was subsequently paid and the policy delivered. It was held that it was the duty of the company, on being notified by its agent of the additional insurance, to indorse the same upon the plaintiff's policy or to notify him of the refusal of the risk, and that, having failed so to do, it was estopped from setting up as a defense the failure to have such additional insurance indorsed upon the policy.

And in *Nat. F. Ins. Co. v. Crane*, *supra*, it was said that, where prior insurance is notified to the company at the time the policy issues, the want of indorsement of such prior insurance on the policy, as required by a condition of the policy, cannot be urged, in a court of equity, in a cause otherwise free from objection, whatever effect it may have at law.

In *Washington Ins. Co. v. Davison*, 30 Md. 91, the company applied to for insurance asked the company sued to share the risk, without the request of the assured, and the risk was accordingly shared and two policies issued. The policy of the second company required an indorsement, "If any other insurance has been or shall hereafter be made," etc. Held, that this policy was neither prior nor subsequent to the other, but contemporaneous; and, being given with a knowledge of the other, neither the spirit nor the letter of the clause was violated.

And in *Carrugi v. Atlantic F. Ins. Co.*, 40 Ga. 135, where the policy contained a clause of forfeiture in case of any other insurance not consented to in writing by the company, and the agent consented to the assured getting further insurance, it was decided that the policy was not

is a provision of the charter that policies shall be void for other insurance unless such insurance shall exist by consent of the company indorsed on the policy, it cannot be waived by the company.¹

In granting consent for other insurance, as in giving notice thereof, it is sufficient that the provision be substantially complied with.²

A common form of indorsement has been, "Other insurance permitted without notice." This has received judicial attention in two reported cases, and has been construed to apply to prior as well as to subsequent insurance;³ as has the consent, "Additional insurance permitted."⁴

The consent must be granted by the officers of the company authorized by the charter or by-laws,⁵ or, in the absence of any provision in these, by such officers or agents as are otherwise authorized by the company⁶ or designated in the policy.

void, though the consent was not in writing, the assured having acted on it, and though, on the renewal of the original policy, the assured did not tell the agent of the additional insurance, there being no fraud.

1. *Couch v. City F. Ins. Co. of Hartford*, 38 Conn. 181.

2. *Philbrook v. New England Mut. Ins. Co.*, 37 Me. 137.

In *Potter v. Ontario & Livingston Mut. Ins. Co.*, 5 Hill (N. Y.), 147, the policy required that notice of other insurance should be given and indorsed on the policy, or otherwise acknowledged and approved in writing. Assured effected other insurance on the property, and notified the company by letter of the same. The secretary replied, "I have received your notice of additional insurance;" and it was held that this was an approval and acknowledgement in writing, within the meaning of the condition; and that, after receipt of the notice, the policy continued in full force until the company made their election to terminate the policy, and made known to the assured such determination.

A recital of prior insurance, in the body of the policy, is a compliance with a condition requiring such insurance to be noted on the application, or indorsed on the policy, or otherwise approved in writing by the secretary. *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253.

The words "privilege for \$4500 additional insurance," written in the body of a policy, will operate as a waiver, within that amount, of a subsequent printed condition requiring notice to be given to the insurers of any other insurance, and to have the same indorsed on

the policy. The true intent and meaning is, that the insured may obtain further insurance without notice to the company, and without affecting their policy or their liability upon it, provided such additional insurance does not exceed \$4500. *Benedict v. Ocean Ins. Co.*, 1 Daly (N. Y.), 8.

3. *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265; *Frederick Co. Mut. Ins. Co. v. Deford*, 38 Md. 404.

4. *Behrens v. Germania Ins. Co.* 58 Iowa, 26.

5. *Stark Co. Mut. Ins. Co. v. Hurd*, 19 Ohio, 149; *Hale v. Mechanics' Mut. Fire Ins. Co.*, 6 Gray (Mass.), 169.

But in *Peck v. New London Co. Mut. Ins. Co.*, 22 Conn. 575, where an agent indorsed consent of company to additional insurance, when charter required that consent of directors must be obtained, it was held that the company was not confined by their charter to a single secretary; that, whenever they directed any agent or officer to perform the appropriate duties of a secretary, they made such agent or officer secretary for that purpose. And evidence showing the exercise of such authority on the agent's part was admissible.

6. *Commonwealth F. Ins. Co. v. Huntzinger*, 10 Ins. L. J. 354; s. c., 98 Pa. St. 41.

In *Warner v. Peoria M. & F. Ins. Co.*, 14 Wis. 318, the policy contained the provision under consideration. The assured handed the policy to an agent of the company, who was authorized to receive applications, issue policies, and receive premiums, and applied to him for additional insurance on the property, in other companies, for which he was also agent, and the agent, before re-

It is now usually provided, further, that, if there be other insurance, the company will only be liable to pay its ratable proportion of a loss;¹ but this does not bind the assured to keep up another policy which was on the property;² nor does such a provision in the second policy merely entitle the first to pro-rate.³ Other insurance being permitted, the risk is assumed, not on any specific portion of the property, but on an undivided proportion of the whole.⁴

2. *Title of the Insured.*—Some condition is always inserted in a fire-insurance policy regarding the title to the property insured. It usually is that, if the interest of the insured in the property be not truly stated in the policy, or if it be any other than the entire, unconditional, and sole ownership, the policy shall be void. The insured, too, is often required to answer certain inquiries in his application for insurance, respecting the interest which he owns, and, thereby being made a part of the policy, become warranties, the falsity of which vitiates the policy.⁵ But unless a statement of interest is required, either in the application or policy, the insured need make none; and unless it is otherwise provided, it is sufficient that he has an insurable interest.⁶ Unless more particularly inquired about, or there be a fraudulent concealment or misrepresentation, it does not invalidate the policy where the applicant states that he is the owner of the property, or that it is his, if in some substantial sense this is true, although it turns out that he has not a perfect and absolute estate.⁷ But it is different where more exact informa-

ceiving the premiums for the additional insurance, or delivering the policies therefor, inserted in the first-mentioned policy the words "Other insurance permitted without notice until required. J. C. M.," and it was held that the insertion of such clause was within the scope of the agent's authority, and that the procuring of further insurance, without any other notice to the company, did not work a forfeiture of the policy.

It is not an obligation of the company, on receipt of notice of other insurance taken out without consent, and the burning of the property, to return the premium for the time the policy had to run after the fire. *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150.

1. A compromise with or the insolvency of one company will not bar action against the others for the full amount of their *pro-rata* share. *Good v. Buckeye Mut. Fire Ins. Co.*, 43 Ohio St. 394.

2. *Lattan v. Royal Ins. Co.*, 45 N. J. 453.

3. *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. St. 28.

4. *Teague v. Germania Fire Ins. Co.*, 71 Ala. 473.

5. *Leonard v. American Ins. Co.*, 97 Ind. 299.

6. *Walsh v. Phila. Fire Assoc.*, 127 Mass. 383; *Strong v. Mfr's Ins. Co.*, 16 Peck (Mass.), 40; *Locke v. N. A. Ins. Co.*, 13 Mass. 61; *Smith v. Browditch Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 448; *Tyler v. Aetna Ins. Co.*, 12 Wend. (N. Y.) 507; *Turner v. Burrows*, 5 Wend. (N. Y.) 546; *West Rockingham, etc., Ins. Co. v. Sheets*, 26 Gratt. (Va.) 854; *Morrison v. Tennessee, etc., Ins. Co.*, 18 Mo. 262; *Mut. Fire Ins. Co. v. Deale*, 18 Md. 26; *Western Ins. Co. v. Mason*, 5 Bradw. (Ill.) 141.

The requirement of a description of the property is not a requirement of a statement of the title. *Franklin Ins. Co. v. Coates*, 14 Md. 285.

Nor is a requirement that the condition, situation, value, and risk shall be stated. *Kerr v. Hastings Mutual Fire Ins. Co.*, 41 U. C. Q. B. 217; *Davis v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.), 35; *Akian v. N. H. Ins. Co.*, 53 Wis. 136.

7. *Morrison's Adm'r v. Tennessee M. & F. Ins. Co.*, 18 Mo. 262; *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541; *Hopkins v. Provincial Ins.*

tion with regard to the title is required; as, where the "true title is called for,¹ or where it is provided that, "if the interest

Co., 18 U. C. C. P. 74; *Sinclair v. Canadian, etc., Ins. Co.*, 40 U. C. Q. B. 211; *Lyon v. Stadacona Ins. Co.*, 44 U. C. Q. B. 472; *Allen v. Charlestown Mut. Fire Ins. Co.*, 5 Gray (Mass.), 384; *Walsh v. Phila. Fire Asso.*, 127 Mass. 383; *Allen v. Mut. Fire Ins. Co.*, 2 Md. 111; *Clapp v. Union Mut. Ins. Co.* 7 Fost. (N. H.) 143. But see *Mut. Ins. Co. v. Deale*, 18 Md. 26; *Mahar v. Mut. Asso. Co.*, 5 Call (Va.), 517; *Liv., Lond. & Globe Ins. Co. v. McGuire*, 52 Miss. 227; *Columbia Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 35.

Thus, where a person erects a building upon the land of another with the right of removal, he may insure it as his own, there being no intentional misrepresentation, and nothing in the policy forbidding. *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419.

So it has been held that a tenant for years,—*Niblo v. N. A. Ins. Co.*, 1 Sandf. (N. Y.) 561; *Sauvey v. Isolated Ins. Co.*, 16 L. J. U. C. Q. B. 30, (but compare *Crockford v. Lon. & Liv. Fire Ins. Co.*, 5 Allen (N. B.), 152; *Mers v. Franklin Ins. Co.*, 68 Mo. 127);—or one who has agreed to sell,—*Davis v. Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.), 113; *Vogel v. People's Mut. F. Ins. Co.*, 9 Gray (Mass.), 23;—or to purchase, and has paid part of the purchase-money,—*Lorillard Fire Ins. Co. v. McCulloch*, 21 Ohio St. 176; *Bonham v. Iowa, etc., Ins. Co.*, 25 Iowa, 328; *Dohn v. Farmers, etc., Ins. Co.*, 5 Lans. (N. Y.) 275; *Tyler v. Aetna Ins. Co.*, 16 Wend. (N. Y.) 385; *Ramsay v. Phoenix Ins. Co.* (N. Y.), 2 Fed. Rep. 429; *Farmers' Ins. Co. v. Fogelman*, 35 Mich. 481; *Southern Ins. Co. v. Lewis*, 42 Ga. 587,—may insure the property as owner.

A partner or joint owner may insure the partnership or joint property as owner,—*Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. (N. Y.) 507; *Peck v. New London Mut. Ins. Co.*, 22 Conn. 575; *Gould v. York Co. Mut. Ins. Co.*, 47 Me. 403; *Collins v. Charlestown Mutual Fire Ins. Co.*, 10 Gray (Mass.), 155;—a *cestui que trust* the trust property,—*Newman v. Springfield Ins. Co.*, 17 Minn. 123;—a mortgagor the mortgaged property, whether real or personal,—*Washington Ins. Co. v. Kelley*, 32 Md. 421; *Buffum v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 540; *Hubbard v. Hartford Fire Ins. Co.*, 33

Iowa, 325; *Delahay v. Memphis Ins. Co.*, 8 Humph. (Tenn.) 684;—or a pledgee of warehouse receipts the property receipted for,—*Wilson v. Citizens' Ins. Co.*, 19 L. C. Jurist, 175.

1. *Philips v. Knox County Mut. Ins. Co.*, 20 Ohio, 174; *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen (Mass.) 213; *Pinkham v. Morang*, 40 Me. 587.

Under this clause it is not sufficient for a lessee,—*Marshall v. Columbian Mut. Ins. Co.*, 7 Fost. (N. H.) 157; *Shaw v. St. Lawrence Co. Mut. Ins. Co.*, 11 U. C. Q. B. 73; *Walroth v. St. Lawrence Co. Mut. Ins. Co.* 11 U. C. Q. B. 525;—mortgagee,—*Jenkins v. Quincy Mut. Fire Ins. Co.*, 7 Gray (Mass.), 370; *Brown v. Gore Dist. Mut. Ins. Co.*, 10 U. C. Q. B. 383;—mortgagor,—*Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray (Mass.), 415. *Contra*, *Dolliver v. St. Joseph Ins. Co.*, 128 Mass. 315;—vendee,—*Birmingham v. Empire Ins. Co.*, 42 Barb. (N. Y.) 457; *Falis v. Conway Mut. Fire Ins. Co.*, Allen (Mass.), 46; *Smith v. Bowditch Mut. Ins. Co.*, 6 Cush. (Mass.) 448; *Brown v. Williams*, 28 Me. 252, 262;—tenant by the courtesy,—*Eminence Mut. Ins. Co. v. Jessie*, 1 Met. (Ky.) 523; *Feathers v. Farmers' Mut. Fire Ins. Co.*, 4 Fost. (N. H.) 259;—or part owner,—*Day v. Charter Oak F. & M. Ins. Co.*, 51 Me. 91; *Wilbur v. Bowditch Mutual Fire Ins. Co.*, 10 Cush. (Mass.) 446,—to say that he is the owner.

The company may avoid a policy under this clause, where it has consented to its assignment, and it turns out that the property was transferred in fraud of creditors. *Phoenix Ins. Co. v. Willis* (Tex.), 6 S. W. Rep. 825. But in *Wyman v. People's Equity Ins. Co.*, 1 Allen (Mass.), 301, it was held that an application by a mortgagee in possession, which contains no direct question or statement as to his title, but, in reply to a question as to encumbrances, states as follows: "First mortgage to M. W. [the name of the plaintiff], entered October, 1855;" and, in reply to a question whether the property is insured, states as follows: "not on first mortgagee's interest,"—does not disclose such a want of true representation of the title of the applicant as to avoid the policy, although the by-laws require him to state his true title.

So in *Fowle v. Springfield, etc., Ins. Co.*, 122 Mass. 191, where lessees erected a building which was to become the lessor's at the end of the term, and in-

of the insured be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured,"¹

sured it as theirs, "situated on leased land," it was held that their interest was truly stated.

A lease is not required by this provision to be stated where the fee is in the assured,—*Dolliver v. St. Joseph Ins. Co.*, 128 Mass. 315; s. c., 35 Am. Rep. 378; *Lockwood v. Middlesex Mut. Assu. Co.*, 47 Conn. 553;—nor is a mortgage, action on which is barred by the Statute of Limitations,—*Lockwood v. Middlesex Mut. Assu. Co.*, 47 Conn. 553;—or any other mortgage,—*Judge v. Conn. Ins. Co.*, 132 Mass. 521.

A, under the name of the "National Slipper Co.," insured his property. The policy provided that "if the interest of the assured in the property is not truly stated, the policy shall be void. *Held*, that in the absence of deceit there had been no breach of this provision. *Clark v. German Mut. Fire Ins. Co.*, 7 Mo. App. 77.

1. *Fuller v. Phoenix Ins. Co.*, 61 Iowa, 350.

The owner of property sold on execution, with a period of redemption, has not the "entire, unconditional, and sole" ownership,—*Reaper City Ins. Co. v. Brennan*, 58 Ill. 158;—nor has one who is in possession under a contract of purchase, and who is in default for a payment, and has allowed the property to be sold for taxes,—*Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159;—or who has agreed to sell,—*Clay Ins. Co. v. Huron Man. Co.*, 31 Mich. 346;—or who is in possession under a verbal gift, and promise to convey,—*Vineland v. Security Ins. Co.*, 53 Md. 276.

A vendee in possession, having paid the purchase price, although he has not received his deed, has such ownership. *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605; *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328; *Franklin Fire Ins. Co. v. Crockett*, 7 Lea (Tenn.), 725; *Ramsey v. Phoenix Ins. Co.* (N. Y.), 2 Fed. Rep. 429; *Lewis v. New Eng., etc., Ins. Co.*, 29 Fed. Rep. (Vt.) 496; *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159. But see *Agricultural Ins. Co. v. Montague*, 38 Mich. 548. And it does not matter that he has assigned his contract as security for a debt. *Chandler v. Commerce Fire Ins. Co.*, 88 Pa. St. 223.

So a mortgagor of real estate which he owns in fee,—*Dolliver v. St. Joseph, etc., Insurance Co.*, 128 Mass. 315; *Insurance Co. v. Haven*, 95 U. S. 242; *Manhattan Ins. Co. v. Barker*, 7 Heisk.

(Tenn.) 503; *Clay Fire Ins. Co. v. Beck*, 43 Md. 358; *Washington Ins. Co. v. Kelley*, 32 Md. 421; *Manhattan Ins. Co. v. Weill*, 28 Gratt. (Va.) 389; *Woodward v. Republic Fire Ins. Co.*, 32 Hun (N. Y.), 365; *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. Rep. (Wis.) 352. But see *McLeod v. Citizens' Ins. Co.*, 3 R. & C. (U. S.) 156;—or of Chattels,—*Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325; *Kronk v. Birmingham Ins. Co.*, 91 Pa. St. 300,—has such ownership.

Likewise one who has agreed to put the property into a partnership, but who has not done so,—*Lycoming Ins. Co. v. Barringer*, 73 Ill. 230;—or who has taken title in the name of another,—*American Basket Co. v. Farmville Ins. Co.*, 3 Hughes (U. S.), 251,—has such ownership.

The policy is not affected under this clause by the existence of liens,—*Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. (Va.) 389; *Woody v. Old Dominion Ins. Co.*, 31 Gratt. (Va.) 362; *Manhattan Ins. Co. v. Barker*, 7 Heisk. (Tenn.) 503. *Contra*, *McLeod v. Citizens' Ins. Co.*, 3 R. & C. (U. S.) 156; *Farmers', etc., Ins. Co. v. Curry*, 13 Bush (Ky.), 312 (vendor's lien);—nor by a lease by the insured,—*Ins. Co. v. Haven*, 5 Otto (U. S.), 242.

The deed of the property was delivered to a third person to be delivered to plaintiff, but it was not received till after the fire. *Held*, owner within this clause. *Mattocks v. Des Moines Ins. Co.* (Iowa), 39 N. W. Rep. 174.

Possession and acts of ownership are *prima facie* evidence of ownership. *Kansas Ins. Co. v. Berry*, 8 Kans. 159; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; *Winneshiek Ins. Co. v. Schneller*, 60 Ill. 465.

Other cases illustrating the application of this clause are: *Noyes v. Hartford Fire Ins. Co.*, 54 N. Y. 668; *American Basket Co. v. Farmville Ins. Co.*, 8 Ins. L. J. 329; s. c., 3 Hughes (C. Ct.), 251; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; *Security Ins. Co. v. Bronger*, 6 Bush (Ky.), 146; *Farmers', etc., Ins. Co. v. Curry*, 13 Bush (Ky.), 312; *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159; *Citizens' Ins. Co. v. Dill*, 35 Md. 89; *Clay F. & M. Ins. Co. v. Huron, etc., Co.*, 31 Mich. 346; *Home Ins. Co. v. Heck*, 65 Ill. 111; *Am. Cent. Ins. Co. v. McLanathan*, 11 Kans. 533; *Franklin Fire Ins. Co. v. Vaughan*, 2 Otto (U. S.), 516; *Millville Mut. Fire Ins.*

or be not "absolute,"¹ or be incumbered,² it must be so repre-

Co. v. Wilgus, 88 Pa. St. 107; Chandler v. Commerce Fire Ins. Co., 88 Pa. St. 223.

It is a sufficient compliance with this condition, in case of the insurance of the interest of the mortgagee, if he is described as such in the policy. Williams v. Roger Williams Ins. Co., 107 Mass. 377.

1. Where the condition of a policy required "the interest" of the assured to be stated, if not absolute, *held*, that this did not mean that he must state the nature of his title, if less than absolute. The terms "interest" and "title" are not synonymous. A mortgagor in possession, and a purchaser holding a deed defectively executed, have absolute as well as insurable interests, though neither of them has the legal title. Hough v. City F. Ins. Co., 29 Conn. 10.

One owning the building insured, though he only has a lease of the land on which it stands, is an absolute owner. Hope Ins. Co. v. Brolosky, 35 Pa. St. 282. But the policy is void if it is provided, further, that it shall be so in case the building stands on leased land, unless consent therefor is properly indorsed. Kibbe v. Hamilton Mut. Ins. Co., 11 Gray (Mass), 163. This latter clause does not avoid a policy where the insured is the owner of the fee, but has leased the property for ten years. Ins. Co. v. Haven, 5 Otto (U. S.), 242.

For other cases illustrating who are absolute owners, see Irving v. Excelsior F. Ins. Co., 1 Bosw. (N. Y.) 507; Franklin F. Ins. Co. v. Vaughan, 92 U. S. 516; David v. Hartford F. Ins. Co., 13 Iowa, 69; Rankin v. Andes Ins. Co., 47 Vt. 145; Boutelle v. Worcester F. Ins. Co. 51 Vt. 4; Virginia Fire Ins. Co. v. Kloeber, 31 Gratt. (Va.) 749.

But one is not an absolute owner who is only in possession under a contract of purchase, though a part of the purchase-money may be paid. Mers v. Franklin Ins. Co., 68 Mo. 127; Reynolds v. State Mut. Ins. Co., 2 Grant (Pa), 326.

2. The following have been held to be encumbrances: Mortgages,—Ætna Ins. Co. v. Rish, 40 Mich. 241; Ger. Am. Bank v. Agricultural Ins. Co., 8 Mo. App. 401; Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624; Hankins v. Rockford Ins. Co. (Wis.), 35 N. W. Rep. 34; Treadway v. Hamilton Mut. Ins. Co., 29 Conn. 68; Hutchins v. Cleveland Mut. Ins. Co., 11 Ohio St. 477; Ellis v. State Ins. Co., 61 Iowa, 577; Hicks v. Farmer's Ins. Co., 70 Wis. 1; s. c., 32 N. W. Rep.

201; Olmstead v. Iowa Mut. Ins. Co., 24 Iowa, 503; Fitchburg Sav. Bk. & Amazon Ins. Co., 125 Mass. 431; Packard v. Agawam Mut. F. Ins. Co., 2 Gray (Mass.), 334;—though not recorded,—Beck v. Hibernia Ins. Co., 44 Md. 302. Attachments, where followed by a judgment,—Brown v. Commonwealth Ins. Co., 41 Pa. St. 187. Seizures on executions: Penn. Ins. Co. v. Gottsman, 48 Pa. St. 158. Liens for taxes. Wilbur v. Bowditch Mut. Ins. Co., 10 Cush. (Mass.) 446. Judgment liens. Merrill v. Agr. Ins. Co., 73 N. Y. 452; Bowman v. Franklin Ins. Co., 40 Md. 620; Gottsman v. Penn. Ins. Co., 56 Pa. St. 210; Kensington Nat. Bank v. Yerkes, 86 Pa. St. 227; Leonard v. Am. Ins. Co., 97 Ind. 299. But see Baley v. Homestead F. Ins. Co., 80 N. Y. 21; Owen v. Farmer's, etc., Ins. Co., 57 Barb. (N. Y.) 518; Stein v. Niagara F. Ins. Co., 61 How. (N. Y.) Pr. 144. Not where property a homestead. Eddy v. Hawkeye Ins. Co., 70 Iowa, 472; s. c., 30 N. W. Rep. 808. A vendor's lien. Reynolds v. State Mut. Ins. Co., 2 Grant (Pa.), 326; Chatillon v. Canadian Mut. Ins. Co., 27 U. C. C. P. 450. A vested right of dower. Security Ins. Co. v. Brouger, 6 Bush (Ky.), 147; see also Tuttle v. Robinson, 33 N. H. 104; Jackson v. Farmer's Mut. Fire Ins. Co., 5 Gray (Mass), 52; Campbell v. Hamilton Mut. Ins. Co., 51 Me. 69. A mechanic's lien, for which a petition is filed. Redmon v. Phoenix Fire Ins. Co., 51 Wis. 292. But see Green v. Homestead Fire Ins. Co., 82 N. Y. 517.

The following have been held not to be encumbrances: An invalid mortgage. Watertown Fire Ins. Co. v. Grover, etc., Co., 41 Mich. 131; Lycoming Ins. Co. v. Jackson, 83 Ill. 302; Lockwood v. Middlesex Mut. Ins. Co., 47 Conn. 553. An unstamped and undelivered mortgage. Olmstead v. Iowa Mut. Ins. Co., 24 Iowa, 503. A paid but uncanceled mortgage. Merrill v. Agr. Ins. Co., 73 N. Y. 452; Hawkes v. Dodge Co. Mut. Ins. Co. 11 Wis. 188; but see Warner v. Middlesex Mut. Asso. Co., 21 Conn. 444; Muma v. Niagara, etc., Ins. Co., 22 U. C. Q. B. 214. A contingent right of dower or curtesy. Commercial Ins. Co. v. Spaukneble, 52 Ill. 53; see also Newhall v. Union Mut. Fire Ins. Co., 52 Me. 180; Newman v. Springfield F. & M. Ins. Co., 17 Minn. 123. A bond for a deed upon the payment of a sum of money at a specified time, if the time has expired and the money has not been paid. Newhall v. Union Mut. Fire Ins. Co., 52 Me.

sent to the company and so expressed in the policy, otherwise the policy shall be void.¹

Where a policy to a warehouseman insures his interest only, and stipulates that goods on storage must be separately and specifically insured, he cannot recover thereon for the benefit of the owners of goods stored.²

But this provision may be waived by any recognition of the validity of the policy;³ as, where the company send money to the mortgagee after loss,⁴ or where the officers have knowledge of the true state of the title (and in such case notice to the agent is notice

180. A bond to support the grantors as part of the purchase-price of the premises insured,—*Mason v. Agricultural Mut. Asso. of Can.*, 18 U. C. C. P. 19. Where land in two sections, and one mortgaged, see *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472; s.c., 30 N. W. Rep. 808.

A change in the encumbrances does not necessarily avoid the insurance. *Russell v. Cedar Rapids Ins. Co. (Iowa)*, 32 N. W. Rep. 95.

Inquiries made in the application, as to incumbrances, do not refer to encumbrances subsequently made. *Howard Fire Ins. Co. v. Bruner*, 23 Pa. St. 50; *Dutton v. New England Mut. Fire Ins. Co.*, 9 Fost. (N. H.) 153; *Allen v. Hudson River Mut. Ins. Co.*, 19 Barb. (N. Y.) 443.

And a provision against encumbrances by the applicant does not apply to incumbrances by the assignee. *Richardson v. Canada, etc., Ins. Co.*, 16 U. C. C. P. 430.

"This company shall not be liable if, without written consent hereon, the property shall hereafter become encumbered in any way," refers to encumbrances created by act of the assured, and has no application to encumbrances by judgment, or otherwise created by operation of law. *Bailey v. Homestead Fire Ins. Co.*, 80 N. Y. 21; *Aff'g 16 Hun (N. Y.)*, 503. Where the amount of the encumbrance is inquired after, it must be truly stated; otherwise, as if the encumbrance is more than stated, the policy will be invalidated. *Towne v. Fitchburg Mut. Fire Ins. Co.*, 7 Allen (Mass.), 51; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 127; *Hayward v. New England Mut. Ins. Co.*, 10 Cush. (Mass.) 444; *Brown v. Peoples' Mut. Ins. Co.*, 11 Cush. (Mass.) 280; *Battles v. York County Mut. Ins. Co.*, 41 Me. 208; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Pennsylvania Ins. Co. v. Gottsman*, 48 Pa. St. 151. But if

a representation as to encumbrances upon the property is untrue, but not fraudulently made, and the agent of the underwriter knows the true state of facts, and writes the statement as made from his own knowledge, and fails to state it truly, such misrepresentation will not avoid the policy, although the statement is adopted and signed by the agent of the insured. *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 258; *Rowley v. Empire Ins. Co.*, 3 Keyes (N. Y.), 557; *Anson v. Winnesheik Ins. Co.*, 23 Iowa, 84. See also *Gahagan v. Union Mut. Ins. Co.*, 43 N. H. 176; *Aetna Live Stock, etc., Ins. Co. v. Olmstead*, 21 Mich. 246; *Mut., etc., Ins. Co. v. Gordon*, 20 Ill. App. 559; s. c., 12 N. Rep. 747. But compare *Smith v. Farmers' Mut. Ins. Co.*, 19 Ohio St. 287.

1. This is both reasonable and valid. *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599; *Addison v. K. & L. Ins. Co.*, 7 B. Mon. (Ky.) 470; *Egan v. Mut. Ins. Co.*, 5 Den. (N. Y.) 326; *Murphy v. People's, etc., Ins. Co.*, 7 Allen (Mass.), 239; *Davenport v. New England Mut. Ins. Co.*, 6 Cush. (Mass.) 340; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Gahagan v. Union Mut. Ins. Co.*, 43 N. H. 176; *Patton v. Merchants', etc., Ins. Co.*, 38 N. H. 338; *Richardson v. Maine Ins. Co.*, 46 Me. 394; *Pennsylvania Ins. Co. v. Gottsman*, 48 Pa. St. 151.

A policy on both real and personal property is avoided altogether by a mortgage of the realty in violation of the terms of the policy. *McGowan v. People's Mut. Fire Ins. Co.*, 54 Vt. 211; s. c., 41 Am. Rep. 843.

2. *Home Ins. Co. v. Gwathmey (Va.)*, 1 S. E. Rep. 209.

3. *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507.

4. *Haggard v. Canada Agricultural Ins. Co.*, 39 U. C. Q. B. 419.

to the company),¹ or the policy is "as interest may appear,"² or is to "A B, superintendent,"³ or for whom it may concern."⁴ So, an indorsement making loss payable to the incumbrancer implies the proper notice and consent.⁵ But proof of the mailing of a notice is only *prima facie* evidence that the company received it.⁶ Notice to the company having been given, its consent will be presumed in the absence of a dissent.⁷

3. *Assignment of Policy*.—Fire-insurance policies always provide that, if the policy be assigned without the consent of the company indorsed thereon, it shall be void. This is binding upon the insured,⁸ whether the assignment of the policy be accompanied by an assignment of an interest in the property or not.⁹ But this provision has reference to assignments before loss. An assignment after a loss is good, notwithstanding the provision,¹⁰ and, indeed, even though it be expressly extended to such assignments.¹¹

1. *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Richmond v. Niagara F. Ins. Co.*, 79 N. Y. 230; *Broadhead v. Locomotive F. Ins. Co.*, 23 Hun (N. Y.) 397.

2. *Dewolf v. Capitol City Ins. Co.*, 16 Hun (N. Y.), 116; *Dakin v. Liv.*, Lon. & Globe Ins. Co., 77 N. Y. 600; *Fame Ins. Co. v. Mann*, 4 Bradw. (Ill.) 485.

3. *Mark v. Nat. F. Ins. Co.*, 24 Hun (N. Y.), 565.

4. *Fire Ins. Asso. v. Merchants', etc.*, Co., 66 Md. 339; s. c., 7 Alt. Rep. 905.

5. *Insurance Co. v. McDowell*, 50 Ill. 120.

6. *Plath v. Union Ins. Co.*, 23 Minn. 479.

7. *Brown v. Commonwealth Mut. Ins. Co.*, 41 Pa. St. 187.

8. *Smith v. Saratoga Co. Mut. F. Ins. Co.*, 1 Hill (N. Y.), 499; affirmed, 3 Hill (N. Y.), 508; *Sinural v. Dubuque Mut. F. Ins. Co.*, 18 Iowa, 310; *Ferree v. Oxford F. & L. Ins. Co.*, 67 Pa. St. 373; *Stolle v. Aetna Ins. Co.*, 10 W. Va. 546; *Waterhouse v. Gloucester F. Ins. Co.*, 69 Me. 409; *Watertown Ins. Co. v. Cherry (Va.)*, 3 S. E. Rep. 876; *Biggs v. Ins. Co.*, 88 N. Car. 141.

It is binding both at law and in equity. *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. App. 308.

Where a fire-insurance policy contains a clause providing that the policy shall be void in case of an alienation of the property, but that an assignment may be ratified by the directors within thirty days, the policy is not void, but voidable; and the directors, after thirty days, may assent to the assignment, and, once having done so, they cannot recede from their action, no mistake or fraud appearing. *Grant v. E. & K. Mut. F. Ins. Co.*, 75 Me. 196.

A sale of the property and delivery of

the policy is a valid assignment on a sufficient consideration. *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297.

A provision in a contract of carriage, that the carrier incurring liability by reason of loss or damage to the goods sustained during transportation shall have the benefit of any insurance which may have been effected upon the goods, is not within the clause in a policy on the goods, that "This insurance shall be void in case the policy, or the interest insured thereby, shall be sold, assigned, transferred, or pledged without the consent in writing of the insurer." *Jackson v. Boyleston Mut. Ins. Co.*, 139 Mass. 508; s. c., 52 Am. Rep. 728.

9. *Ferree v. Oxford F. & L. Ins. Co.*, 67 Pa. St. 373. But see *Beryson v. Builders Ins. Co.*, 38 Cal. 541.

10. *Sadler's Co. v. Badcock*, 2 Atkins, 554; *Hughes Mut. F. Ins. Co.*, 9 U. C. Q. B. 387; *Perry v. Merchants' Ins. Co.*, 25 Ala. 355; *Mullen v. Hamilton F. Ins. Co.*, 17 N. Y. 609; *Brichta v. New York Lafayette Ins. Co.*, 2 Hall (N. Y.), 372; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402; *Carter v. Humboldt F. Ins. Co.*, 12 Iowa, 287; *Walters v. Washington Ins. Co.*, 1 Iowa, 404; *Daniels v. Meinhard*, 53 Ga. 359; *Combs v. Shrewsbury Mut. Fire Ins. Co.*, 5 Stew. (N. J.) Eq. 512; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252. But, with regard to a partial loss, compare *Kerr v. Hastings Mut. Ins. Co.*, 41 U. C. Q. B. 217. But an insured who has parted with all his interest in the insured property prior to the loss cannot thereafter confer any rights by an assignment of the policy. *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. App. 308.

11. *Goit v. Nat. Protection Ins. Co.*, 25 Barb. (N. Y.) 189; *Courtney v. New York*

It also has exclusive reference to the assignment of the policy, not to the assignment of the property insured;¹ nor does it apply to a pledge of the policy or its assignment as collateral security,² though a provision that the policy "is not assignable for purposes of collateral security, but for such purpose is to be made payable in case of loss, etc., by indorsement upon its face," does apply in such cases, and, in the event of its violation, recovery cannot be had.³ Nor, again, does it apply to a transfer by a register in bankruptcy to the assignee in bankruptcy,⁴ or to the assignment of the interest of one partner to another.⁵ The policy is not affected by a mere agreement to assign;⁶ nor is it by an actual assignment with the understanding that the assignment shall not be effectual if consent be not granted,⁷ or by an agreement of the insured to hold the policy for the benefit of a third party.⁸ And it is said that an invalid assignment of the policy cannot defeat the insurance.⁹ A substantial compliance with the condition is sufficient. Thus, where there was entered in the policy register, at the instance of the insured, "transferred to William D. Griswold," it was held to be a compliance with the condition.¹⁰ The consent should be indorsed

City Ins. Co., 28 Barb. (N. Y.) 116; Carroll v. Charter Oak Ins. Co., 38 Barb. (N. Y.) 402; s. c., 40 Barb. (N. Y.) 292; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; Pennetaker v. Tomlinson, 1 Coop. Ch. 598; Spare v. Home Mut. Ins. Co. (Oreg.), 17 Fed. Rep. 568; Alkan v. New Hampshire Ins. Co., 53 Wis. 136.

1. People v. Beigler, Hill & Denis (N. Y.) 133; Kitts v. Massasoit Ins. Co., 56 Barb. (N. Y.) 177. And see White v. Robbins, 21 Minn. 370; Texas Ins. Co. v. Cohen, 47 Tex. 406.

A conveyance of the property insured does not assign or transfer the policy. Lahiff v. Ashuelot Ins. Co., 60 N. H. 75.

2. Ellis v. Kreutginger, 27 Mo. 311; True v. Manhattan F. Ins. Co. (Colo.), 26 Fed. Rep. 83; Bibend v. Liverpool & London F. & L. Ins. Co., 30 Cal. 78; Griffey v. N. Y. Cent. Ins. Co., 30 Hun (N. Y.), 299; s. c., 100 N. Y. 417. But see Ferree v. Oxford F. & L. Ins. Co., 67 Pa. St. 373.

3. Lynde v. Newark Ins. Co., 139 Mass. 57.

4. Starkweather v. Cleveland Ins. Co., 2 Abbott (U. S.), 67.

5. Texas Ins. Co. v. Cohen, 47 Tex. 406.

6. Wheeling Ins. Co. v. Morrison, 11 Leigh (Va.), 354; Cromwell v. Brooklyn F. Ins. Co., 39 Barb. (N. Y.) 227; Smith v. Monmouth Mut. F. Ins. Co., 50 Me. 96.

Where an assignment agreed to be

made before a loss is not actually delivered until after it, it operates from the time of such delivery only, and then as an assignment of a money demand against the company. Watertown Ins. Co. v. Grover & Baker Sewing-Machine Co., 41 Mich. 131.

7. Menley v. Ins. Co. of N. America, 1 Sansing (N. Y.) 20.

8. Washington F. Ins. Co. v. Kelley, 32 Md. 421.

A clause making loss payable to a third party is not an assignment. Martin v. Franklin F. Ins. Co., 9 Vroom (N. J.), 140; Burbank v. McCluer, 54 N. H. 339.

9. Crozier v. Phoenix Ins. Co., 2 Han. (N. B.) 200.

10. Griswold v. American Central Ins. Co., 70 Mo. 654.

The written attestation of the assignment of a policy, indorsed on the policy by the agent of the association issuing it, with knowledge of the sale of the goods covered by it, is a sufficient compliance with the condition. New Orleans Ins. Asso. v. Holberg, 64 Miss. 51; s. c., 1 So. Rep. 5.

But an acknowledgment by an insurance company, of notice of an assignment, is not equivalent to a promise by the company to pay the assignee. Pierce v. Charter Oak Ins. Co., 138 Mass. 151. Nor is the mere receipt of premiums through the agent to whom a verbal notice of the assignment had been given by the assignee. Gibbs v. Richmond Co. Mut. Ins. Co., 9 Daly (N. Y.), 203.

by the parties having such authority.¹ But where the provision is that the consent shall be granted by the president and directors, and the president indorses such consent on the policy according to a usage of the company, the consent of the directors will be implied.² The provision may be waived, and if an insurance company, after knowledge of the facts, recognize the existence of the contract by acting upon it, as in demanding and receiving payments of assessments under it, they thereby waive all right to avoid it.³

4. *Rights of Assignee.*—It is the doctrine of the earlier cases that, when the policy has been assigned with the consent of the company, it is beyond the power of the assignor to do anything which will invalidate the policy in the hands of the assignee;⁴ but this the later cases have overturned. The generally recognized doctrine now is, that the assignee takes the policy subject to all its conditions, and, if the assignor could not recover, the assignee cannot;⁵ and it has always been the rule that, where an indorsement

1. In *Stringham v. St. Nicholas Ins. Co.*, 3 Keyes (N. Y.), 280, the agent indorsed consent without actual authority from the company, he only being authorized to receive and forward applications and issue preliminary certificates of insurance. The blanks for the indorsement had the word "secretary" added to the place for the signature. This word the agent erased and substituted the word "agent." The company had no notice of the assignment, and had no knowledge of the contents of the book in which the agent recorded his transactions for the company. *Held*, the agent had no authority to consent to assignments and had not been held out as having such authority.

2. *Phillips v. Merrimack Mut. F. Ins. Co.*, 10 Cush. (Mass.) 350. And see *Duray v. Hudson Co. Mut. Ins. Co.*, 4 Zab. (N. J.) 171.

3. *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Pa. St. 374.

Knowledge of agent binding. *Imperial F. Ins. Co. v. Dunham* (Pa.), 12 Atl. Rep. 668.

4. *Pollard v. Somerset Mut. Ins. Co.*, 42 Me. 221; *Tillon v. Kingston Mut. Ins. Co.*, 7 Barb. (N. Y.) 570; *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221. And see *Foster v. Equitable Mut. Ins. Co.*, 2 Gray (Mass.), 216.

Thus, where a party took a policy, and, the same day on which it was executed, permission was given by the company to assign it to a third person, it was held, that the assignee was entitled to recover the amount of the interest which he had in the policy, notwithstanding the assignor had deprived himself of his right

to recover by the procuring of other insurance contrary to the terms of the policy. *Charleston Ins. & Trust Co. v. Neve*, 2 McMull. (S. Car.) 239. To the same effect see *Traders' Ins. Co. v. Roberts*, 9 Wend. (N. Y.) 404; *Allen v. Hudson River Mut. Ins. Co.*, 19 Barb. (N. Y.) 442; *Foster v. Equitable Mut. Ins. Co.*, 2 Gray (Mass.), 216; *Burton v. Gore Dist. Mut. F. Ins. Co.*, 12 Grant's Ch. (U. C.) 156.

5. *Pupke v. Resolute F. Ins. Co.*, 17 Wis. 378; *East Texas Ins. Co. v. Coffee*, 61 Tex. 287; *Swenson v. Sun, etc., Co.* (Tex.), 5 S.W. Rep. 60; *Reed v. Windsor Co. Mut. F. Ins. Co.*, 54 Vt. 413; *Edes v. Hamilton Mut. Ins. Co.*, 3 Allen (Mass.), 362; *Lawrence v. Holyoke Ins. Co.*, 11 Allen (Mass.), 387; *McCluskey v. Providence Ins. Co.*, 126 Mass. 306; *Phoenix Ins. Co. v. Willis* (Tex.), 6 S.W. Rep. 698; *Hoxsie v. Providence Mut. Ins. Co.*, 6 R. I. 517; *Chishom v. Provincial Ins. Co.*, 20 U. C. 11; *Ill. Mut. F. Ins. Co. v. Fix*, 53 Ill. 151; *Home Mut. Ins. Co. v. Hanslein*, 60 Ill. 521; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391; *Buffalo Steam-Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401; *Burger v. Farmers' Mut. Co.*, 71 Pa. St. 422; *State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. St. 438. In this last case it is said that where a policy of insurance against fire is assigned to a mortgagee with the assent of the insurer, in case of a loss the assignee can only recover where his assignor could have done so had no assignment been made. Such an assignment does not convert the policy into a contract of indemnity to the mortgagee; it is the interest of the mortgagor alone that is covered by

"payable in case of loss," etc., only is made, the beneficiary takes only the rights of the originally insured.

5. *Alienation, Change of Interest, etc.*—Fire policies always contain a provision of varying phraseology to the effect that, if the property insured be alienated without notice to the company and consent duly indorsed upon the policy, the latter shall be void; and, as the ownership is always an important element of the risk, courts have had no hesitation in giving effect to this clause² where

it. The assignee takes it subject to all the express stipulations contained in the policy, and he cannot recover in case of a subsequent breach of the conditions by the mortgagor; such as affecting a further insurance on the property without notice to the prior insurer.

But the company remains liable to the assignee if it pays a loss to the assignor after notice of the assignment. *Hall v. Dorchester Mut. F. Ins. Co.*, 111 Mass. 53.

And an assignment for less than the claim upon it, obtained by a representative of the company by false representations, will be set aside in equity. *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; *Burnham v. Lamar Ins. Co.*, 79 Ill. 160. So, if the company induce the belief that no claim exists against the insured, it will be estopped from asserting one. *Johnston v. Phoenix Ins. Co.*, 39 Md. 233.

1. *Hale v. Mechanics' Mut. F. Ins. Co.*, 6 Gray (Mass.), 169; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391.

A mortgage of real estate, to whom a policy of insurance thereon is made payable in case of loss, is not the assignee of the policy, and is affected by subsequent acts of the assured. *Loring v. Manufacturers' Ins. Co.*, 8 Gray (Mass.), 28; *Smith v. Union Ins. Co.*, 120 Mass. 90; *Fitchburg Savings Bank v. Amazon Ins. Co.*, 125 Mass. 131; *Livingstone v. Western Ins. Co.*, 16 Grant Ch. 9; *Van Buren v. St. Joseph Ins. Co.*, 28 Mich. 398; *Griswold v. American Cent. Ins. Co.*, 70 Mo. 654; *Mervin v. Star F. Ins. Co.*, 7 Hun (N. Y.), 659; affirmed, 72 N. Y. 603; *Brunswick Savings Inst. v. Commercial Union Ins. Co.*, 68 Me. 313; *Continental Ins. Co. v. Hulman*, 92 Ill. 145; *Humphrey v. Hartford Ins. Co.*, 15 Blatchf. (C. Ct.) 35; *Warbasse v. Essex Co. Mut. Ins. Co.*, 13 Vroom (N. J.), 203; *State Ins. Co. v. Maackens*, 9 Vroom (N. J.), 564; *Lias v. Roger Williams Ins. Co.*, 9 Ins. L. J. 154.

2. *Macarty v. Commercial Ins. Co.*, 17 La. 365; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Smith v. Union Ins. Co.*, 120 Mass. 90; *Abbott v. Hampden Ins. Co.*, 30 Me.

414; *Indiana Mut. Fire Ins. Co. v. Coquillard*, 2 Carter (Ind.), 645; *McCulloch v. Indiana Mut. Fire Ins. Co.*, 8 Blackf. (Ind.) 150; *Moulthrop v. Farmers' Mut. Fire Ins. Co.*, 52 Vt. 123. A conveyance for the benefit of creditors is an alienation. *Dadmun Mfg. Co. v. Worcester Mut. Fire Ins. Co.*, 11 Metc. (Mass.) 429; *Young v. Eagle Fire Ins. Co.*, 14 Gray (Mass.), 150; *Adams v. Rockingham Mut. Ins. Co.*, 29 Me. 292; *Hazard v. Franklin Mut. Fire Ins. Co.*, 7 R. I. 429. But see *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9. A sale of a partner's interest is within "alienation by sale or otherwise,"—*Finley v. Lycoming Mut. Ins. Co.*, 30 Pa. St. 311;—even though sale be to member of partnership,—*Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523; *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179; *Buckley v. Garrett*, 47 Pa. St. 80. *Contra*, *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Pierce v. Nashua Fire Ins. Co.*, 50 N. H. 297; *Dermani v. Home Mut. Ins. Co.*, 26 La. Ann. 69; *Corvon v. Iowa State Ins. Co.*, 40 Iowa, 551; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; *Powers v. Guardian F. & L. Ins. Co.*, 136 Mass. 108. The provision prohibits a sale, though it be to a mortgagee, to whom the loss is made payable. *Dailey v. Westchester Fire Ins. Co.*, 131 Mass. 173.

A conveyance of insured premises by a husband, by warranty deed, to a person who, at the same time and as part of the same transaction, conveys the premises to the grantor's wife, avoids a policy of insurance containing a provision that it shall become void if the insured premises are "sold or conveyed in whole or in part," although the husband retains an interest in the land as tenant by the curtesy. *Oakes v. Mfrs. F. & M. Ins. Co.*, 131 Mass. 164.

A sale by one of two tenants in common, of his interest, is held not to violate a policy on both interests. *Lockwood v. Middlesex Mut. Ins. Co.*, 47 Conn. 553.

A conditional sale is not an alienation. *Tittenmore v. Vermont Mut. Fire Ins. Co.*, 20 Vt. 546. But compare *Adams v. Rockingham Mut. Ins. Co.*, 29 Me. 292;

the alienation has been valid.¹ But such a provision does not extend to every change of title.² Thus, if the insured sell only a portion of his interest in the subject-matter of the insurance, the policy will protect his remaining interest if it contain nothing more than the above provision.³ Nor does it comprehend a mortgage,⁴ or a contract to convey,⁵ or the levy of an execution.⁶ Hence, it is now expressly extended in most policies to any change in the title⁷

Tatham v. Commerce Ins. Co., 4 Hun (N. Y.), 136; *Moulthrop v. Farmers' Mut. Fire Ins. Co.*, 52 Vt. 123. But where the policy is on a certain interest, the sale, by the owner, of another interest cannot affect it. *Humphrey v. Hartford Fire Ins. Co.*, 15 Blatchf. (C. Ct.) 35.

A conveyance by a husband and wife to a third person, who immediately conveys it to the insured, is not a sale that will avoid a policy. *Kyte v. Commercial, etc., Ins. Co.*, 144 Mass. 438; s. c., 10 N. E. Rep. 518.

1. A void sale is not an alienation. *School District v. Aetna Ins. Co.*, 62 Me. 330; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. App. 308; *Scammon v. Commercial Union Ins. Co.*, 6 Bradw. (Ill.) 551.

2. *Power v. Ocean Ins. Co.*, 19 La. 28; *Norcroft v. Ins. Co.*, 17 Pa. St. 429; *Hooper v. Hudson Riv. Ins. Co.*, 17 N. Y. 424.

The case of a foreclosure of a mortgage upon the insured property, leaving the right of redemption with the mortgagor, is not reached by such a provision merely. *Strong v. Mfrs' Ins. Co.*, 10 Pick. (Mass.) 40. Otherwise where period of redemption has expired,—*McKissick v. Millowners' Ins. Co.*, 50 Iowa, 116;—nor is it where the property is sold and taken back before the loss, and the provision is that "Alienation by sale or otherwise shall avoid the policy,"—*Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44;—or where the property descends to heirs,—*Burbank v. Rockingham Ins. Co.*, 4 Fost. (N. H.) 550; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88;—or is turned over to a mortgagee, who held the mortgage when the policy was issued,—*Washington Ins. Co. v. Hayes*, 17 Ohio St. 432.

3. *Aetna Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176; *Scanlon v. Union Fire Ins. Co.*, 4 Biss. (C. Ct.) 511. But see *Baldwin v. Hartford Fire Ins. Co.*, 60 N. H. 422.

4. *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418; *Conover v. Mut. Ins. Co.*, 3 Den. (N. Y.) 254;

affirmed, 1 Comst. (N. Y.) 290; *Rice v. Tower*, 1 Gray (Mass.), 426; *Rollins v. Columbian Fire Ins. Co.*, 5 Fost. (N. H.) 200; *Pollard v. Somerset Mut. Fire Ins. Co.*, 42 Me. 221; *Smith v. Monmouth Mut. Fire Ins. Co.*, 50 Me. 96; *Bryan v. Trades, etc., Co.*, 145 Mass. 389; s. c., 5 N. Eng. Rep. 457;—or a quitclaim deed given as security,—*Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. App. 308.

5. *Trumbull v. Portage Co. Mut. Ins. Co.*, 12 Ohio, 305; *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Reynolds v. Mut. Fire Ins. Co.*, 34 Md. 280; *Kempton v. State Ins. Co.*, 62 Iowa, 83. But in *Davidson v. Hawkeye Ins. Co.* (Iowa), 32 N. W. Rep. 514, it was held that, where one party binds himself to pay a certain price for the property, and takes possession thereof, and the other contracts to convey the property on the payments being made, there is a sale of the real estate, within the meaning of a policy which becomes void if the property be sold without the written consent of the company.

6. *Clark v. New England Mut. Ins. Co.*, 6 Cush. (Mass.) 342; *Rice v. Tower*, 1 Gray (Mass.), 426.

7. This is valid. *Foote v. Hartford Ins. Co.*, 119 Mass. 259; *Farmers' Ins. Co. v. Archer*, 36 Ohio St. 608; *Gould v. Patrons Androscoggin Mut. Fire Ins. Co.*, 76 Me. 298; *Biggs v. Ins. Co.*, 88 N. Car. 141. Any material change in the title will be covered by such provision. *Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110.

A sale under a decree of foreclosure or power in a mortgage is a change of title within the meaning of such a clause, though the purchase-money be not entirely paid or the deed executed. *McCaren v. Hartford Fire Ins. Co.*, 1 Seld. (N. Y.) 151; *McKissick v. Millowners', etc., Ins. Co.*, 50 Iowa, 116; *Commercial Union Ins. Co. v. Scammon*, 102 Ill. 49; *Bishop v. Clay Ins. Co.*, 45 Conn. 430; *Brunswick Savings Inst. v. Commercial Union Ins. Co.*, 68 Me. 313. Compare *Foy v. Home Ins. Co.*, 24 Minn. 315. So is a dissolution of a partnership and a division of the partnership goods insured,—*Dreher v. Aetna Ins. Co.*, 18 Mo. 128;—or a sale of the interest of one of several partners,

Card *v.* Phoenix Ins. Co., 4 Mo. App. 424; Dix *v.* Mercantile Ins. Co., 22 Ill. 272; Hathaway *v.* State Ins. Co., 64 Iowa, 229; Hartford Fire Ins. Co. *v.* Ross, 23 Ind. 179; Drennen *v.* London Assurance Corporation (Minn.), 20 Fed. Rep. 657. *Contra*, where sale to other partners,—Burnett *v.* Eufaula Home Ins. Co., 46 Ala. 11; Drennen *v.* London Assurance Corporation (Minn.), 20 Fed. Rep. 627; New Orleans Ins. Association *v.* Holberg, 64 Miss. 51; s. c., 1 So. Rep. 5;—or joint owners,—Western Massachusetts Ins. Co. *v.* Riker, 10 Mich. 279;—or a descent to heirs,—Lappin *v.* Charter Oak F. & M. Ins. Co., 58 Barb. (N. Y.) 325; Hine *v.* Woolworth, 93 N. Y. 75; Hine *v.* Homestead Fire Ins. Co., 29 Hun (N. Y.), 84. But see Westchester Fire Ins. Co. *v.* Dodge, 44 Mich. 420. A devise by will. Sherwood *v.* Agricultural Ins. Co., 73 N. Y. 447. An assignment in bankruptcy. Perry *v.* Lorillard Fire Ins. Co., 61 N. Y. 214. A sale with a mortgage back for the purchase-money. Bates *v.* Commercial Ins. Co., 2 Cin. Sup. Ct. (Ohio) 195; Savage *v.* Howard Ins. Co., 52 N. Y. 502. A conveyance by a husband to a third party and by him to the wife. Oakes *v.* Mfs. Fire, etc., Ins. Co., 131 Mass. 164; Langdon *v.* Minnesota Farmers' Mut. Fire Ins. Co., 22 Minn. 193; Baldwin *v.* Phoenix Ins. Co., 60 N. H. 164. A conveyance absolute in form with a separate defence. Barry *v.* Hamburg-Bremen Fire Ins. Co., 53 N. Y. Super. Ct. 249.

In Home Mut. Fire Ins. Co. *v.* Hauslein, 60 Ill. 521, the policy provided that if there was any sale, transfer, or change of title in the property insured the insurance should be void. After the execution of the policy the assured assigned the property with consent, and then sold the property to three persons, one of whom reconveyed to him, and the others mortgaged the property to him. *Held*, that there was a change of title, and that the policy was void.

A parol contract for the sale of personal property does not avoid the policy under prohibition against change of title, when the money has not been paid or the goods delivered, but still remains in possession of the assured at the time of the fire. *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Browning v. Home Ins. Co.*, 71 N. Y. 508. And see *Pitney v. Glens Falls Ins. Co.*, 61 Barb. (N. Y.) 335. But see to the contrary, where a part of the purchase-money had been paid. *Germond v. Home Ins. Co.*, 2 Hun (N. Y.), 540.

A deed without any proof of its having

been recorded or delivered is inadmissible to show a change in the title. *Humphrey v. Hartford Fire Ins. Co.*, 15 Blatch. (C. Ct.) 35.

A mere agreement between the owner of the property insured and another person to represent to the creditors of the owner, in order to prevent attachments, that it had been sold to such other person, does not avoid the policy, although it is upon the condition that the insurance shall be void "in case of any sale, transfer, or change of title." *Orrell v. Hampden Fire Ins. Co.*, 13 Gray (Mass.), 431.

In *Manhattan Ins. Co. v. Stein*, 5 Bush (Ky.), 652, the condition was that the policy should be void if the property should be "sold or conveyed, or the interest of the parties therein changed." The insured had been a member of a partnership, had bought out his partner's interest, and obtained the insurance to secure his lien for the unpaid purchase money. In proceedings to foreclose this lien the retired partner bought in the property, but the sale was not confirmed till after the fire, nor was the occupancy surrendered or changed. *Held*, that the condition was not broken.

To the same effect see *Farmers' Mut. Ins. Co. v. Graybill*, 74 Pa. St. 17; *Hannell v. Queen's Ins. Co.*, 54 Wis. 72.

This provision does not apply to the sale of merchandise from a stock in trade,—*West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49;—unless sold in mass,—*Biggs v. North Carolina Home Ins. Co.*, 88 N. Car. 141. Nor to a mere nominal transfer, as for collateral security. *Ayres v. Hartford Fire Ins. Co.*, 21 Iowa, 193; *Ayres v. Home Ins. Co.*, 21 Iowa, 185. And see *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53. Nor to a lease. *Dolliver v. St. Joseph Ins. Co.*, 128 Mass. 315. Nor to a mortgage before foreclosure. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun (N. Y.), 98; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606; *Friezen v. Alemania Fire Ins. Co.* (Wis.), 30 Fed. Rep. 352; *Judge v. Connecticut Fire Ins. Co.*, 132 Mass. 521; *Dolliver v. St. Joseph Ins. Co.*, 128 Mass. 315. But compare *Sassaman v. Pamlico Ins. Co.*, 78 N. Car. 145; *Dacey v. Agricultural Ins. Co.*, 21 Hun (N. Y.), 83. Even though proceedings are commenced. *Phoenix Ins. Co. v. Union Mut. Life Ins. Co.*, 101 Ind. 892. Nor to any change of title which increases the interest of the insured. *Bailey v. Am. Central Ins. Co.*, 4 McCrary (C. Ct.), 221.

or possession,¹ whether by legal process or judicial decree, or voluntary transfer or conveyance, and also to mortgages,² proceedings to foreclose any lien,³ contracts of sale,⁴ and the levying of an execution.⁵

The stipulation against alienation without notice to and consent of the company may be waived by any act or acts after a knowledge of the event upon which the policy is conditioned to be void which evince such intention;⁶ and it has been held sufficient to

It does not apply to a mortgage, where it is further provided, with regard to the change of title, "whether by sale, legal process, judicial decree, voluntary transfer or conveyance." *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213. Nor does the appointment of a receiver of partnership property pending a suit for the dissolution of the partnership affect the policy under this provision. *Keeney v. Home Ins. Co.*, 71 N. Y. 396. Nor a sale on execution where the judgment debtor is entitled to possession and redemption. *Hammel v. Queen's Ins. Co.*, 54 Wis. 72; s. c., 41 Am. Rep. 1.

1. A provision with regard to change of title is not violated by a lease, which only changes the possession. *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289.

A partial vacancy does not affect the policy under this provision. *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605. Nor does the letting of a house to tenants. *Rumsey v. Phoenix Ins. Co.*, 17 Blatch. (C. Ct.) 527. And see *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136. Or allowing a prospective tenant to enter into possession for the single purpose of making repairs. *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136.

2. This has its stipulated effect. *Meadows v. Hawkeye Ins. Co.*, 62 Iowa, 387; *Hicks v. Farmers' Ins. Co. (Iowa)*, 32 N. W. Rep. 201. And a policy upon building and contents made void as to the building by a mortgage thereon is void as to the contents also. *McGowan v. People's Mut. Fire Ins. Co.*, 54 Vt. 211.

A policy which declares that it shall be void if the property shall be encumbered by judgment, mortgage, or otherwise, without notice given thereof, is rendered void by the entry of judgment by confession, although no execution could have been had thereon. *Seybert v. Pennsylvania Mut. Fire Ins. Co.*, 103 Pa. St. 282. But in *Sheperd v. Union Mut. Fire Ins. Co.*, 38 N. H. 232, where the provision was that "when the title of any property insured shall be changed by sale,

mortgage, or otherwise, the policy shall thereupon be void," it was held that a subsequent mortgage did not avoid the policy; that a mortgage and foreclosure are both necessary to make it a change of title within the meaning of the condition.

3. But the beginning of foreclosure proceedings between the application and the issue will not vitiate the policy. *Day v. Hawkeye Ins. Co. (Iowa)*, 34 N. W. Rep. 435.

4. In *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. St. 474, the provision of the policy was that if the property should be "alienated by sale or otherwise," or if it, or any part of it, should "be transferred by any contract or any change of partnership or ownership without written consent," the policy should be void; and it was held that a contract of sale under which no deed was to be made until the whole of the purchase price was paid was not a breach of the condition.

5. Even such a clause will be confined to executions levied after the execution of the policy. *Rex v. Ins. Co.*, 2 Phila. (Pa.) 357.

The levy must be effectual. *Commonwealth Ins. v. Berger*, 42 Pa. St. 285; *Pennebaker v. Tomlinson*, 1 Coop. Ch. (Tenn.) 598.

A condition avoiding a policy in case of "the issuing or levy of an execution, without actual possession, against any kind of property insured," does not apply to real estate. *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361.

6. *Buckle v. Garrett*, 47 Pa. St. 280; *Gilliat v. Pawtucket Mut. Fire Ins. Co.*, 8 R. I. 282.

But it must be clearly intentional. *Girard Fire & Marine Ins. Co. v. Hebard*, 95 Pa. St. 45.

The payment of a dividend to a partner who had bought out his co-partner waives the company's rights respecting such change. *Combs v. Shrewsbury Mut. Fire Ins. Co.*, 34 N. J. Eq. 403.

The fact that the insurance agent wrote, acknowledged, and witnessed the deed of

avoid its stipulative effect to show that the knowledge has come to the agent or proper representatives of the company.¹ But where the policy requires the consent to be indorsed upon the policy, mere notice to the company will not suffice, unless it be clearly shown that this condition was waived.²

The consent of the company to an indorsement of "payable in case of loss," etc., does not imply either knowledge of or consent to a sale of the property. A sale in such a case avoids the policy.³ But if to this the word "transfer" be added, the consent of the company will be implied.⁴

6. *Use and Occupation*.—Another provision generally inserted in fire policies is, that if the premises shall be used or occupied so as to increase the risk, without notice to and consent of the company, the policy shall be void. This is valid,⁵ and in case of its breach the policy becomes void without regard to the cause or origin of the fire,⁶ but in its absence a change of use or occupation increasing the risk bars recovery only in case of its being the cause of the loss.⁷ It has relation, however, only to a change produced by the assured; such a change as the company could consent to, and not to one caused by accident or by something over which the assured has no control.⁸

What is a change increasing the risk is, of course, a question of fact to be passed upon by the jury in each case,⁹ unless the policy

conveyance is not a waiver. *Sahiff v. Ashuelot Ins. Co.*, 60 N. H. 75.

1. *Elliott v. Ashland Mut. Fire Ins. Co.* (Pa.), 12 Atl. Rep. 676; *Mattocks v. Des Moines Ins. Co.* (Iowa), 37 N. W. Rep. 174. But see *Girard Fire & Marine Ins. Co. v. Hebard*, 95 Pa. St. 45.

2. *Girard Fire & Marine Ins. Co. v. Hebard*, 95 Pa. St. 45.

3. *Bates v. Equitable Ins. Co.*, 10 Wall. (U. S.) 33; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Dailey v. Westchester Fire Ins. Co.*, 131 Mass. 173.

4. *Batchelor v. People's Ins. Co.*, 40 Conn. 56.

5. *Mack v. Rochester, etc., Ins. Co.* (N. Y.), 13 N. E. Rep. 343; *Mead v. Northwestern Ins. Co.*, 3 Seld. (N. Y.) 530; *Fire Association of Philadelphia v. Williamson*, 26 Pa. St. 196; *Western Assurance Co. v. McPike*, 62 Miss. 740. But where the policy is silent in reference to the use of premises adjoining those insured, and there has been no misrepresentation or suppression of any fact relating to the subject-matter, the insured has the same right to use his adjoining property, and is governed by the same obligations in respect to its use, as any other owner would be. *Miller v. West. Farmers' Mut. Ins. Co.*, 1 Hand. (Ohio) 209; *Allemania Fire Ins. Co. v. Pitts Exposition Soc.* (Pa.), 11 Atl. Rep. 572.

The insured in an action on the policy cannot be allowed to say that the particular clause was unusual, was not specially pointed out to him, and that he did not know that he was breaking a condition. *Reeve v. Phoenix Ins. Co.*, 23 La. Ann. 219.

6. *Howell v. Baltimore Equitable Soc.*, 16 Md. 377; *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274.

7. *Pim v. Reid*, 6 Man. & Grang. 1. And see *Loehner v. Home Mut. Ins. Co.*, 19 Mo. 628.

8. *Breuner v. Ins. Co.*, 51 Cal. 101; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88.

9. *Rice v. Tower*, 1 Gray (Mass.), 426; *Washington Mut. Ins. Co. v. Merchants' and Mfrs. Ins. Co.*, 5 Ohio St. 450; *Lat-touros v. Farmers' Mut. Ins. Co.*, 3 Hous. (Del.) 404; *Griswold v. Am. Cent. Ins. Co.*, 70 Mo. 654; *Williams v. People's Fire Ins. Co.*, 57 N. Y. 274; *Jones v. Firemen's Fund Ins. Co.*, 51 N. Y. 318; *Cornish v. Farm Buildings Fire Ins. Co.*, 74 N. Y. 295; *Peck v. Phoenix Mut. Ins. Co.*, 45 U. C. Q. B. 620.

The policy provided that if the insured premises should be so occupied or used as to increase the risk without the assent of the company, the policy should become void. The policy allowed the insured to use naphtha in his business, but with no

contains a classified list of hazards embracing those in question, or a provision specially prohibiting the same,¹ when that governs.²

fire or lights in the building except a small stove in the office. The assured, without the consent of the company, placed a stove in a room called the finishing room, in which there was frequently a large quantity of inflammable naphtha-gas. *Held*, that this was an increase of the risk which avoided the policy. *Daniels v. Equitable, etc., Co.*, 50 Conn. 551.

1. Although a night auction is not included in the schedule of hazardous employments, yet if the issue presents the question whether a night auction is more hazardous than a dry-goods store, the jury must find upon it from the evidence before them. *Harris v. Protection Ins. Co.*, *Wright (Ohio)*, 548.

2. *Lee v. Harvard Fire Ins. Co.*, 3 Gray (Mass.), 583. In this case the policy stipulated that the use of the buildings insured for any trade or business "denominated hazardous or extra-hazardous, or specified in the memorandum of special rates, in the terms and conditions annexed to this policy, unless herein otherwise specially provided for, or hereafter agreed by this company in writing, and added to or indorsed upon this policy," should avoid the contract; and that "the conditions annexed shall be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for." One of the conditions was that if, after effecting insurance, the risk should be increased by any means in the control of the assured, or the premises be so occupied, with the assent of the assured, as to render the risk more hazardous, the policy should be void; and it was held that the use of part of the premises for a trade or business specified in the memorandum of special rates, and not mentioned in the policy, or indorsed thereon, avoided the policy, though the trades disclosed in the policy were also special hazards; and that parol evidence was inadmissible to show that the use not disclosed did not increase the risk, and was in fact known to the agent of the company, who visited and examined the premises, agreed with the assured upon what facts were material to be stated, filled up the application, and issued the policy. See also *Washington Mut. Ins. Co. v. Merchants' and Manufacturers' Ins. Co.*, 5 Ohio St. 450; *Pindar v. Continental Ins. Co.*, 38 N. Y. 364; *Diehl v. Adams Co. Mut. Ins. Co.*, 58 Pa. St. 443; *Liv. & Lond. Ins. Co. v. Gunther*, 116 U. S. 575;

Reynolds v. Commerce Fire Ins. Co., 47 N. Y. 597; *Appleby v. Astor Ins. Co.*, 54 N. Y. 253; *Sperry v. Springfield F. & M. Ins. Co. (Col.)*, 26 Fed. Rep. 234; *Reardon v. Faneuil Hall Ins. Co.*, 135 Mass. 121.

Notwithstanding the agent may know that the premises are used for, or has even authorized, a prohibited hazard. *Deweese v. Manhattan Ins. Co.*, 34 N. J. L. 244; *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366; *Western Assu. Co. v. Rector (Ky.)*, 3 S. W. Rep. 415. *Contra, Couch v. Rochester, etc., Ins. Co.*, 25 Hun (N. Y.), 469; *Am. Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.), 513; *s. c.*, 41 Am. Rep. 647; *Kruger v. Western, etc., Ins. Co. (Cal.)*, 13 Pac. Rep. 156.

Making a prohibited use of premises insured renders the policy void without regard to the question of increase of risk. *Matthews v. Queen City Ins. Co.*, 2 Cin. Supr. Ct. (Ohio) 109; *Faulkner v. Central Fire Ins. Co.*, 1 Kerr (N. B.), 279.

Gasoline is included under petroleum and kerosene, and a prohibition of the use of the latter is therefore a prohibition of the former also. *Kings Co. Fire Ins. Co. v. Swigert*, 11 Ill. App. 590. But in *New York Equitable Ins. Co. v. Langdon*, 6 Wend. (N. Y.) 623, where the policy prohibited the use of the premises for any business or vocation specified in the memorandum of hazards, and the business of a grocer was not therein mentioned, it was held that it was not therefore a prohibited trade, and might be carried on in the usual manner, and if certain articles were necessary incidents to the trade of a grocer they might be kept on the premises, although they were specified among the enumeration of prohibited articles. And see, to the same effect, *Niagara Ins. Co. v. DeGraff*, 12 Mich. 124; *Girard Fire Ins. Co. v. Stephenson*, 44 Pa. St. 298; *Citizens' Ins. Co. v. McLaughlin*, 54 Pa. St. 485; *Leggett v. Ins. Co.*, 10 Rich. L. (S. Car.) 202; *Rafferty v. New Brunswick Ins. Co.*, 3 Harr. (N. J.) 480; *Pindar v. Kings Co. Ins. Co.*, 36 N. Y. 648; *Archer v. Merchants' Ins. Co.*, 43 Mo. 434; *Merchants', etc., Ins. Co. v. Washington Ins. Co.*, 1 Handy (Ohio), 408; *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.), 359; *Stout v. Com. Union Ins. Co.*, 11 Biss. (C. Ct.) 309; *Washington Ins. Co. v. Davison*, 30 Md. 91; *Corrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418; *s. c.*, 35

But it has been held, for instance, that the following do not constitute such change in the use or occupation as to avoid the policy: The making of repairs to a dwelling-house;¹ shutting down a factory temporarily;² running the engine and certain shafting of a mill or factory at night when the policy recites, "run by daylight only;"³ changing from a dwelling to a boarding house;⁴ changing occupants;⁵ mixing and keeping paints in a barn described in the policy as "used for hay, straw, grain unthreshed, stabling, and shelter," while painting the house on the same premises;⁶

Am. Rep. 687; *Plinsky v. Germania Ins. Co.* (Mich.), 32 Fed. Rep. 47. But compare *People's Ins. Co. v. Kuhn*, 12 Heisk. (Tenn.) 515; *Pindar v. Continental Ins. Co.*, 38 N. Y. 364.

Keeping fireworks in insured premises is not in violation of a prohibition against keeping gunpowder on them. *Fischler v. California, etc., Ins. Co.*, 66 Cal. 178. Nor is using for illuminating purposes a light coal-oil, or lard-oil, and candles in violation of a stipulation against "keeping or using camphene, spirit-gas, burning fluid, and chemical oils." *Wheeler v. Am. Cent. Ins. Co.*, 6 Mo. App. 235; *Carlin v. West. Assu. Co.*, 57 Md. 515; *Mark v. Nat. Fire Ins. Co.*, 24 Hun (N. Y.), 565. And see *Putnam v. Commonwealth Ins. Co.*, 18 Blatch. (C. Ct.) 368. Nor does the temporary use of benzine for cleaning machinery avoid a policy which forbids the insured to "keep or have" such article on the premises. *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15; s. c., 37 Am. Rep. 647. Nor, again, does the use of oil which the assured believes to be lard and sperm oil, but which is really a compound of them with petroleum, equally as safe and good as lard and sperm oil, avoid the policy under an agreement to use only lard and sperm oil in lubricating machinery. *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468. Nor does keeping petroleum in an engine-house adjoining the premises described for lubricating purposes violate a provision prohibiting the keeping thereof on the premises insured. *Carlin v. West. Assu. Co.*, 57 Md. 515; s. c., 40 Am. Rep. 440. Nor does keeping gunpowder in a stock of merchandise insured violate a provision which prohibits the keeping thereof "upon or on the premises insured." That applies to insurance upon buildings only. *Mosley v. Vermont, etc., Ins. Co.*, 55 Vt. 142. See also *Carr v. Roger Williams Ins. Co.*, 60 N. H. 513.

In *Farmers' Mut. F. Ins. Co. v. Moyer*, 97 Pa. St. 441, the by-laws prohibited the insuring of any building within fifty yards of any mills, factories, or machinery

driven by steam-power, and provided that if the owner of an insured building should convert it to some other purpose, or should carry on therein any of the trades thereinbefore set forth, the policy should be avoided. Held, that the use of a portable steam-engine near a barn for the purpose of threshing grain therein did not avoid the policy, and that it was properly left to the jury to say whether the insured had materially increased the risk of fire by using the engine.

A policy upon a factory prohibited the use of petroleum. The agent issuing it knew that the factory was to be run at night and lighted by a product of petroleum. Held, that the prohibition was waived. *Couch v. Rochester, etc., Ins. Co.*, 25 Hun (N. Y.), 469.

1. *Jolly v. Baltimore Equitable Soc., i Har. & G. (Md.) 295.*

2. *Brighton Mfg. Co. v. Reading Fire Ins. Co.*, 33 Fed. Rep. (Ill.) 252; *Brighton Mfg. Co. v. Fire Asso. of Phila. (Ill.)*, 33 Fed. Rep. 234; *Brighton Mfg. Co. v. Reliance Ins. Co. (Ill.)*, 33 Fed. Rep. 235; *Brighton Manufg. Co. v. Fire Ins. Co. of Penn. (Ill.)*, 33 Fed. Rep. 236.

3. *Whitehead v. Price*, 2 Crompt. M. & R. 447; *Mayall v. Mitford*, 6 Ad. & E. 670.

4. *Rafferty v. New Brunswick Fire Ins. Co.*, 3 Harr. (N. J.) 480.

5. *Lyon v. Commercial Ins. Co.*, 2 Rob. (La.) 266; *Hobson v. Wellington Dist. Ins. Co.*, 6 U. C. Q. B. 536; *Miller v. Oswego & Onandaga Ins. Co.*, 18 Hun (N. Y.), 525; *Planters' Ins. Co. v. Sorrels*, i Baxt. (Tenn.) 352.

Even though the first be a careful and the second a grossly negligent one. *Gates v. Madison Co. Mut. Ins. Co.*, i Seld. (N. Y.) 469.

6. *Billings v. Tolland Co. Mut. F. Ins. Co.*, 20 Conn. 139.

If an engine is occasionally used on the premises at the time the policy is issued, its use thereafter cannot be set up as a defence to a suit on the policy on the ground that the risk is thereby in-

ceasing to occupy the premises;¹ lighting temporarily with gasoline;² mortgaging the property insured.³ On the other hand, the following changes have been held to vitiate the policy under the provision: Hackling hemp, and spinning it, in a building described as "occupied as a store house;"⁴ keeping a "livery stable" in premises described as a "tavern barn;"⁵ changing of sleeping-apartments into a house of assignation and prostitution;⁶ of a dwelling into a retail liquor store;⁷ the erection of adjoining buildings.⁸

The change contemplated by the provision is not a mere temporary or incidental change, but a permanent⁹ and substantial change.¹⁰ And the changed use or occupation must be such as is known to and authorized by the insured, or have existed for so long that he must, as a prudent man, be presumed to have known of and authorized it.¹¹ The change, too, must be an actual appropriation to some other use. A mere intention of a preparation to change does not amount to a violation of the condition.¹²

creased. *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136. And see *Whitney v. Black River Ins. Co.*, 72 N. Y. 117.

1. *Foy v. Ætna Ins. Co.*, 3 Allen (N. B.), 29; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88.

See also *Herman v. Merchants' Ins. Co.*, 81 N. Y., 184.

Contra, *Luce v. Dorchester Mut. Ins. Co.*, 110 Mass. 361.

2. *Mut. Fire Ins. Co. v. Coatesville Shoe Fact.*, 80 Pa. St. 407.

3. *Tiefenthal v. Citizens' Mut. Fire Ins. Co.*, 53 Mich. 306.

4. *Wall v. E. Riv. Mut. Ins. Co.*, 3 Seld. (N. Y.) 370.

5. *Hobby v. Dana*, 17 Barb. (N. Y.) 111.

6. *Indiana Ins. Co. v. Brehm*, 88 Ind. 578.

7. *Western Assurance Co. v. McPike*, 62 Miss. 740.

8. *Pottsville Mut. Fire Ins. Co. v. Horan*, 89 Pa. St. 438.

See, for further illustrations, *Denkla v. Ins. Co.*, 6 Phila. (Pa.) 233.

9. *Shaw v. Robberda*, 6 Ad. & E. 75; *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219; *Gates v. Madison Co. Mut. Ins. Co.*, 1 Seld. (N. Y.) 469; *Boardman v. Merrimack Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 583; *Loud v. Citizens Mut. Ins. Co.*, 2 Gray (Mass.), 221; *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20; *Farmers' & Mechanics' Ins. Co. v. Simmons*, 30 Pa. St. 299; *Merchants' & Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Hand. (Ohio), 408; *Washington Ins. Co. v. Davi-*

son, 30 Md. 91; *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121.

Compare Harris v. Columbian Mut. Ins. Co., 4 Ohio St. 285.

10. *Brink v. Merchants' Ins. Co.*, 49 Vt. 442; *St. Nicholas Ins. Co. v. Merchants' Ins. Co.*, 11 Hun (N. Y.), 108; *Miller v. Oswego & Onondaga Ins. Co.*, 18 Hun (N. Y.), 525; *Crane v. City Ins. Co. (Ohio)*, 3 Fed. Rep. 558.

It must be a new and different use. *Whitney v. Black River Ins. Co.*, 72 N. Y. 117.

11. *Farmers' & Mechanics' Ins. Co. v. Simmons*, 30 Pa. St., 299; *Hall v. People's Mut. F. Ins. Co.*, 6 Gray (Mass.), 185; *Breuner v. Ins. Co.*, 51 Cal. 109; *Georgia House Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88; *Merrill v. N. A. Ins. Co. (Minn.)*, 23 Fed. Rep. 245.

Compare Howell v. Baltimore Equitable Soc., 16 Md. 377; *Long v. Beeber*, 106 Pa. St. 466; s. c., 51 Am. Rep. 532.

Knowledge of the agent of a mortgage for whose benefit a building is insured, that the owner of the building is doing that which increases the hazard, is knowledge of the mortgagee. *Cole v. Germania F. Ins. Co.*, 99 N. Y. 36.

12. In *U. S. F. & M. Ins. Co. v. Kimberly*, 34 Md. 224, one of the provisions was that if, at any time thereafter, the premises should be appropriated or used for any manufactory requiring heat, etc., the policy should be avoided during such appropriation; and it was held that the putting in of a lathe to make broom handles the day before the fire, which had never been used, and the having of circular saws previously used in a differ-

A statement in a policy of insurance, or the application therefor, as to the manner in which the building insured is occupied, is not a warranty that it shall continue to be so used during the existence of the policy. It is a warranty only as to the present use. To constitute it a continuing warranty, it must be so expressed by apt words.¹

Policies sometimes exempt the company from liability for loss where on mills or factories, in case they shall be run extra hours; but, where the regular hours are not fixed, liability cannot be escaped by showing that the mill or factory sometimes ran nights.² These provisions may be waived by the company, and this either expressly or impliedly.³ If it does not wish to be bound by the continuance of the policy, it must exercise its option of discontinuing the same on coming into the possession of notice or knowledge of the increased hazard. If this is not done, a waiver will be implied.⁴

7. *Vacancy*.—It is usually further stipulated that, if the premises insured shall become vacant or unoccupied without notice to and consent of the insurers indorsed on the policy, the same shall be void. This is also binding,⁵ without regard to the increase of risk;⁶ but a policy not containing the provision is not affected by the vacancy of the building,⁷ at any rate unless the risk be materially increased.⁸

ent business, was not such an appropriation for a prohibited use as was contemplated.

1. *Stout v. City F. Ins. Co. of New Haven*, 12 Iowa, 371; *Smith v. Mechanics' & Traders' F. Ins. Co.*, 32 N. Y. 399; *Joyce v. Maine Ins. Co.*, 45 Me. 168; *Frisbee v. Fayette Mut. Ins. Co.*, 27 Pa. St. 325; *Franklin F. Ins. Co. v. Brock*, 57 Pa. St. 74; *Blood v. Howard F. Ins. Co.*, 12 Cush. (Mass.) 472; *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 291; *U. S. F. & M. Ins. Co. v. Kimberly*, 34 Md. 224.

See also *Herrick v. Union Mut. F. Ins. Co.*, 48 Me. 558; *Hough v. City F. Ins. Co.*, 29 Conn. 10.

2. *German-Am. Ins. Co. v. Steiger*, 109 Ill. 254.

3. It was held in *Nedrow v. Farmers' Ins. Co.*, 43 Iowa, 24, that the returning of a policy by the company to the assured, after notification of a change in the occupation of the premises, operates as a waiver of a forfeiture by reason of such use.

4. *Lattruros v. Farmers' Mut. Ins. Co.*, 3 Hous. (Del.) 404; *Eclipse Ins. Co. v. Schoerner*, 2 Cin. Supr. Ct. Rep. 474; *Firemen's F. Ins. Co. v. Sholom*, 80 Ill. 558; *Williamsburg City Ins. Co. v. Cary*, 83 Ill. 453; *Naughton v. Ottawa Ins. Co.*, 43 U. C. Q. B. 121.

5. *Wustum v. City F. Ins. Co.*, 15 Wis. 138; *Ins. Co. of N. A. v. Garland*, 108 Ill. 220; *N. A. F. Ins. Co. v. Zaen-*

ger, 63 Ill. 464; *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457.

A fire, smouldering in a house when it was vacated, broke out a few hours later. *Held*, the policy providing that it should become void on the house becoming unoccupied, that no recovery could be had on the policy. *Bennett v. Agricultural Ins. Co.*, 51 Conn. 504.

It is immaterial that the assured may have striven diligently to keep it occupied. *Niagara F. Ins. Co. v. Drda*, 19 Ill. App. 76; *McClure v. Watertown F. Ins. Co.*, 90 Pa. St. 277; s. c., 35 Am. Rep. 656.

6. *Abrahams v. Agricultural Ins. Co.*, 40 U. C. Q. B. 175; *Galveston Ins. Co. v. Long*, 51 Tex. 89.

7. *Gilliat v. Pawtucket Mut. F. Ins. Co.*, 8 R. I. 282; *Cumberland Val. Mut. Protection Co. v. Douglas*, 58 Pa. St. 419; *Somerset, etc., Ins. Co. v. Usaw*, 112 Pa. St. 80; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Residence F. Ins. Co. v. Hannawold*, 37 Mich. 103; *Becker v. Farmer's Mut. Fire Ins. Co.*, 48 Mich. 610; *Lockwood v. Middlesex Mut. Ins. Co.*, 47 Conn. 553. And the adoption of a by-law by a mutual company, the by-laws of which are made a part of the policies, cannot have any effect upon policies previously underwritten. *Becker v. Farmers' Mut. F. Ins. Co.*, 48 Mich. 610.

8. *Lockwood v. Middlesex Mut. Assurance Co.*, 47 Conn. 553.

What it means is a substantial vacancy or disuse of the premises.¹ A mere temporary absence or cessation of use, for instance, is not intended.²

1. In *Keith v. Quincy Mut. F. Ins. Co.*, 10 Allen (Mass.), 228, where the policy was on a trip-hammer shop, with the machinery therein, it was held not sufficient to constitute occupancy that the tools remained in the shop and some one went there nearly daily to see if all was right, but that some practical use must be made of them. So, in *Ashworth v. Builders Mut. F. Ins. Co.*, 112 Mass. 422, it was held that a dwelling-house and barn are unoccupied, within the meaning of an insurance policy which provides that buildings unoccupied shall not be covered by the policy where the house is only used by the insured and his servants for the purpose of taking their meals there when engaged in carrying on a contiguous farm, and the barn is only used for the purpose of storing hay and farming-tools. See also *Fitzgerald v. Conn. F. Ins. Co.*, 64 Wis. 463; *Am. Ins. Co. v. Padfield*, 78 Ill. 167; *Held v. Eq. Mut. F. Ins. Co.*, 58 N. H. 82; *Sleeper v. Ins. Co.*, 56 N. H. 401, overruling *Chamberlain v. Ins. Co.*, 55 N. H. 249; *Abrahams v. Agricultural Ins. Co.*, 40 U. C. Q. B. 175; *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420; *Corrigan v. Connecticut Ins. Co.*, 122 Mass. 298; *Litch v. N. B. & M. Ins. Co.*, 136 Mass. 491; *Cook v. Continental Ins. Co.*, 70 Mo. 610; *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 600; s. c., 30 N. W. Rep. 808; *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457; *Hermann v. Adriatic Ins. Co.*, 85 N. Y. 162; *Sonneborn v. Mfrs'. Ins. Co.*, 44 N. J. L. 220. But compare *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Humphrey v. Hartford F. Ins. Co.*, 15 Blatchf. (C. Ct.) 35; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133; *Gibbs v. Continental Ins. Co.*, 13 Hun (N. Y.), 611; *Herman v. Merchants' Ins. Co.*, 81 N. Y. 184. In this last case the condition was that the policy should be void should the premises become "vacant and unoccupied," and the property insured, the summer residence of the assured. The assured resided in the house during the summer and fall of 1876; moved from thence to New York in November of that year, intending to return during the next May, and the fire occurred in April, 1877. He left the house, furnished throughout, in charge of a person who lived near. It was held that the house must not only have been unoccupied, but also vacant, to render the policy void, and that it was

not vacant within the meaning of the policy.

A factory is not vacant when shut down only temporarily and repairs are being made, the night and day watchman being on duty, and the employees continually at and about the factory. *Brighton Mfg. Co. v. Reading F. Ins. Co. (Ill.)*, 33 Fed. Rep. 232, 234-236.

Vacancy of a part only of the property insured does not avoid the insurance under this clause. *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605; *Hartford F. Ins. Co. v. Smith*, 3 Colo. 422; *Harrington v. Fitchburg Ins. Co.*, 124 Mass. 126. See also *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133.

Whether a building is vacant and unoccupied is a question to be determined by the jury under proper instructions. *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133; *Poor v. Hudson Ins. Co. (U. S. C. Ct. N. H.)*, 9 Ins. L. J. 428; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64.

2. *Shearman v. Niagara F. Ins. Co.*, 46 N. Y. 526; *Whitney v. Black Riv. Ins. Co.*, 72 N. Y. 117; *Johnson v. N. Y. Bowery F. Ins. Co.*, 39 Hun (N. Y.), 410; *Ring v. Phoenix Assur. Co. (Mass.)*, 14 N. E. Rep. 525; *Canada Land Co. v. Canada Agricultural Ins. Co.*, 7 Grant Ch. 418; *Chandler v. Commerce F. Ins. Co.*, 88 Pa. 223; *Franklin F. Ins. Co. v. Repler*, 95 Pa. St. 492; *Albion Lead Works v. Williamsburg City Ins. Co.*, 9 Ins. L. J. 435; *Stupetzki v. Transatlantic Ins. Co.*, 43 Mich. 373; *Laselle v. Hoboken F. Ins. Co.*, 43 N. J. L. 458; *Pass v. Western Assurance Co.*, 7 Lea (Tenn.), 704. But compare *Ridge v. Ins. Co.*, 9 Lea (Tenn.), 507.

In *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260, a stipulation of the policy is that, if the dwelling-house thereby insured should become vacated by the removal of the owner or occupant, it should be void unless written consent should be obtained therefor. The assured and his family absented themselves for a considerable time for a temporary purpose, the furniture and clothing of the family being left. During the absence of the insured, his wife cared for the house and went there weekly to cleanse it, and occasionally to obtain such things as were required for the use of the family. *Held*, that it was for the jury to determine whether the house had been vacated by removal; and that the words of condition

But where the policy further states the time beyond which vacancy shall avoid the policy, as thirty days, that governs.¹

The provision does not apply where the vacancy occurs by means beyond the control or knowledge of the insured.²

The notice of vacancy must be given within a reasonable time after it occurs, if no other be agreed upon.³

This condition, like others, may be waived;⁴ but such is not the effect of requiring the assured to furnish proofs of the loss,⁵ nor of an agent consenting to a transfer, with knowledge of the vacancy of the premises.⁶

8. *Erection and Occupation of Neighboring Buildings.*—It is usual for a policy to provide that if the risk shall be increased by the erection or occupation of neighboring buildings the policy shall be void;⁷ but in the absence of such provision and others relative

had reference to a permanent removal and entire abandonment as a place of residence. And to the same effect see *Wait v. Agricultural Ins. Co.*, 13 Hun (N. Y.), 371. But compare *Ætna Ins. Co. v. Myers*, 63 Ind. 238, where it was held that a vacancy pending a change of tenants avoids the policy. But this point is denied in *Alston v. Ins. Co.*, 80 N. Car. 326; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133; *Shackleton v. Sun F. Office*, 55 Mich. 288; *Ring v. Phoenix Assur. Co.* (Mass.), 14 N. E. Rep. 525.

1. *Western Assur. Co. v. McPike*, 62 Miss. 740.

2. As by a tenant removing. *Atlantic Ins. Co. v. Manning*, 3 Colo. 224. *Contra*, *McClure v. Watertown F. Ins. Co.* 90 Pa. St. 277; *Farmers' Ins. Co. v. Wells*, 42 Ohio St. 519.

If the tenant of the assured violates the conditions of the policy, it is equivalent to a violation by the assured. *Liverpool, etc., Ins. Co., v. Gunther*, 116 U. S. 575.

3. *Alston v. Ins. Co.* 80 N. Car. 326, where it is said that six weeks, when the company's principal office is but a few miles distant, cannot be regarded as a reasonable time.

4. In *Wakefield v. Orient Ins. Co.*, 50 Wis. 532, the condition was as follows: "If the premises insured shall, at any time during the life of this policy, become vacant, by the removal of the owner or occupant, without immediate notice to this company, and indorsement made on this policy, this insurance shall be void and of no effect." It also contained a provision for cancellation at the option of the company by giving notice in writing and the payment of the unearned premium. *Held*, that vacancy did not of itself avoid the policy, and that the object of requiring notice was realized by the re-

ceipt of notice. The company having thus acquired knowledge of vacancy, might, in its discretion, have terminated the policy only by written notice and payment of the unearned premium.

It is waived where the company insures an unoccupied building and receives the premium therefor,—*Williams v. Niagara F. Ins. Co.*, 50 Iowa, 561; *Short v. Home Ins. Co.*, 90 N. Y. 16; s. c., 43 Am. Rep. 138; *Haight v. Continental Ins. Co.*, 92 N. Y. 51;—or where it consents to an assignment of the policy with knowledge of the vacancy,—*Garland v. N. A. Ins. Co.*, 9 Ill. App. 571.

5. *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa, 335.

6. *N. A. Ins. Co. v. Garland*, 108 Ill. 220.

7. This is binding upon the insured. *Long v. Beeber*, 106 Pa. St. 466; s. c., 51 Am. Rep. 532.

A policy of fire insurance upon a building was issued by defendant, loss, if any, payable to a mortgagee named. The policy contained a condition avoiding it in case of "increase of hazard" by the erection of neighboring buildings, but in a "mortgage clause" it was declared that the interest of the mortgagee would not be invalidated by any act or neglect of the mortgagor. The mortgagee, however, was required to notify the company of any increase of hazard which should come to his knowledge. The policy provided for a renewal, but declared that "in case there shall have been any increase of hazard it must be made known to the company by the assured at time of renewal, otherwise this policy shall be void. During the life of the original policy the insured erected a building near the one insured which increased the hazard. A loss occurred after the expiration of the original policy. In an action

thereto the erection of neighboring buildings does not affect the binding force of the policy; and representations made in an application for insurance that the adjoining ground is vacant is not a warranty that it shall so continue,¹ though similar representations as to the distance of other buildings, if made a part of the policy, are warranties, the falsity of which avoids the policy without regard to the increase of risk.² However, where it is provided in the policy that if the risk shall be increased from any cause within the knowledge of the assured the policy shall be void unless notice thereof be given to the company and consent indorsed upon the policy, the insured is bound to give notice of the erection of adjoining buildings if they increase the risk,³ and whether they do or not is a question of fact for the jury,⁴ as it is in the case of the former provision.⁵

8. *Builder's Risk*.—There is invariably inserted in fire policies what is known as "builder's risk," and which usually reads about as follows: "The working of carpenters, roofers, tinsmiths, gas-fitters, plumbers, or other mechanics in building, altering, or repairing the premises named in this policy will violate the same unless permission for such work be indorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs, without notice or indorsement." This has its stipulated effect,⁶ without regard to the increase of

thereon a renewal was claimed by plaintiff. It appeared that the broker, who acted on behalf of the assured and the mortgagee in making the alleged renewal agreement with the company, had knowledge at the time of the erection of the new building, but did not disclose the same. *Held*, that the knowledge of the agent was imputable to his principal, the mortgagee, and that his failure to disclose it avoided the policy. *Cole v. Germania Fire Ins. Co.*, 99 N. Y. 36.

1. *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y.), 632.

2. *Burritt v. Saratoga Co., etc., Ins. Co.*, 5 Hill (N. Y.), 188.

Whether such representations be actual, or by a failure to make known the existence of other buildings within the specified limit. *Susquehanna Ins. Co. v. Perrine*, 7 W. & S. (Pa.) 348; *Sexton v. Montgomery Co. Mut. Ins. Co.*, 9 Barb. (N. Y.) 191; *Trench v. Chenango Co. Mut. Ins. Co.*, 7 Hill (N. Y.), 122; *Frost v. Saratoga Co. Mut. Ins. Co.*, 5 Den. (N. Y.) 154; *Wilson v. Herkimer Co. Mutual Ins. Co.*, 6 N. Y. 53; *Chaffee v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 376; *Brown v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 385; *But compare Gates v. Madison Co. Mut. Ins. Co.*, 2 Comst. (N. Y.) 43; s. c., 5 N. Y. 469; *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. (N.

Y.) 624, where it is said that giving the distance to the nearest buildings within the specified limit is not a warranty that there are none beyond, and whether the agent of the company knows of their falsity or not. *Jennings v. Chenango Mut. Ins. Co.*, 2 Den. (N. Y.) 75; *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Barb. (N. Y.) 285. *Contra*, *Clark v. Union Mut. F. Ins. Co.*, 40 N. H. 333.

Where the insured, in reply to question as to situation of adjacent buildings, said "See diagram," it was held that there was no warranty of the correctness of the diagram. *Sayles v. Northwestern Ins. Co.*, 2 Curtis (C. C.), 610. *But compare* *Tebbetts v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.), 305; *Gilligan v. Commercial Ins. Co.*, 20 Hun (N. Y.), 93.

3. *Pottsville Mut. Fire Ins. Co. v. Horan*, 89 Pa. St. 438.

4. *Franklin Fire Ins. Co., v. Gruver*, 100 Pa. St. 266.

5. *Long v. Beeber*, 106 Pa. St. 466; s. c., 51 Am. Rep. 532.

6. *Kuntz v. N. D. F. Ins. Co.*, 16 U. C. C. P. 573.

In *Crane v. City Ins. Co. (Ohio)*, 3 Fed. Rep. 558, a clause of the policy was as follows: "The insured has permission to make alterations and repairs incidental to the business." *Held*, that this could not be construed to embrace all altera-

risk;¹ but, in its absence, such work or an alteration of the building will not avoid the policy unless the risk be thereby increased.²

IV. The Risk or Peril Insured Against.—1. *Loss by Fire, What is.*—To constitute a loss by fire, there must at some place be actual ignition. Loss caused by heat merely, is not such a loss.³ However, where the loss necessarily follows from the occurrence of a fire, and the injury arises directly or immediately from the peril, or necessarily from incidental and surrounding circumstances the operation and influence of which could not be avoided, it is such a loss, though there be no actual ignition of the property insured.⁴

The cause of the fire is immaterial, if it be not by design,⁵ be not one expressly excluded by the policy, or be not the incident of a use increasing the risk. And when a risk mentioned is assumed, it is covered with all those things fairly and properly connected with it, whether used before the insurance was effected or not,⁶ even though it be more than an ordinary hazard⁷ and include

tions; that it must be understood as embracing such alterations in relation to carrying on the business of the plaintiff as would not essentially and materially increase the liability of the property to be destroyed by fire. *Crane v. City Ins. Co. (Ohio)*, 3 Fed. Rep. 558.

In *Crane v. City Ins. Co.*, 2 Flip. (C. C.) 576, the policy was to be avoided if the premises "shall be occupied or used so as to increase the risk, or if the risk be increased by any means whatever within the contract of the assured," but the insured had permission "to make alterations and repairs incidental to the business." An artesian well was being sunk on the premises, when a vein of gas was struck, which, coming in contact with a gas-jet near by, caused an explosion and set fire to the building. It was held that it was a question for the jury whether an artesian well was useful in the plaintiff's business and commonly used at the time the policy was taken out. If so, and if it did not materially increase the risk, it would not avoid the policy.

Under this stipulation, an occasional day's work by a carpenter does not invalidate the policy as being hazardous and hence within the terms of another condition. *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121.

But in *James v. Lycoming Ins. Co.*, 4 Cliff. C. C. 272, the facts were these: After the policy was taken out, which was on a mill, the boiler being cracked and in a dangerous condition, it became necessary to put in another, with some additions. These repairs did not increase the risk, and were extended no further than was reasonably necessary, and were completed several months before the de-

struction of the mill; and it was held that these facts did not render it void under the "builder's risk."

Permission "to make additions, alterations, and repairs" does not comprehend a new warehouse erected forty feet away from the main building, although connected therewith by a bridge, and an underground passage used for pipes. *Peoria Sugar-Refining Co. v. People's Ins. Co. (Conn.)*, 24 Fed. Rep. 773.

1. *Frost's, etc., Works v. Millers', etc. (Minn.)*, Co. 34 N. W. Rep. 35.

2. *Stetson v. Massachusetts Mut. Ins. Co.*, 4 Mass. 330; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Jones Mfg. Co. v. Mfrs' Mut. Ins. Co.*, 8 Cush. (Mass.) 82; *Dorn v. Germania Ins. Co.*, 5 Ins. L. J. 183.

3. *Austin v. Drewe*, 6 Taunt. 426.

An insurance on a theatre provided that the company should not be responsible for loss resulting from a fire originating in the theatre. One of the walls became so heated from without that it ignited the woodwork inside. *Held*, that this was not a fire originating in the theatre, within the meaning of the policy. *Sohier v. Norwich Fire Ins. Co.*, 11 Allen (Mass.), 336.

4. *Brady v. N. W. Ins. Co.*, 11 Mich. 425.

5. Burning by design of course bars recovery; but if one, while insane, burns property which he has insured, the company is liable, there being no stipulation to the contrary. *Karow v. Continental Ins. Co.*, 57 Wis. 56; s. c., 46 Am. Rep. 17.

6. *Merchants', etc., Ins. Co. v. Washington Ins. Co.*, 1 Handy (Ohio), 408.

7. *Whitmarsh v. Conway Fire Ins.*

that which is provided against in the printed portions of the policy.¹

2. *Explosion*.—Loss caused by an explosion, and that alone, cannot be said to be a loss by fire;² but, where the explosion was caused by fire, it is such a loss.³

Where the policy provides in the usual terms that the company shall not be liable for loss by an explosion, it is held that recovery cannot be had for damage done by fire which was caused by an explosion.⁴ And it has been held by the supreme court of the United States,⁵ in a case where the policy contained this provision: that an explosion in a distant building, causing a fire, which is communicated to the property insured through numerous intermediate buildings, is the proximate cause of loss, and that the company is not liable.

But liability attaches for such a loss where the policy expressly provides that the company shall be liable for a loss by fire ensuing an explosion.⁶

A provision that the company "shall not be liable for any loss occasioned by the explosion of a steam-boiler" will be given its stipulated effect.⁷

3. *Destruction of Buildings to Prevent Spread of Conflagration*.—The destruction of a building, in the course of a conflagration, to prevent the spread thereof, and which in all probability would

Co., 16 Gray (Mass.), 359; *Pindar v. Kings Co. Fire Ins. Co.*, 36 N. Y. 648; *Washington Ins. Co. v. Davison*, 30 Md. 91.

1. *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124; *Mayor, etc., of N. Y. v. Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231; *Brown v. Kings Co. Fire Ins. Co.*, 31 How. (N. Y.) 508; *Pindar v. Kings Co.*, 36 N. Y. 648; *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray (Mass.), 359; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Archer v. Merchant's & Mfr's. Ins. Co.*, 43 Mo. 434; *Sims v. State Ins. Co.*, 47 Mo. 54; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213.

Thus, a policy on a stock of "goods usually kept in a country store" covers all articles usually kept in such stores, even though some may be excluded by the printed portions of the policy. *Pindar v. Kings Co. Fire Ins. Co.*, 36 N. Y. 648. But see *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313; *Mason v. Hartford Fire Ins. Co.*, 29 U. C. Q. B. 585; *Steinbach v. Ins. Co.*, 13 Wall. (U. S.) 183; *Lancaster Fire Ins. Co. v. Lenheim*, 89 Pa. St. 497.

2. *Milland v. New Orleans Ins. Co.*, 4 L. Ann. 15.

3. *Waters v. Louisville Ins. Co.*, 11 Pet. (U. S.) 213; *Scripture v. Lowell Mut. Ins. Co.*, 10 Cush. (Mass.) 356;

Transatlantic F. Ins. Co. v. Dorsey, 56 Md. 70; s. c., 40 Am. Rep. 403; *Washburn v. Miami Val. Ins. Co.*, 2 Flip. (C. C.) 664.

It is held in *Caballero v. Home Mut. Ins. Co.*, 15 La. Ann. 217, that the explosion must occur on the premises insured; that fire in adjoining premises, causing an explosion there which does injury to those insured, is not comprehended.

4. *United, etc., Ins. Co. v. Foote*, 22 Ohio St. 340; *Waldeck v. Springfield F. & M. Ins. Co.*, 56 Wis. 96.

Even where the fire breaks out after it is supposed to be extinguished. *Fanneret v. Merchants' Mut. Ins. Co.*, 34 La. Ann. 249.

On the other hand, recovery is not barred by such provision where the explosion of an explosive substance, necessarily present (as flour dust in a flouring mill), is caused by fire. *Washburn v. Miami Valley Ins. Co.*, 2 Flip. (C. C.) 664.

5. *Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44.

6. *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 70; s. c., 40 Am. Rep. 403.

7. *St. John v. Am. Mut. etc., Ins. Co.*, 1 Duer (N. Y.), 871; affirmed, 1 Kern. (N. Y.) 516. See also *Hayward v. Liverpool, etc., Ins. Co.*, 7 Bosw. (N. Y.) 385.

have been burned if it had not been destroyed, is a loss by fire.¹ And the destruction may be by the use of gunpowder, although the policy provides that the company shall not be liable for loss caused by the explosion of such article.²

4. *Spontaneous Combustion*.—Fire occasioned by spontaneous combustion is covered by a fire policy.³

5. *Damages by Water in Extinguishing Fire*.—Damages occasioned by water in efforts in good faith to extinguish the fire, come within the contract of insurance against fire.⁴

6. *Damages in Removal of Goods*.—A fire-insurance policy covers damages sustained to goods in their removal to avoid threatened burning, even though they would have remained unharmed had they not been removed.⁵

7. *Theft at Fire*.—Losses by theft at a fire are covered by the policy where not provided against;⁶ but such provisions are valid, and hence, where they are inserted, recovery cannot be had for such losses.⁷

8. *Lightning*.—As in the case of an explosion, damages done by lightning alone—that is, where no fire results—does not come within the terms of insurance against fire; but where it is against “loss or damage caused by lightning” as well, it covers all the effects of lightning.⁸

9. *Freshet*.—Loss by a freshet is not covered by insurance against loss by fire or storm.⁹

10. *Invasion, Insurrection, etc.*—A common clause limiting the risk is, that the company shall not be liable for any loss caused by an invasion, insurrection, riot, civil commotion, or military or usurped power; which clause is binding upon the assured.¹⁰

And it does not matter, according to a decision of the supreme court of the United States, that the fire was communicated from the building or property originally fired, through intermediate buildings, to the one the loss on which is in question.¹¹

1. City F. Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367; Pentz v. Aetna Ins. Co., 9 Paige (N. Y.), 568.

2. Greenwald v. Ins. Co., 3 Phila. (Pa.) 323.

3. British Am. Ins. Co. v. Joseph, 9 L. C. Q. B. 448.

4. Whitehurst v. Fayetteville Mut. Ins. Co., 6 Jones L. (N. Car.) 352. See also Brady v. N. W. Ins. Co., 11 Mich. 425.

5. Balestracci v. Firemen's Ins. Co., 34 La. Ann. 844.

6. Whitehurst v. Fayetteville Mut. Ins. Co., 6 Jones L. (N. Car.) 352.

7. Liv., Lond. & Globe Ins. Co. v. Creighton, 51 Ga. 95.

8. Spensley v. Lancashire Ins. Co., 54 Wis. 433. It was held in this case that recovery may be had under such clause for a loss caused by a tornado where the evidence shows the presence in the tor-

nado of electrical disturbance presenting the usual characteristics of lightning, and that such lightning was an active agent in destroying the property.

9. Stover v. Ins. Co., 3 Phila. (Pa.) 38.

10. Dupin v. Mutual Ins. Co., 5 La. Ann. 482.

It is not essential that the company should show that rioters have been convicted criminally. Dupin v. Mut. Ins. Co., 5 La. Ann. 482. Nor is it essential that it show that an order was given for the burning, when it was proximately caused by an occupying military force. Barton v. Home Ins. Co., 42 Mo. 156. But compare, with these cases, Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613.

11. Ins. Co. v. Boon, 5 Otto (U. S.), 117.

As defining their various perils, the following decisions are of interest:

A riot falls within the term "civil commotion."¹

It is a riot where eight or ten men exchange shots with the watchmen at a coal mine, and drive them off, and set fire to the coal-breakers.²

An exception of losses caused by "mobs and riots" does not embrace a loss caused by the burning of a bridge by military order, to prevent the approach of an opposing force.³

Loss caused by a mob is not by "usurped power."⁴

A fire caused by convicts attempting to escape, such attempt being easily quelled, is not by "notorious resistance to authority, foreign enemy, or civil commotion."⁵

11. *Falling of Building*.—It is provided in fire-insurance policies that if a building fall, except as the result of a fire, the insurance on it or its contents shall immediately cease and determine. This is binding.⁶ But such a provision is to be construed, in a case of ambiguity, strongly against the company; and where the building is destroyed, not by reason of inherent defects, but by an explosion within it, and a fire immediately ensues, the company is liable for the loss.⁷ The falling of building in the absence of such provision does not avoid the policy, but even in its absence no liability attaches for loss resulting from this casualty alone. However, where fire ensues, liability does attach in the absence of the provision.⁸ The building must cease to be such to be "fallen." If it is only dilapidated,⁹ or if only a part falls,¹⁰ it is not within the provision.¹¹

V. Loss and its Adjustment.—1. *Compliance with Requirements of Policy Condition Precedent*.—Numerous requirements are always inserted in fire-insurance policies regarding the notice and proof of loss, and their phraseology is usually such that compliance therewith becomes a condition precedent to recovery.¹² Thus, if a cer-

1. Longdale v. Mason, 2 Marsh on Ins. 792.

2. Lycoming F. Ins. Co. v. Schwenk, 10 Ins. L. J. (Pa.) 13; s. c., 95 Pa. St. 89.

3. Harris v. York Mut. Ins. Co., 50 Pa. St. 341.

4. Drinkwater v. London Assurance Co., 2 Wilson, 363.

5. Straus v. Imperial F. Ins. Co. (Mo.), 6 S. W. Rep. 698.

6. Huck v. Globe Ins. Co., 127 Mass. 306.

7. Dows v. Faneuil Hall Ins. Co., 127 Mass. 346.

8. Lewis v. Springfield F. & M. Ins. Co., 10 Gray (Mass.), 159.

9. Firemen's Ins. Co. v. Sholom, 80 Ill. 558.

10. Breuner v. Liv., Lond. & Globe Ins. Co., 51 Cal. 101.

11. But see Huck v. Globe Ins. Co., 127 Mass. 306.

12. Blakely v. Phenix Ins. Co., 20 Wis. 205; Badger v. Glens Falls Ins. Co., 49 Wis. 389; Graham v. Phoenix Ins. Co., 77 N.Y. 171; O'Brien v. Commercial F. Ins. Co., 63 N.Y. 108; Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1; Woodfin v. Asheville Mut. Ins. Co., 6 Jones L. (N. Car.) 558; Smith v. Haverhill Mut. F. Ins. Co., 1 Allen (Mass.), 297; Lycoming Co. Ins. Co. v. Updegraff, 40 Pa. St. 311; Mason v. Harvey, 8 Wel., Hurl. & Gord. Exch. 819; Roper v. Leudon, 1 Ell. & Ell. 2 B. 825. But it was held in Farmers' Mut. F. Ins. Co. v. Moyer, 97 Pa. St. 441, that where a building is insured under a valued policy, by the terms of which the insurers undertake to pay the amount of the policy within three months after notice of loss, and a total loss of the build-

tificate of the nearest magistrate,¹ or of the chief of the fire department, be required, it must be furnished.² So if a statement of the interest of the insured is required it must be made,³ and made truly.⁴

So, too, if a statement of other insurance be required, compliance is obligatory.⁵

ing occurs, preliminary notice, whereby the company is informed of such loss, is sufficient without giving the more formal proofs. See also, to the same effect, *Lycoming Co. Mut. Ins. Co. v. Schollenberger*, 44 Pa. St. 259.

"Particular account of loss and damage" refers to the articles lost and damaged, not to the manner or cause of the loss. *Catlin v. Springfield F. Ins. Co.*, 1 Sumn. (C. Ct.) 434.

Where the insured has more than one policy in the same company and on the same property, he is not required to furnish more than one set of proofs. *Dakin v. Liv. & G. Ins. Co.*, 13 Hun (N. Y.), 122.

1. *Daniels v. Equitable F. Ins. Co.*, 50 Conn. 551; *Firemen's Ins. Co. v. Crandall*, 33 Ala. 9; *O'Neil v. Buffalo F. Ins. Co.*, 3 N. Y. 122; *Turley v. N. A. Ins. Co.*, 25 Wend. (N. Y.) 374; *Van Deusen v. Charter Oak Ins. Co.*, 1 Rob. (N. Y.) 55; *Busch v. Humboldt, etc., Ins. Co.*, 6 Vroom (N. J.), 429; *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; *Wright v. Hartford Ins. Co.*, 36 Wis. 522; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Germania F. Ins. Co. v. Curran*, 8 Kan. 9; *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Bryne v. Rising Sun Ins. Co.*, 20 Ind. 103; *Johnson v. Phoenix Ins. Co.*, 112 Mass. 49; *Cornell v. Hope Ins. Co.*, 15 Martin (La.), 223; *Roumage v. Mechanics' Ins. Co.*, 13 N. J. 110; *Noonan v. Hartford Ins. Co.*, 21 Mo. 81; *Routledge v. Burrell*, 1 H. Bl. 254; *Worsley v. Wood*, 6 T. R. 710; *Oldman v. Burwicke*, 2 H. Bl. 577; *Mann v. Western Ins. Co.*, 19 U. C. Q. B. 190; *Langel v. Mut. Ins. Co.*, 17 U. C. Q. B. 524. But see *Petersburg, etc., Ins. Co. v. Manhattan F. Ins. Co.*, 66 Ga. 446.

It is not sufficient if the magistrate who certifies is not the nearest, even though the difference in distance be only a few rods. *Gilligan v. Commercial F. Ins. Co.*, 20 Hun (N. Y.), 93.

However, the Iowa court holds that the provision should receive a liberal, rather than a literal, construction, and that nice distinctions as to distance are not to be indulged. *Williams v. Niagara F. Ins. Co.*, 50 Iowa, 561.

The receipt of proofs by the company's

agent without objection to a want of compliance with this provision is not a waiver of it. *Daniels v. Equitable F. Ins. Co.*, 50 Conn. 551.

A provision that loss shall not be payable until the assured produces a certificate of loss by a magistrate "not concerned in the loss as a creditor," means a magistrate not so concerned by means of having an interest in the property insured, or in the policy as security for an obligation to himself, and not to disqualify a magistrate from acting who is a general creditor of the insured. *Dolliver v. St. Joseph, etc., Ins. Co.*, 131 Mass. 39.

The policy required that a magistrate should certify that the notice of loss was sworn to before him, and that he believed it to be true. The magistrate certified that it was sworn to before him, and that he believed that the insured had really, by misfortune, and without fraud or evil practice, sustained by the fire damage to the amount stated in the affidavit. *Held* to be sufficient. *Lockwood v. Middlesex Mut. Assoc. Co.*, 47 Conn. 553.

2. *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389.

3. *Ederly v. Farmers' Ins. Co.*, 43 Iowa, 587; *Shawmut Sugar, etc., Co. v. People's Ins. Co.*, 12 Gray (Mass.), 535; *Wellcome v. People's, etc., Ins. Co.*, 2 Gray (Mass.), 480. Otherwise if it is not required. *Gilbert v. N. A. Ins. Co.*, 23 Wend. (N. Y.) 43. But in *Foule v. Springfield Ins. Co.*, 122 Mass. 191, it was held that this provision is directory only, and that if it is not complied with to the satisfaction of the company, further information should be called for.

4. *Sherboneau v. Beaver Mut. F. Ins. Co.*, 30 U. C. Q. B. 472. But a requirement of "the whole value and ownership" does not require a statement of encumbrances. *Taylor v. Aetna Ins. Co.*, 120 Mass. 254.

5. *Battaille v. Merchants' Ins. Co.*, 3 Rob. (La.) 384; *Blakely v. Phoenix Ins. Co.*, 20 Wis. 205.

In *Towne v. Springfield F. & M. Ins. Co.*, (Mass.), 15 N. E. Rep. 112, plaintiff had insured a portion of the goods with another company, and in his statement of loss set out an exact copy of the items of the property so insured. *Held*, that

Again if the production of books of account, invoices, or other documents is required by the policy, compliance is necessary,¹ though not where it is a mere after-request by the company.² The insertion of this requirement does not impose upon the insured the duty of keeping books of account,³ but simply to produce the same in case he does keep them and they are required by the company.

2. *Where Compliance Impossible*.—However, it is held that where the insured, without fault or fraud on his part, is unable to furnish proofs of loss, or such as are required, such fact will not prevent a recovery.⁴

3. *Substantial Compliance Sufficient*.—While the rule is strict that the requirements and conditions of the policy regarding the notice and proofs of loss must be complied with where possible, yet a substantial compliance is sufficient. It is not ordinarily essential that every minute detail be given with absolute exactness;⁵ and it is the duty of the company, where the proofs of loss are put into its possession in time, to notify the insured of any formal defects which may be discovered therein, and have them corrected.⁶

he had sufficiently set forth, as required by the policy sued upon, "all other insurance thereon in detail."

A statement that there was other insurance is not an admission that the assured had other insurance. *McMaster v. Ins. Co. of N. A.*, 55 N. Y. 222.

There is no fraud in the statement, in proofs of loss, that there is no other insurance if the second policy was never effectual. *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291.

1. *Jube v. Brooklyn Fire Ins. Co.*, 28 Barb. (N. Y.) 412; *O'Brien v. Commercial Fire Ins. Co.*, 63 N. Y. 108; *Farmers' Ins. Co. v. Mispelhorn*, 50 Md. 180; *Cinqu Mars v. Equitable Ins. Co.*, 15 U. C. Q. B. 144.

2. *Franklin Ins. Co. v. Culver*, 6 Ind. 137.

And see *Keeney v. Home Ins. Co.*, 71 N. Y. 396.

3. *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442.

4. *Fame Ins. Co. v. Norris*, 18 Ill. App. 308; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 403. As where books and vouchers are lost. *Norton v. Rensselaer & S. Ins. Co.*, 7 Cow. (N. Y.) 645; *Bumstead v. Dividend Mut. Ins. Co.*, 2 Kern. (N. Y.) 81; *O'Brien v. Commercial Fire Ins. Co.*, 63 N. Y. 108; *Home Ins. Co. v. Cohen*, 20 Gratt. (Va.) 312; *Jones v. Mechanics' Fire Ins. Co.*, 7 Vroom (N. J.), 29; *Mechanics' Fire Ins. Co. v. Nicols*, 1 Harr. (N. J.) 410; *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Perry v. Niag-*

ara Dist. Mut. Ins. Co., 21 L. C. Jurist, 257; *Farmers' Fire Ins. Co. v. Mispelhorn*, 50 Md. 180.

Insanity is a sufficient excuse; but, if sufficient proofs are sent, it does not matter that the maker was insane. *Ins. Cos. v. Boykin*, 12 Wall. (U. S.) 433. But in *Blakely v. Phoenix Ins. Co.*, 20 Wis. 205, it was held that the loss of another policy, a copy of which was required, was no excuse.

5. *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142; *Fame Ins. Co. v. Norris*, 18 Ill. App. 308; *Petersburg Savings Ins. Co. v. Manhattan Fire Ins. Co.*, 66 Ga. 446; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; *McLaughlin v. Washington Co. Ins. Co.*, 23 Wend. (N. Y.) 525; *Sexton v. Montgomery, etc., Ins. Co.*, 9 Barb. (N. Y.) 191; *Wyman v. People's Eq. Ins. Co.*, 1 Allen (Mass.), 301; *Harkins v. Quincy Mut. Fire Ins. Co.*, 16 Gray, 591; *Northwestern Ins. Co. v. Atkins*, 3 Bush (Ky.), 328; *Willis v. Germania Ins. Co.*, 79 N. Car. 285.

Thus, in the absence of fraud, the policyholder is not bound by an erroneous statement in the preliminary proofs as to the cause of the fire; he may recover by proof of the true cause. *Smiley v. Citizen's, etc., Ins. Co.*, 14 W. Va. 33.

6. *Ben Franklin Fire Ins. Co. v. Flynn*, 98 Pa. St. 627; *Lockwood v. Middlesex Mut. Asso. Co.*, 47 Conn. 553; *Pratt v. N. Y. Cent. Ins. Co.*, 55 N. Y. 505; *Peacock v. N. Y. Ins. Co.*, 1 Bosw. (N. Y.) 338; *Post v. Aetna Ins. Co.*, 43

Where the policy stipulated that "In case of loss, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered, setting forth the value of the property insured," etc., and that the policy should be void "if the insured shall make any attempt to defraud the company, either before or after the loss," it was held that an omission in the statement of loss to give any quantities or items of the goods destroyed, in detail, did not of itself defeat the claim or make the statement of loss insufficient under the policy.¹

It is held by the *Michigan*, *Illinois*, and *New York* courts that one is not estopped, by his proofs of loss, from showing additional losses unless the insurer has so changed his position as to make such further showing inequitable.² But it is held elsewhere that, if an incorrect statement of a material matter is made, even by mistake, and no amended statement is furnished before trial upon the policy, the insured cannot be allowed to prove the mistake and show that the facts were not as therein stated.³

Whether or not notice and proofs have been furnished according to the stipulations of the contract is a question of fact for the jury.⁴

The insured, in making the required proofs, is not bound to negative the exceptions of losses from design, invasion, public enemies, risks, etc.; these are matters of defence.⁵

4. *Examination under Oath*.—The policy invariably provides that, if required, the insured shall submit to an examination under oath respecting the loss; and, if the insured fails to comply with such provision without justification or excuse, he cannot recover.⁶

Barb. (N. Y.) 351; *Great W. Ins. Co. v. Staaden*, 26 Ill. 360.

1. *Towne v. Springfield F. & M. Ins. Co.* (Mass.), 15 N. E. Rep. 112.

A policy provided that, "when personal property is damaged," the assured shall arrange "the various articles according to their kind, separating the damaged from the undamaged," and shall furnish the company an inventory "naming the quantity, quality, and cost of each article." The property insured was an organ, and was wholly destroyed. The insured, in his proofs of loss, stated the name of the article, its value just before the fire, and the amount of the loss, the sums named at such value and the amount of the loss being the same. He refused to furnish further "schedule" under that provision, on the ground that, in case of a total loss of a single article insured, no other "schedule" was required. *Held*, that the jury were warranted in finding a compliance with said provision of the policy. *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322. See, to the same

effect, *Residence Fire Ins. Co. v. Hanowold*, 37 Mich. 103.

See, in further illustration of the rule stated, *Lockwood v. Middlesex Mut. Asso. Co.*, 47 Conn. 553.

2. *Schmidt v. Mut.*, etc., *Ins. Co.*, 55 Mich. 432; *Ætna Ins. Co. v. Stevens*, 48 Ill. 31; *Commercial Ins. Co. v. Huckerberger*, 52 Ill. 464; *Cummings v. Agricultural Ins. Co.*, 67 N. Y. 260; *Parmelee v. Hoffman F. Ins. Co.*, 54 N. Y., 193; *McMaster v. Ins. Co. of U. S.*, 55 N. Y. 222. But see *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594.

3. *Campbell v. Charter Oak F. & M. Ins. Co.*, 10 Allen (Mass.), 213; *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. (N. Y.) 507.

4. *Franklin F. Ins. Co. v. Hamill*, 6 Gill (Md.), 87.

5. *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; *Catlin v. Springfield F. Ins. Co.*, 1 Sumn. (C. C.) 434.

6. But the insured cannot be compelled in such examination to state on what terms he has settled with other companies. *Ins. Cos. v. Weides*, 14 Wall.

But his failure is, to some extent, a question of fact and intention. If, for instance, it was to gain time and lessen the chances of detecting fraud, it would be fatal; but if to save the plaintiff or his family from an epidemic, it would not.¹

The provision is not ordinarily such as to work a forfeiture of the policy in case its terms are not observed, but simply to bar an action until it is complied with. Thus, the refusal of the insured to submit to an examination under oath, under a clause that the loss shall not be payable until such examination, is not a forfeiture, but the loss is not payable until it is done.² The provision is held to have been complied with where one examination has been submitted to, although answers to subsequent questions are refused,³ but not where only a partial examination has been had, which examination was adjourned without objection by the insured.⁴

The demand for an examination must be so made that the party shall be fully informed that the company means to insist upon having it. Mere informal conversation or declarations to the effect that the company desires the insured to submit to an examination does not impose that duty upon him.⁵

A demand upon the party to whom the loss is made payable, that the insured shall submit to an examination, is sufficient.⁶

5. *Fraud and False Procuring*.—Sometimes it is provided that fraud, false answers or swearing in making the proof shall render the policy void. Such provision is given its stipulated effect.⁷

To constitute fraud or false swearing, the false statements must be wilfully made with respect to a material matter, with the intention of thereby deceiving the insurer.⁸

It cannot be insisted, for instance, that an overstatement of value, in the proof, of itself avoids the policy, for this is the

(U. S.) 375. He is only bound to answer such questions as have a material bearing upon the insurance and the loss. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

1. *Phillips v. Protection Ins. Co.*, 14 Mo. 220.

2. *Weide v. Germania Ins. Co.*, 1 Dill. (C. C.) 441.

3. *Moore v. Protection Ins. Co.*, 29 Me. 97.

4. *Bonner v. Home Ins. Co.*, 13 Wis. 677.

5. *State Ins. Co. v. Maackens*, 9 Vroom (N. J.), 564.

6. *State Ins. Co. v. Maackens*, 9 Vroom (N. J.) 564.

7. *Regnier v. Louisiana State M. & F. Ins. Co.*, 12 La. 336; *Security Ins. Co. v. Brouger*, 6 Bush (Ky.), 146; *Weide v. Germania F. Ins. Co.*, 1 Dill. (C. Ct.) 441; *Hanover Ins. Co. v. Manasson*, 29 Mich. 316.

8. *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Huchberger v. Merchants' Ins. Co.*, 4 Biss. (C. Ct.) 265; *Jones v. Me-*

chanics' F. Ins. Co., 7 Vroom (N. J.), 29; *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382; *Parker v. Amazon Ins. Co.*, 34 Wis. 363; *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. St. 350; *Marion v. Great Republic Ins. Co.*, 35 Mo. 148; *Hickman v. Long Island Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 374; *Gibbs v. Continental Ins. Co.*, 13 Hun (N. Y.), 611; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Mason v. Agr. Mut. Asso.*, 18 U. C. C. P. 19; *Gerhauser v. North B. & M. Ins. Co.*, 7 Nev. 174. *Contra*, *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, wherein it was held that the false statement, to bar recovery, need not be made with the intention to defraud.

It is not a case of false swearing, within the provision, when the company's agent is fully advised of the facts. Nor is an incorrect statement which does not and cannot mislead. *Rohrback v. Aetna Ins. Co.*, 62 N. Y. 613; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Young v. Hartford Ins. Co.*, 45 Iowa, 377.

expression of mere opinion.¹ Nor can it be claimed that discrepancies between the preliminary proofs, and the plaintiff's testimony on trial, make a case of fraud or false swearing as a matter of law. It is a question for the jury.²

6. *Who May Make Proof*.—Generally, proofs of loss must be made by the insured himself; but, in his absence,³ or where knowledge of the property is exclusively with his agent,⁴ the latter may make the proof and institute suit.⁵

Where the requirement is that the proofs shall be sworn to by the owner of the property, an oath by a husband, his wife owning the property insured, is insufficient.⁶

7. *Giving of Notice*.—The manner of giving the notice prescribed in the policy should ordinarily be followed; but, where the conduct of the company or the circumstances justify it, that may be departed from. Thus, if the company receive and act upon an oral notice, it will be considered a waiver of a written one.⁷ Notice or proofs sent by mail will be presumed to have duly reached their destination, in the absence of evidence.⁸ Notice of loss to the agent of the insurer is held, in the absence of knowledge on the part of the insured of the revocation of his agency, to be notice to the insurer.⁹

Under a policy issued by two companies making themselves severally liable, notice of loss addressed to but one company, but delivered to the agent of both, who countersigned the policy, is held sufficient to bind both.¹⁰

8. *Time of Furnishing Notice and Proof*.—It is ordinarily provided that the notice and proofs of the loss shall be furnished within a time named, and that, if they are not furnished within

1. *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291; *Moore v. Protection Ins. Co.*, 29 Me. 97; *Williams v. Phoenix Ins. Co.*, 61 Me. 67; *Franklin Ins. Co. v. Culver*, 6 Ind. 137; *Park v. Phoenix Ins. Co.*, 19 U. C. Q. B. 110; *Clark v. Phoenix Ins. Co.*, 36 Cal. 168; *Gerhauser v. North B. & M. Ins. Co.*, 6 Nev. 15; *Beck v. Germania Ins. Co.*, 23 La. Ann. 510; *Unger v. People's Ins. Co.*, 4 Daly (N. Y.), 96; *Rockford Ins. Co. v. Nelson*, 75 Ill. 548; *Schulter v. Merchant's Mut. Ins. Co.*, 62 Mo. 236; *Dogge v. Northwestern Nat. Ins. Co.*, 49 Wis. 501.

But this is a question of fact. *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. (N. Y.) 275; *Dolan v. Aetna Ins. Co.*, 22 Hun (N. Y.), 396. And see *Newton v. Gore Dist. Mut. F. Ins. Co.*, 33 U. C. Q. B. 92; *Sleeper v. N. H. F. Ins. Co.*, 55 N. H. 401.

2. *Ins. Cos. v. Weides*, 14 Wall. (U. S.) 375; *Hilbing v. Svea Ins. Co.*, 54 Cal. 156.

3. *German F. Ins. Co. v. Grunert*, 112 Ill. 68; *O'Connor v. Hartford F. Ins. Co.*, 31 Wis. 160.

4. *Findeisen v. Metropole F. Ins. Co.*, 57 Vt. 520; *Sims v. State Ins. Co.*, 47 Mo. 54.

5. Thus, if one, whose insured household effects are burned, gets his wife to make the inventory, he is liable for false statements made therein. *Mullin v. Vermont Mut. F. Ins. Co.*, 58 Vt. 113.

6. *Spooner v. Vermont Mut. F. Ins. Co.*, 53 Vt. 156. But see *O'Connor v. Hartford F. Ins. Co.*, 31 Wis. 160.

7. *Edwards v. Ins. Co. (N. Y.)*, 20 Fed. Rep. 661.

8. *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472; *Susquehanna Mut. Fire Ins. Co. v. Tunkhannock Toy Co.*, 97 Pa. St. 424; s. c., 39 Am. Rep. 816; *Bell v. Lycoming Fire Ins. Co.*, 19 Hun (N. Y.), 238.

9. *Bennet v. Maryland Ins. Co.*, 14 Blatchf. (U. S.) 422; *Watertown Fire Ins. Co. v. Grover & B. Sewing-Machine Co.*, 41 Mich. 131.

10. *Bernero v. South B. & N. Ins. Co.*, 65 Cal. 386.

such time, all rights under the policy shall be forfeited; but provisions prescribing the time within which notice must be given or proofs furnished will not be construed as causes of forfeiture where not so expressly stipulated in the policy.¹ Where the stipulation is that the notice shall be given "forthwith" or "immediately," it is satisfied by an immediate notice to the local agent, who transfers it in a short time to a general agent;² but it is not satisfied where there is an unexplained delay of forty-eight days.³ But, after all, the question of whether notice of a loss was given "forthwith" is ordinarily one of fact, there being evidence tending to show reasonable promptness.⁴

A stipulation that the proofs shall be furnished "as soon after the loss as possible" means within a reasonable time,⁵ and that reasonable diligence shall be used.⁶ It is not complied with by furnishing the proof nine months,⁷ four months,⁸ or even two months⁹ after the fire unless the delay be satisfactorily explained.¹⁰ It is proper under such a provision to leave it to the jury to say whether or not it has been complied with.¹¹

An "immediate" notice means a notice within a reasonable time,¹² or "as soon as possible under the circumstances,"¹³ or with due diligence.¹⁴ It is an "immediate" notice where the loss occurs July 14 and the notice is given August 5,¹⁵ or where the loss occurs October 9 and the notice is given Nov. 13.¹⁶ But it is proper, under this provision, also to submit the question of whether or not an immediate notice has been given as one of fact to the jury.¹⁷

Where the policy fixes no definite time within which the notice must be given or proofs furnished, the assured may do this within

1. *Coventry, etc., Ins. Asso. v. Evans*, 102 Pa. St. 281.

2. *Fisher v. Crescent Ins. Co. (N. Car.)*, 33 Fed. Rep. 544; *Watertown Fire Ins. Co., v. Grover & B. Sewing-Machine Co.*, 41 Mich. 131.

3. *Brown v. London Assur. Corp.*, 40 Hun (N. Y.), 101. But see *Northwestern Ins. Co. v. Akins*, 3 Bush (Ky.), 328.

4. *Griffey v. N. Y. Cent. Ins. Co.*, 100 N. Y. 417; *Donahue v. Windsor Co. Mut. Fire Ins. Co.*, 56 Vt. 374.

5. *Scammon v. Germania Ins. Co.*, 101 Ill. 621; *Palmer v. St. Paul F. & M. Ins. Co.*, 44 Wis. 201; *State Ins. Co. v. Maackens*, 9 Vroom (N. J.), 564.

6. *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108.

The insured may testify that he did all in his power to have the proofs forwarded at the earliest possible moment. *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108.

7. *Scammon v. Germania Ins. Co.*, 101 Ill. 621.

8. *State Ins. Co. v. Maackens*, 9 Vroom (N. J.), 564.

9. *McPike v. Western Assurance Co.*, 61 Miss. 37.

10. Merely showing that the insured was embarrassed by his creditors threatening bankruptcy proceedings is no excuse for the delay. *Scammon v. Germania Ins. Co.*, 101 Ill. 621.

11. *Home Ins. Co. v. Davis*, 98 Pa. St. 280; *O'Brien v. Phoenix Ins. Co.*, 76 N. Y. 459. Compare *Ben Franklin Fire Ins. Co. v. Flynn*, 98 Pa. St. 627.

12. *Rokes v. Amazon Ins. Co.*, 51 Md. 512. Nineteen days in a reasonable time. *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442.

13. *Cashan v. N. W. Nat. Ins. Co.*, 5 Biss. (C. Ct.) 476.

14. *Continental Ins. Co. v. Lippald*, 3 Neb. 391.

15. *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644.

16. *Knickerbocker Ins. Co. v. McGinnis*, 87 Ill. 70.

17. *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Swan v. Liv., Lond. & G. Ins. Co.*, 52 Miss. 704.

a reasonable time ; and, indeed, if not objected to on this account, they are efficient whenever supplied.¹

9. *Parties to Adjustment.*—Besides the originally insured, the assignee of a policy, or one to whom loss is made payable, is entitled to participate in the adjustment ; and, if this be not permitted, it is not binding upon him.²

A guardian *ad litem* is a proper person to receive payment of a policy of insurance payable to the "guardian" of the plaintiffs.³

10. *Liability of Company.*—Where property insured against fire is destroyed, the insurer is liable for its cash value at the time of the loss, if within the limit of the insurance ;⁴ where it is only damaged, liability attaches for the difference between its value in the sound and damaged conditions.⁵ Whether or not there has been a total loss may in some cases be a question. But a total loss does not mean an absolute extinction. An insurance upon a building, for instance, is an insurance upon it as such, and not upon the material of which it is composed.⁶

In estimating the loss, the market value of the property destroyed must control, where it can be had in the market.⁷ But in the case of a building, which cannot be said to have a market value, the amount which the insured is entitled to recover in case of loss is, not what it would cost to rebuild, but what is shown to have been the money value of the building under all the circumstances of its situation and surroundings at the time of the fire.⁸ However, the policy may limit the measure of recovery ; and, where this

1. *Palmer v. St. Paul Fire Ins. Co.*, 44 Wis. 201.

2. *London Fire Assoc. v. Leon*, 63 Tex. 282. Though the rights of a mortgagee to whom a policy is made payable may be affected by the acts of the mortgagor before loss, yet at the moment of loss the rights of the parties are fixed, and the mortgagee cannot be bound by an adjustment between the mortgagor and the company without his knowledge or consent. *Hall v. Fire Asso. of Philadelphia* (N. H.), 13 Atl. Rep. 648.

3. After statutory notice by a mortgagee of insured real estate to the insurance company, he becomes the equitable owner of the policy *qua* his mortgage, and may avail himself of any waiver of proof of loss by the company. *Nickerson v. Nickerson* (Me.), 12 Atl. Rep. 880.

4. *Wuesthoff v. Germania Ins. Co.* (N. Y.), 14 N. E. Rep. 811.

5. *Hoffman v. Western M. & F. Ins. Co.*, 1 La. Ann. 216; *Commonwealth Ins. Co. v. Sennet*, 37 Pa. St. 205; *Mut. Fire Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362; *Dacey v. Agricultural Ins. Co.*, 21 Hun (N. Y.), 83.

No deduction is to be made because

the entire value of the insured property was much greater than the sum insured. *Underhill v. Agawam Mut. Ins. Co.*, 6 Cush. (Mass.) 440; *Mississippi Mut. Ins. Co. v. Ingram*, 34 Miss. 215. Nor is any deduction to be made because the goods insured were in the custom-house subject to unpaid duties. *Wolfe v. Howard Ins. Co.*, 1 Sandf. (N. Y.) 121; affirmed, 3 Seld. (N. Y.) 583.

6. *Hoffman v. Western M. & F. Ins. Co.*, 1 La. Ann. 216.

7. *Williams v. Hartford Ins. Co.*, 54 Cal. 442; *s. c.*, 35 Am. Rep. 77; *Harri-man v. Queen's Ins. Co.*, 49 Wis. 71.

8. *Fisher v. Crescent Ins. Co.* (N. Car.), 33 Fed. Rep. 544; *Marchesseau v. Merchant's Ins. Co.*, 1 Rob. (La.) 438; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Fowler v. Old North State Ins. Co.*, 74 N. Car. 89.

9. *Waynesboro Mut. Fire Ins. Co. v. Creaton*, 98 Pa. St. 451; *Brinley v. Nat. Ins. Co.*, 11 Metc. (Mass.) 195; *Aetna Ins. Co. v. Johnson*, 11 Bush (Ky.), 586.

The rental of the building may be considered. *Atlantic Ins. Co. v. Manning*, 3 Colo. 224.

is the case, as where it is limited to two thirds of the loss, that measure cannot be exceeded.¹

The insured is not entitled, as an element of his recovery, to the value of the expected profits or increase of his business or property of which he is deprived by the loss,² or other consequential damages.³

Where the company elects to rebuild under a provision therefor, and enters upon such undertaking but does not complete it, the insured is entitled to recover the amount it would take to complete the building by making it substantially like the one destroyed.⁴ A mortgagor may recover the entire value of the building, not exceeding the sum insured.⁵ A mortgagee whose interest is insured as such is entitled to recover his debt, and that only;⁶ though, where the mortgage is assigned to him as collateral security, he may recover the whole sum insured if the loss be so much.⁷ It is held that he is entitled to recover even though the mortgagor has fully repaired the subject-matter.⁸ And it is not competent, in any event, for the insurers to show that the mortgaged premises are still ample security for the debt.⁹

An insured who has entered into an executory contract for the sale of the property covered by the policy is not thereby prevented from having a recovery for the loss, nor is he limited in the amount thereof to the sum due on the contract.¹⁰

A person having insured his buildings upon the land of another, and which he is entitled to remove, may have recovery for their intrinsic cash value, without regard to the fact that they are to be removed.¹¹

11. *Time of Payment.*—If a policy provides that it shall be paid within sixty days after proof of loss, interest does not run before the expiration of the sixty days;¹² and such sixty days run from the time of furnishing proof of loss, not from the time the amount of the loss is adjusted.¹³ Suit cannot be instituted before the ex-

1. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415.

2. *Leonarda v. Phoenix Assur. Co.*, 2 Rob. (La.) 131; *Niblo v. N. A. Ins. Co.*, 1 Sandf. (N. Y.) 551.

3. *Ellmaker v. Franklin Ins. Co.*, 5 Pa. St. 138.

4. *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429.

5. *Strong v. Mfs.' Ins. Co.*, 10 Pick. (Mass.) 40; *Borden v. Hingham Mut. Ins. Co.*, 18 Pick. (Mass.) 523.

6. *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541.

7. *Carpenter v. Washington Ins. Co.*, 16 Pet. (U. S.) 495.

8. *Foster v. Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.) 216.

9. *Kernochen v. N. Y. Bowery Fire Ins. Co.*, 17 N. Y. 428; *Rex v. Ins. Co.*, 2 Phila. (Pa.) 357.

10. *Boston & S. Ice Co. v. Royal Ins. Co.*, 12 Allen (Mass.) 381.

11. *Washington, etc., Mfg. Co. v. Weymouth & B. Mut. Fire Ins. Co.*, 135 Mass. 503.

12. *Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141.

Interest does not run where payment is prevented by trustee process. *Oriental Bank v. Tremont Ins. Co.*, 4 Metc. (Mass.) 1.

13. *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141; *Field v. Ins. Co. N. A.*, 6 Biss. (C. Ct.) 121; *Huchberger v. Home Ins. Co.*, 5 Biss. (C. Ct.) 106; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Ins. Co. of N. A. v. McDowell*, 50 Ill. 120; *Hatton v. Provincial Ins. Co.*, 7 U. C. C. P. 555; *Rice v. Provincial Ins. Co.*, 7 U. C. C. P. 548. But see

piration of the sixty days;¹ unless the company claims that the policy is void and that there is no liability, when it may.

12. *Recovery Back of Payments.*—A loss having been paid, the sum paid may under some circumstances, not all, be recovered back. It may be recovered back where it was paid through ignorance of other insurance which vitiated the policy,³ or of the fact of the fire being caused by design;⁴ or of other fraud upon the part of the insured.⁵ But insurance money paid cannot be recovered where the policy might have been avoided for something known to the insurers at the time of payment, or which they might have ascertained upon inquiry.⁶

13. *Effect of Adjustment.*—The adjustment and payment of a loss, with full knowledge of the facts, has the effect of a final settlement of the matter between the parties, in the absence of fraud or imposition upon the part of either party.⁷ Thus, where, after a loss, and after an opportunity to investigate it, the company, without any deception or fraud practised upon it by the insured at the time of such investigation, agrees with the insured that it shall pay, and he receive a certain sum in full on account of such loss, a recovery of that sum cannot be defeated by showing a breach of a warranty in the policy, though unknown to the insurer at the time of such agreement.⁸

14. *Rebuild, Repair, or Replace.*—Fire-insurance policies now provide that it shall be optional with the company to repair, rebuild, or replace the property lost or damaged. This is valid, and should the insured prevent rebuilding or repairing, his rights under the

Home Ins. Co. v. Myer, 93 Ill. 271. And see Mayor, etc., of N. Y. v. Hamilton Fire Ins. Co., 10 Bosw. (N. Y.) 537.

1. Harris v. Protection Ins. Co., 1 Wright (Ohio), 548; Doyle v. Phoenix Ins. Co., 44 Cal. 264.

When the policy provides that payment is to be made sixty days after notice, proof, and adjustment of the loss, "in conformity with the conditions annexed to this policy," such provisions become a part of the contract. Kensington Nat. Bank v. Yerkes, 86 Pa. St. 227; Shawmut Sugar-Refining Co. v. People's Mut. Fire Ins. Co., 12 Gray (Mass.), 535.

A clause giving the company thirty days within which to exercise the option of rebuilding is not repugnant to another clause stipulating that the company will pay the loss in sixty days. Beals v. Home Ins. Co., 36 Barb. (N. Y.) 614.

A petition alleging that the loss occurred "on or about April 14, 1886," and that notice and proof of such loss was given "on or about June 19, 1886," does not show that more than sixty days intervened between the loss and notice and proof to defendant. Dist. Township v.

Des Moines Ins. Co. (Iowa), 36 N. W. Rep. 902.

2. Cobb v. Ins. Co. of N. A., 11 Kan. 93; Phillips v. Protection Ins. Co., 14 Mo. 220; Indiana Mut. Fire Ins. Co. v. Routledge, 7 Ind. 25; Aetna Ins. Co. v. Maguire, 51 Ill. 342.

Contra, Hatton v. Provincial Ins. Co., 7 U. C. C. P. 555; Rice v. Provincial Ins. Co., 7 U. C. C. P. 555.

3. Columbus Ins. Co. v. Walsh, 18 Mo. 229.

4. McConnell v. Delaware Ins. Co., 18 Ill. 228.

5. Johnson v. Continental Ins. Co., 39 Mich. 33.

6. Mut. Life Ins. Co. v. Wager, 27 Barb. (N. Y.) 354.

7. Remington v. Westchester Fire Ins. Co., 14 R. I. 245.

There is an adjustment where a person employed by the insurance company has gone to the premises, made calculations, and stated the amount to be paid. Fame Ins. Co. v. Norris, 18 Ill. App. 570; Susquehanna Mut. Fire Ins. Co. v. Staats, 102 Pa. St. 529.

8. Stache v. St. Paul F. & M. Ins. Co., 49 Wis. 89; s. c., 35 Am. Rep. 772.

policy would be forfeited; ¹ but, in the absence of this provision, such right would not be possessed. ² Making the loss payable to a third party does not affect the right of the company to rebuild. ³

The election to restore or repair must be made within the prescribed time, and, if no definite time be mentioned, then within a reasonable time. ⁴ Where the provision is that the property shall be rebuilt, repaired, or replaced within a reasonable time, whether or not it has been done within such time is a question for the jury. ⁵ If it has not, recovery on the policy may be had; ⁶ though, of course, before the expiration of such time an action cannot be sustained. ⁷

If rebuilding or the making of the repairs is prohibited, as by a municipal ordinance, the insurers have no option, but must pay the damages sustained within the limits of the policy, whatever might be the cost of rebuilding or the repairs, were they permitted. ⁸

In case of an election to rebuild, and an undertaking thereof which is abandoned before completion, the insured may have an action for his damages by reason of the non-completion of the work; ⁹ and, if there are two or more similar policies, the action may be maintained on them either jointly or severally. ¹⁰ The rule of damages in such cases is the cost of completing the work. ¹¹ So if an election to rebuild or repair is made and not undertaken, the injured may recover his damages caused by the delay. ¹² Likewise, he may recover his damages by reason of the defective execution

1. *Beals v. Home Ins. Co.*, 36 N. Y. 522; *N. Y. F. Ins. Co. v. Delavan*, 8 Paige Ch. (N. Y.) 419.

The insured is not entitled to rent during the time necessarily taken in rebuilding or repairing. *St. Paul F. & M. Ins. Co. v. Johnson*, 77 Ill. 598.

The rebuilding of property by a third party does not release the insurance company from its obligations. *People's Ins. Co. v. Straehle*, 2 Cin. Super. Ct. (Oh o), 186.

2. *Wallace v. Ins. Co.*, 4 La. 289; *Com. Ins. Co. v. Sennett*, 37 Pa. St. 205.

In ruling on this point in *Wallace v. Ins. Co.*, above cited, Porter, J., said: "No usage is found to sanction such a pretension. There is no law which authorizes it. The contract makes no mention of it. On the contrary it stipulates, the loss shall be compensated in money. It is true rebuilding might in some cases be an indemnity for the loss. It would perhaps have been so in this instance. But, then, it was not the indemnity the insured paid for; and we are at a loss to conceive how, on policies where such a right is not expressly conferred, it could be supposed one of the

parties had a right to change the agreement, and substitute one mode of performance for another."

3. *Tolman v. Manufacturer's Ins. Co.*, 1 Cush. (Mass.) 73.

4. *Ins. Co. of N. A. v. Hope*, 58 Ill. 75.

5. *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.), 432.

6. *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.), 432; *Home Mut. Ins. Co. v. Garfield*, 60 Ill. 124; *St. Paul F. & M. Ins. Co. v. Johnson*, 77 Ill. 598.

7. *Beals v. Home Ins. Co.*, 36 Barb. (N. Y.) 614; *Beals v. Home Ins. Co.*, 36 N. Y. 522.

8. *Brady v. N. W. Ins. Co.*, 11 Mich. 425.

9. *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429.

10. *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429.

11. *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429.

But see *Parker v. Eagle Ins. Co.*, 9 Gray (Mass.), 152, where it is held that it is the difference between the value of what is done and the whole.

12. *Am. Cent. Ins. Co. v. McLanathan*, 11 Kans. 533.

of the work;¹ in which case the measure is the difference between the value of the repairs or building in the defective state, and what it would have been had they been properly made or erected.² Indeed, it is held that an election to rebuild converts the policy into a building contract, upon which the remedies are the same as upon other contracts of that nature.³ A court of equity will not, however, interfere by injunction to prevent improper rebuilding, but will leave the insured to his remedy at law.⁴

15. *Waiver and Estoppel*.—The notice or proof required by the policy, or any part thereof, or any requirement with regard thereto, may be waived by the company,⁵ even though there be a provision in the policy that no waiver or modification of any of its terms or conditions shall be made in any event;⁶ or it may, by its conduct or declarations which lead the insured to believe that it will not insist upon the enforcement of such requirements,⁷ or which prevents him from complying therewith,⁸ be estopped to assert them.

Thus where proofs of loss are delivered to the agent, who asserts that the company is not liable, all objections to the proofs are thereby waived.⁹ Likewise questions as to the sufficiency of proof are waived by the examination of the premises by the company's authorized agent, who investigates the loss, and refuses to pay it.¹⁰ So the company is precluded from denying the receipt of proper notice of the loss where its agent has adjusted it.¹¹ So also if the

1. *Ryder v. Com. Ins. Co.*, 52 Barb. (N. Y.) 447.

2. *Brinley v. Nat. Ins. Co.*, 11 Metc. (Mass.) 195; *Parker v. Eagle Ins. Co.*, 9 Gray (Mass.), 152.

3. *Morrell v. Irving Ins. Co.*, 33 N. Y. 429; *Brown v. Royal Ins. Co.*, 1 E. & E. 853.

However, compare, with the above cases, *Home Mut. Ins. Co. v. Garfield*, 60 Ill. 124; *Brady v. N. W. Ins. Co.*, 11 Mich. 425.

4. 1 N. Car. (Err. & App.) 247.

5. *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Commonwealth Ins. Co. v. Sennett*, 41 Pa. St. 161; *Rokes v. Amazon Ins. Co.*, 51 Md. 512; *Bennett v. Maryland Ins. Co.*, 14 Blatchf. (C. Ct.) 422.

6. *New Orleans Ins. Asso. v. Matthews* (Miss.), 4 So. Rep. 62; *Rokes v. Amazon Ins. Co.*, 51 Md. 512; *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265; *Pitney v. Glens Falls Ins. Co.*, 61 Barb. (N. Y.) 335.

7. *Rokes v. Amazon Ins. Co.*, 51 Md. 512.

8. *Cornell v. Leroy*, 9 Wend. (N. Y.) 163; *Hicks v. Empire Ins. Co.*, 6 Mo. App. 254.

9. *Commercial Union Assur. Co. v. State* (Ind.), 15 N. E. Rep. 518; *Frank-*

lin Fire Ins. Co. v. Coates, 14 Md. 285; *Manhattan Ins. Co. v. Stein*, 5 Bush (Ky.), 652. But see *Engelbreton v. Hekla Fire Ins. Co.*, 58 Wis. 301.

10. *Fisher v. Crescent Ins. Co.* (N. Car.), 33 Fed. Rep. 544; *Susquehanna Mut. Fire Ins. Co. v. Staats*, 102 Pa. St. 529; *Sexton v. Montgomery, etc., Ins. Co.*, 9 Barb. (N. Y.) 191; *Blake v. Exch. Mut. Ins. Co.*, 12 Gray (Mass.), 265; *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562. *Contra*, *Liv., Lond. & Globe Ins. Co. v. Sorscby*, 60 Miss. 302; *Bush v. Ins. Co.*, 6 Phila. (Pa.) 252.

11. *Home Ins., etc., Co. v. Myer*, 93 Ill. 271; *Byrne v. Rising Sun Ins. Co.*, 20 Ind. 103. It is held that the agent may waive the requirement with regard to the time and manner of giving notice and making proof. *Eastern R. v. Relief Fire Ins. Co.*, 105 Mass. 570; *Security Ins. Co. v. Fay*, 22 Mich. 467; *Dohn v. Farmers', etc., Ins. Co.*, 5 Lans. (N. Y.) 275; *Pennell v. Lamar Ins. Co.*, 73 Ill. 303; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88; *Edgerly v. Farmers' Ins. Co.*, 48 Iowa, 644.

Delivery of proof to the local agent and retention by him without objection is a waiver, although the policy provides that the proofs shall be furnished at the home

insurance company makes no specific objection to the form, sufficiency, or absence of notice or proofs of loss, but declines payment upon other grounds,¹ as that the policy is void;² or no grounds at all;³ or elects to rebuild under a provision therefor.⁴ It may be presumed to have waived defects in or the absence of notice or proof. But this declination to pay, in order to constitute a waiver, must be by an authorized agent of the company, not merely by a third person within his hearing.⁵ Again, holding the proofs furnished for an unreasonable length of time without objecting to them may amount to a waiver.⁶ Though it has been considered

office. *German Ins. Co. v. Ward*, 90 Ill. 550.

1. *Mosby v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142; *Noyes v. Washington Co. Mut. Ins. Co.*, 30 Vt. 659; *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Farmers' Mut. Fire Ins. Co. v. Moyer*, 97 Pa. St. 441; *McPike v. Western Assurance Co.*, 61 Miss. 37; *Daul v. Firemen's Ins. Co.*, 35 La. Ann. 98; *Merchants and Mechanics' Ins. Co. v. Vining*, 67 Ga. 661; *Charleston Ins. and Trust Co. v. Neve*, 2 McMullan (S. Car.), 237; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Phillips v. Protection Ins. Co.*, 14 Mo. 220; *Sims v. State Ins. Co.*, 47 Mo. 54; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Enterprise Ins. Co. v. Parisot*, 35 Ohio St. 35; *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466; *Ins. Co. N. A. v. Hope*, 58 Ill. 75; *Winnesheik Ins. Co. v. Schuller*, 60 Ill. 465; *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Lewis v. Monmouth Mut. Fire Ins. Co.*, 52 Me. 492; *Bailey v. Hope Ins. Co.*, 56 Me. 474; *Warner v. Peoria M. & F. Ins. Co.*, 14 Wis. 318; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472; *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389; *Spratley v. Hartford Ins. Co.*, Dill. (C. Ct.) 392; *Dohn v. Farmers', etc., Co.*, 5 Lans. (N. Y.) 275; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Graham v. Firemen's Ins. Co.*, 8 Daly (N. Y.), 420; *Aurora Fire Ins. Co. v. Kranich*, 36 Mich. 289; *Humphrey v. Hartford Ins. Co.*, 15 Blatchf. (C. Ct.) 35; *Basch v. Humboldt Ins. Co.*, 6 Vroom. (N. J.), 429; *State Ins. Co. v. Maackens*, 9 Vroom (N. J.) 564; *Mason v. Citizens' Fire Ins. Co.*, 10 W. Va. 572; *Williams v. Niagara Ins. Co.*, 50 Iowa, 561; *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468. But the provision is not waived by setting up and relying on other defences not inconsistent therewith. *Farmers'*

Ins. Co. v. Frick, 29 Ohio St. 466. And consult *Brink v. Hanover Fire Ins. Co.*, 70 N. Y. 593.

2. *Parker v. Amazon Ins. Co.*, 34 Wis. 364; *Harriman v. Queen Ins. Co.*, 49 Wis. 71; *Batchelor v. People's Ins. Co.*, 40 Conn. 56; *Lycoming Ins. Co. v. Dunmore*, 75 Ill. 14; *Williamsburg City Ins. Co. v. Cary*, 83 Ill. 453; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *Rumsey v. Phoenix Ins. Co.*, 17 Blatchf. (C. Ct.) 527; *Field v. Ins. Co. of N. A.*, 6 Biss. (C. Ct.) 121; *Bennett v. Matyland Ins. Co.*, 14 Blatchf. (C. Ct.) 422; *West Rockingham Fire Ins. Co. v. Sheets*, 26 Gratt. (Va.) 854; *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. (Va.) 613; *Crawford Co. Mut. Ins. Co. v. Cochran*, 88 Pa. St. 230; *People's Ins. Co. v. Strachle*, 2 Cin. Supr. Ct. (Ohio), 186; *Ætna Ins. Co. v. Sparks*, 62 Ga. 187. In such case the last becomes immediately due and payable, even though the policy provides that it shall only become due in sixty days. *Cobb v. Ins. Co. of N. A.*, 11 Kans. 93.

3. *German-Am. Ins. Co. v. Davidson*, 67 Ga. 11; *Lockwood v. Middlesex Mut. Assu. Co.*, 47 Conn. 553; *Bennett v. Maryland Ins. Co.*, 14 Blatchf. (N. Y.) 422; *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257.

However, compare *Donahue v. Windsor Co. Mut. Fire Ins. Co.*, 56 Vt. 374.

4. *Am. Cent. Ins. Co. v. McLanathan*, 11 Kans. 533.

5. *East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287.

6. *Keeney v. Home Ins. Co.*, 71 N. Y. 396; *Sexton v. Montgomery, etc., Ins. Co.*, 9 Barb. (N. Y.) 191; *Post v. Ætna Ins. Co.*, 43 Barb. (N. Y.) 351; *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Spratley v. Hartford Ins. Co.*, 1 Dill. (Ct. Ct.) 392; *Great W. Ins. Co. v. Staaden*, 26 Ill. 360; *Hartford Ins. Co. v. Walsh*, 54 Ill. 164; *O'Connor v. Hartford Ins. Co.*, 31 Wis. 160; *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382, 404; *Patterson*

that mere silence is not enough to constitute a waiver where the defect is not one of form merely, but so substantial that it cannot be regarded as a statement at all.¹ As to what is a reasonable time for the insurers to make known their dissatisfaction with proofs of loss furnished, is a question of law for the court.² But the fact that the insurers have had in their possession since the loss the books of the insured, containing the invoices of the goods insured, or that the insured has, at the instance of the insurers, been examined under oath in respect to the loss, will not relieve him from the obligation to furnish proof of the loss.³ Nor will a waiver of notice so relieve him.⁴ Whether or not the facts exist which are claimed as a waiver, and if they do, whether or not they indicate an intention to waive any requirement or condition of the policy, are questions of fact to be submitted to the jury.⁵ The stipulation requiring the production of proofs may be waived by parol, and this though the policy provides that only a written agreement indorsed on the policy shall be deemed a waiver of a condition therein.⁶ Indeed, the case of *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568, decides that a waiver may be inferred from any act of the insurer evincing such intention.

FIRE-PROOF.—To say of any article that it is fire-proof conveys no other idea than that the material out of which it is formed is incombustible. That statement, as regards certain well-known substances

v. Triumph Ins. Co., 64 Me. 500; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Swan v. Liv., Lond. and Globe Ins. Co.*, 52 Miss. 704; *Young v. Hartford Ins. Co.*, 45 Iowa, 378.

It is a waiver where the company is asked what further proof is required and no reply is made. *Home Ins. Co. v. Cohen*, 20 Gratt. (Va.) 312; *Pitney v. Glens Falls Ins. Co.*, 61 Barb. (N. Y.) 335.

So retention of proofs for thirty-eight days, with knowledge of defect, without making objection, will sustain a finding that proofs were accepted as sufficient, and of a waiver. *Keeney v. Home Ins. Co.*, 71 N. Y. 396.

Retention and silence does not waive the provision with regard to the time of furnishing proof. *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388.

See, for further cases illustrating the doctrine of waiver, *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108; *Owen v. Farmers' Joint Stock Ins. Co.*, 57 Barb. (N. Y.) 518; *Birmingham v. Farmers', etc., Ins. Co.*, 67 Barb. (N. Y.) 595; *Edgerly v. Farmers' Ins. Co.*, 48 Iowa, 644; *Jones v. Mechanics' Fire Ins. Co.*, 7 Vroom (N. J.), 29; *State Ins. Co. v. Todd*, 83 Pa. St. 272; *Residence Fire Ins.*

Co. v. Hannawold, 37 Mich. 103; *Hicks v. Empire Ins. Co.*, 6 Mo. App. 254; *Farmers' Fire Ins. Co. v. Mispelhorn*, 50 Md. 180.

1. *Beatty v. Lycoming Co. Mut. Ins. Co.*, 66 Pa. St. 6.

2. *Mispelhorn v. Farmers' Fire Ins. Co.*, 53 Md. 473. It has been held that two months is more than a reasonable time. *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472.

3. *Gauche v. Lond. and Liv. Ins. Co.*, 4 Woods (C. Ct.), 102.

4. *Desilver v. State Mut. Ins. Co.*, 38 Pa. St. 130.

5. *Nickerson v. Nickerson (Me.)*, 12 Atl. Rep. 880; *Farmers' Mut. Fire Ins. Co. v. Moyer*, 97 Pa. St. 441; *Farmers' Ins. Co. v. Taylor*, 73 Pa. 342.

A submission by insurers to appraisers of the amount of a loss is sufficient evidence of waiver of proof of loss to go to the jury. *Allemania Fire Ins. Co. v. Pitts Exposition Soc. (Pa.)*, 11 Atl. Rep. 572.

6. *Lowry v. Lancashire Ins. Co.*, 32 Hun (N. Y.), 320.

Authorities.—*Bennett's Fire Ins. Cases*; *Littleton & Blatchley, Clarke, and Bates' Digest*; *Flanders and Wood on Fire Insurance*, and *May on Insurance*.

usually employed in the construction of buildings, while it might in some final sense be deemed the expression of an opinion, could in practical affairs be properly regarded only as a representation of a fact. To say of a building that it is fire-proof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fire-proof buildings. To say of a certain portion of a building that it is fire-proof suggests a comparison between that portion, and other parts of the building not so characterized, and warrants the conclusion that it is of a different material.¹

1. *Hickey v. Morrell*, 102 N. Y. 454. In this case, goods had been stored in a warehouse declared to be fire-proof, and were destroyed by a fire communicated by the wooden window-frames of the warehouse, which had caught fire from a neighboring building. In an action to recover damages for alleged false representations, expert testimony was given to the effect that a building so constructed could not be considered fire-proof, and that it was practicable to construct a storage warehouse which would be fire-proof. Plaintiff was nonsuited on the ground that the statement as to the character of the exterior of the building was

a mere statement of opinion, but this was held to be error,—that the statement was of fact, not an opinion, and necessarily referred to the quality of the material, excluding the idea that it was of wood.

A lease of a lot of ground described by metes and bounds, "together with the fire-proof brick cotton-warehouse built thereon," etc., was construed to be a covenant that the warehouse was fire-proof, it appearing the lessee leased the premises for the purpose of procuring a fire-proof warehouse in which to store cotton. *Vaughan v. Matlock*, 23 Ark. 9.

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